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READING MATERIAL

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I. Human Rights Commitments of Foreign Companies investing in Sri Lanka

A. Lanka should focus on ethical investors

By: *Cherie Blair*[1]

Human rights is not the business of the government anymore, but it is the business of business. Economic development is not about the improvement of statistics and indicators, but about people and their aspirations, quality of life and reaching greater heights, Cherie Blair, leading international barrister and wife of former British Prime Minister Tony Blair, told a seminar on 'Human Rights and Business' organized by the Bar Association of Sri Lanka.

She said that the current political landscape in Sri Lanka will have a positive effect in attracting more Foreign Direct Investments to the country.

"Recent political developments, such as President Sirisena's election commitment to tackle corruption and protect human rights will have potentially far reaching and great impact on the level and diversity of foreign investments in Sri Lanka," Blair said. "There's a new sense of energy, new direction and a huge desire for reconciliation and a new beginning in Sri Lanka. Alongside reconciliation, the international community is looking at your economic success. Today, ethical investors look for long-term prospects and they are the type that Sri Lanka should attempt to attract, a view shared by former Policy Planning and Economic Affairs Deputy Minister Dr. Harsha de Silva," she said.

"The 2008 global economic crash was caused due to the short-term nature of investments. Today, investors look for long-term projects. Investors prefer sustainable investments rather than a lucrative business which gets rocked by human rights violations or corruption. The government has the responsibility to create a level-playing field where unethical companies cannot undercut ethical ones. Sri Lanka has become notorious for having crony businesses undercutting other local and foreign companies through the introduction of favourable laws and regulations by influencing politicians," Blair said.

She praised the new government's high-end export development strategy which is set to bring equitable growth. "People (Westerners) look for quality, ethically sourced and environment-friendly products. Sri Lanka should work on quality and high-end products — not the top high-end but the middle market - high-end — which will benefit the workers," she said.

[1] *Sunday Observer*, available at: http://www.sundayobserver.lk/2015/08/30/fin03.asp, visited on: 19/11/2015

B. FDI and Sri Lankan Approach

Supportive Government Policies

Sri Lanka pioneered South Asia's economic liberalization over three decades ago. Liberalizing many areas of the economy, the government has embraced strategies and policies that are more than conducive for international investment. In fact the policy environment is undoubtedly, compelling.

The following transparent investment laws aim to foster foreign direct investments.

- Total foreign ownership is permitted across almost all areas of the economy.
- No restrictions on repatriation of earnings, fees, capital, and on forex transactions relating to current account payments.
- Safety of foreign investment is guaranteed by the constitution.
- Existence of a transparent and sophisticated legal and regulatory framework. Covering all prerequisite business law enactments.
- Bilateral investment protection agreements with 28 countries and double taxation avoidance agreements with 38 countries

Sri Lanka is a founder member of the Multilateral Investment Guarantee Agency (MIGA), an investment guarantee agency of the World Bank. This provides a safeguard against expropriation and non-commercial risks.

Index of Economic Freedom measures the pro-business policy environment of a country. According to the Index of Economic Freedom – 2014, the country has been ranked 90 of 186 countries

C. Index of World Economic Freedom Rankings -2014[2]

Country	World Ranking
Singapore	2
Korea, South	31
Malaysia	37
Thailand	72
Philippines	89
Sri Lanka	90
Indonesia	100
India	119
Pakistan	126

[2] Available at: http://www.investsrilanka.com/why_sri_lanka/supportive_government_policies, visited on: 19/11/2015 at: 5: 57 PM

Bangladesh	131
China	137
Vietnam	147
Nepal	149
Burma	162
Iran	173

In line with the government's policy, efforts are intensified to attract investments to target sectors in which Sri Lanka has strong foundation for growth as well as areas where it is nationally important to develop. By offering incentives to induce high value investment to priority sectors, the BOI promotes diversification of Sri Lanka's industry and services with special focus on advanced technology and value addition. The government has made necessary amendments to the tax system of the country that the overall tax regime for all sectors will be less complex and at a lower rate across the economy.

Target Sectors Actively Promoted by Sri Lanka through Board of Investment (BOI)

1. Export Oriented Manufacturing
2. Export Oriented Services
3. Tourism, Tourism Related Projects
4. Infrastructure Projects
5. Higher Education/Skill Development
6. Value Added Strategic Projects
7. Agriculture (Agro Processing, Fish Based Industry, Dairy)
8. Establishment of Industrial Estates, Special Economic Zones, Knowledge Cities.

D. THE UNITED NATIONS "PROTECT, RESPECT AND REMEDY" FRAMEWORK[3]

INTRODUCTION

In June 2011, the United Nations Human Rights Council endorsed the Guiding Principles on Business and Human Rights presented to it by the Special Representative of the United Nations Secretary-General, Professor John Ruggie.

This move established the Guiding Principles as the global standard of practice that is now expected of all States and businesses with regard to business and human rights. While they do not by themselves constitute a legally binding document, the Guiding Principles elaborate on the implications of existing standards and practices for States and businesses, and include points covered variously in international and domestic law.

THE UNITED NATIONS "PROTECT, RESPECT AND REMEDY" FRAMEWORK

The Guiding Principles are based on six years of work by the former Special Representative, including in-depth research; extensive consultations with businesses, Governments, civil society, affected individuals and communities, lawyers, investors and other stakeholders; and the practical road-testing of proposals. They were developed to put into operation the "Protect, Respect and Remedy" Framework presented by the Special Representative to the United Nations in 2008. This three-pillar Framework consists of:

- The State duty to protect human rights
- The corporate responsibility to respect human rights
- The need for greater access to remedy for victims of business-related abuse.

The United Nations High Commissioner for Human Rights welcomed the "Protect, Respect and Remedy" Framework, which set:

"both a new and clear benchmark and represents an important milestone in the evolving understanding of human rights in our societies... Clarity about the baseline expectations of business with regard to human rights is a first important step towards developing appropriate and effective responses to such problems".[1]

THE GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

The Guiding Principles reflect and build on the three-pillar structure of the "Protect, Respect and Remedy" Framework. They comprise 31 principles, each followed by a brief commentary. Together, the Guiding Principles outline steps for States to foster business respect for human rights; provide a blueprint for companies to manage the risk of having an adverse impact on human rights; and offer a set of benchmarks for stakeholders to assess business respect for human rights.

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[3] Extract is taken from http://www.ohchr.org/Documents/Publications/HR.PUB.12. b2_En.pdf, visited on: 26/11/2015

As Professor Ruggie has stated, the Guiding Principles will not bring all human rights challenges to an end, but their endorsement marks the end of the beginning. They provide a solid and practical foundation on which more learning and good practice can be built.

The first task now is to ensure their effective implementation. This Interpretive Guide, which was developed in full collaboration with the former Special

Representative, is designed to support this process.[4]

THE PURPOSE OF THIS INTERPRETIVE GUIDE

This Guide does not change or add to the provisions of the Guiding Principles or to the expectations that they set for businesses. Its purpose is to provide additional background explanation to the Guiding Principles to support a full understanding of their meaning and intent. The Guide's content was the subject of numerous consultations during the six years of Professor Ruggie's mandate and was reflected in his many public reports and speeches, but has not previously been brought together.

The Guide is not an operational manual that will explain exactly how to put the Guiding Principles into practice. Further work will be needed to develop such operational guidance, which will vary depending on the sector, operating context and other factors. The United Nations Working Group on Business and Human Rights will play a central role in this regard. In addition, other organizations with particular sectoral or issue-based focuses are already preparing their own thinking on implementation. As they do so, it is hoped that this Guide will assist them by explaining further the intent behind the Guiding Principles that address the corporate responsibility to respect human rights. As such it is a resource not just for businesses, but also for Governments, civil society, investors, lawyers and others who engage with business on these issues.

While this Guide focuses on the corporate responsibility to respect human rights, it in no way reduces the equally important duty of States to protect human rights against abuse by third parties, including business.

THE STRUCTURE OF THIS INTERPRETIVE GUIDE

Chapter I briefly defines some key concepts used in the Guiding Principles.

Chapters II and III focus on the substance of those Guiding Principles that address the corporate responsibility to respect human rights, with a series of basic questions and answers to help interpret each principle, its intent and the implications of its implementation. Chapter II covers the five "foundational principles" of the corporate responsibility to respect human rights, which are the basis for all the "operational principles" of chapter III. These operational principles elaborate on the policies and processes businesses need to have in place to ensure that they respect human rights. They follow the same structure as the Guiding Principles:

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[4] Special thanks go to Caroline Rees of the Harvard Kennedy School of Government, who served as a senior adviser to the Special Representative's team.

A. Policy commitment

B. Human rights due diligence

C. Remediation

D. Issues of context

The Guiding Principles address the issue of remediation both under the second pillar (the corporate responsibility to respect) and under the third (access to remedy). Those Guiding Principles on access to remedy that are relevant to businesses are included here under "Remediation", for the sake of completeness. Section D focuses on dilemmas where the operating context of a business seems to preclude or limit its ability to respect all human rights in practice.

The annexes contain useful reference material.

THE STATUS OF THIS INTERPRETIVE GUIDE

The formal commentary provided in the Guiding Principles is not reproduced in this Guide, although it is at times quoted. The questions and answers provided here go beyond that commentary to provide additional detail and assistance in understanding the Guiding Principles. As such, they complement the commentary but do not replace or supersede it.

I. KEY CONCEPTS

Actual human rights impact

An "actual human rights impact" is an adverse impact that has already occurred or is occurring.

Adverse human rights impact

An "adverse human rights impact" occurs when an action removes or reduces the ability of an individual to enjoy his or her human rights.

Business relationships

Business relationships refer to those relationships a business enterprise has with business partners, entities in its value chain and any other non-State or State entity directly linked to its business operations, products or services. They include indirect business relationships in its value chain, beyond the first tier, and minority as well as majority shareholding positions in joint ventures.

Complicity

Complicity has both legal and non-legal meanings. As a legal matter, most national legislations prohibit complicity in the commission of a crime, and a number allow for the criminal liability of business enterprises in such cases. The weight of international criminal law jurisprudence indicates that the relevant standard for aiding and abetting is "knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime".

Examples of non-legal "complicity" could be situations where a business enterprise is seen to benefit from abuses committed by others, such as when it reduces costs because of slave-like practices in its supply chain or fails to speak out in the face of abuse related to its own operations, products or services, despite there being principled reasons for it to do so. Even though enterprises have not yet been found complicit by a court of law for this kind of involvement in abuses, public opinion sets the bar lower and can inflict significant costs on them.

The human rights due diligence process should uncover risks of non-legal (or perceived) as well as legal complicity and generate appropriate responses.

Due diligence

Due diligence has been defined as "such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person] under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case".[5] In the context of the Guiding Principles, human rights due diligence comprises an ongoing management process that a reasonable and prudent enterprise needs to undertake, in the light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights.

Gross human rights abuses

There is no uniform definition of gross human rights violations in international law, but the following practices would generally be included: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, enforced disappearances, arbitrary and prolonged detention, and systematic discrimination. Other kinds of human rights violations, including of economic, social and cultural rights, can also count as gross violations if they are grave and systematic, for example violations taking place on a large scale or targeted at particular population groups.

Human rights and international crimes

Some of the most serious human rights violations may constitute international crimes. International crimes have been defined by States under the Rome Statute of the International Criminal Court. They are genocide ("acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group"), crimes against humanity (widespread and systematic attacks against civilians that include murder, enslavement, torture, rape, discriminatory persecution, etc.), war crimes (as defined by international humanitarian law) and the crime of aggression.

Human rights risks

A business enterprise's human rights risks are any risks that its operations may lead to one or more adverse human rights impacts. They therefore relate to its *potential* human rights impact. In traditional risk assessment, risk factors in both the consequences of an event (its severity) and its probability. In

[5] *Black's Law Dictionary*, 6th ed. (St. Paul, Minnesota, West, 1990).

the context of human rights risk, severity is the predominant factor. Probability may be relevant in helping prioritize the order in which potential impacts are addressed in some circumstances (see "severe human rights impact" below). Importantly, an enterprise's human rights risks are the risks that its operations pose to human rights. This is separate from any risks that involvement in human rights impact may pose to the enterprise, although the two are increasingly related.

Leverage

Leverage is an advantage that gives power to influence. In the context of the Guiding Principles, it refers to the ability of a business enterprise to effect change in the wrongful practices of another party that is causing or contributing to an adverse human rights impact.

Mitigation

The mitigation of adverse human rights impact refers to actions taken to reduce its extent, with any residual impact then requiring remediation. The mitigation of human rights risks refers to actions taken to reduce the likelihood of a certain adverse impact occurring.

Potential human rights impact

A "potential human rights impact" is an adverse impact that may occur but has not yet done so.

Prevention

The prevention of adverse human rights impact refers to actions taken to ensure such impact does not occur.

Remediation/remedy

Remediation and remedy refer to both the *processes* of providing remedy for an adverse human rights impact and the substantive *outcomes* that can counteract, or make good, the adverse impact. These outcomes may take a range of forms, such as apologies, restitution, rehabilitation, financial or non-financial compensation, and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.

Salient human rights

The most salient human rights for a business enterprise are those that stand out as being most at risk. This will typically vary according to its sector and operating context. The Guiding Principles make clear that an enterprise should not focus exclusively on the most salient human rights issues and ignore others that might arise. But the most salient rights will logically be the ones on which it concentrates its primary efforts.

Severe human rights impact

The commentary to the Guiding Principles defines severe human rights impact with reference to its scale, scope and irremediable character. This means that its gravity and the number of individuals that are or will be affected (for instance, from the delayed effects of environmental harm) will both be

relevant considerations. “Irremediability” is the third relevant factor, used here to mean any limits on the ability to restore those affected to a situation at least the same as, or equivalent to, their situation before the adverse impact. For these purposes, financial compensation is relevant only to the extent that it can provide for such restoration.

Stakeholder/affected stakeholder

A stakeholder refers to any individual who may affect or be affected by an organization’s activities. An affected stakeholder refers here specifically to an individual whose human rights has been affected by an enterprise’s operations, products or services.

Stakeholder engagement/consultation

Stakeholder engagement or consultation refers here to an ongoing process of interaction and dialogue between an enterprise and its potentially affected stakeholders that enables the enterprise to hear, understand and respond to their interests and concerns, including through collaborative approaches.

Value chain

A business enterprise’s value chain encompasses the activities that convert input into output by adding value. It includes entities with which it has a direct or indirect business relationship and which either (a) supply products or services that contribute to the enterprise’s own products or services, or (b) receive products or services from the enterprise.

II. FOUNDATIONAL PRINCIPLES

GUIDING PRINCIPLE 11

Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

GUIDING PRINCIPLE 12

The responsibility of business enterprises to respect human rights refers to internationally recognized human rights—understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.

GUIDING PRINCIPLE 13

The responsibility to respect human rights requires that business enterprises:

(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;

(b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

GUIDING PRINCIPLE 14

The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts.

GUIDING PRINCIPLE 15

In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

(a) A policy commitment to meet their responsibility to respect human rights;

(b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;

(c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

III. OPERATIONAL PRINCIPLES

A. POLICY COMMITMENT

GUIDING PRINCIPLE 16

As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy that:

(a) Is approved at the most senior level of the business enterprise;

(b) Is informed by relevant internal and/or external expertise;

(c) Stipulates the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services;

(d) Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties;

(e) Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise.

B. HUMAN RIGHTS DUE DILIGENCE

GUIDING PRINCIPLE 17

In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

(a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;

(b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;

(c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

GUIDING PRINCIPLE 18

In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should:

(a) Draw on internal and/or independent external human rights expertise;

(b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.

Q 34. Why does this matter?

For any enterprise, gauging its human rights risks is the starting point for understanding how to translate its human rights policy statement—and therefore its responsibility to respect human rights—into practice. It is the prerequisite for knowing how to prevent or mitigate potential adverse impact and remedy any actual impact that it causes or contributes to. It is therefore the essential first step in human rights risk management.

Q 35. What is meant by "human rights risks" and whose human rights are relevant?

Much of human rights due diligence is focused on human rights risks—or the *potential* impact on human rights in which an enterprise may be involved.

Actual human rights impact is a matter primarily for remediation, although it is also an important indicator of potential impact. It is worth highlighting again that an enterprise's human rights risks are

the risks that its operations pose to human rights. This is separate from any risks that involvement in human rights impact may pose to the enterprise, although the two are increasingly related.

An enterprise's operations may pose risks to the human rights of various groups. Direct employees are always a relevant group in this regard. But potentially affected stakeholders may also be communities around the enterprise's facilities, workers of other enterprises in its value chain (insofar as they can be affected by its own actions or decisions), users of its products or services, others involved in product development (such as in product trials) and so forth. It is important for enterprises to look beyond the most obvious groups and not assume, for instance, that the challenges lie in addressing impact on external stakeholders while forgetting direct employees; or assume that those affected are employees alone, ignoring other affected stakeholders beyond the walls of the enterprise. Individuals from population groups that are more vulnerable to human rights impact require particular attention. (See question 4 for more on vulnerable populations and groups.)

GUIDING PRINCIPLE 19

In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action.

(a) Effective integration requires that:

(i) Responsibility for addressing such impacts is assigned to the appropriate level and function within the business enterprise;

(ii) Internal decision-making, budget allocations and oversight processes enable effective responses to such impacts.

(b) Appropriate action will vary according to:

(i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship;

(ii) The extent of its leverage in addressing the adverse impact.

GUIDING PRINCIPLE 20

In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response. Tracking should:

(a) Be based on appropriate qualitative and quantitative indicators;

(b) Draw on feedback from both internal and external sources, including affected stakeholders.

GUIDING PRINCIPLE 21

In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them. In all instances, communications should:

(a) Be of a form and frequency that reflect an enterprise's human rights impacts and that are accessible to its intended audiences;

(b) Provide information that is sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved;

(c) In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.

C. REMEDIATION

GUIDING PRINCIPLE 22

Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.

GUIDING PRINCIPLE 29

To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.

GUIDING PRINCIPLE 31

In order to ensure their effectiveness, non-judicial grievance mechanisms, both Statebased and non-State-based, should be:

(a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;

(b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;

(c) Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;

(d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;

(e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;

(f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;

(g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms.

Operational-level mechanisms should also be:

(h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.

GUIDING PRINCIPLE 23

In all contexts, business enterprises should:

(a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;

(b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements;

(c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.

GUIDING PRINCIPLE 24

Where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable.

ANNEX I

The rights contained in the International Bill of Human Rights and the International Labour Organization's core conventions A. The International Bill of Human Rights

The International Bill of Human Rights consists of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Similar provisions in the two Covenants stipulate non-discrimination and gender equality as overarching principles to be applied in conjunction with specific rights. Both Covenants recognize and define in more detail the rights in the Universal Declaration in the following manner:

International Covenant on Civil and Political Rights

Article 1:	Right of self-determination
Articles 2 to 5:	Overarching principles
Article 6:	Right to life
Article 7:	Right not to be subjected to torture, cruel, inhuman and/or degrading treatment or punishment
Article 8:	Right not to be subjected to slavery, servitude or forced labour
Article 9:	Rights to liberty and security of the person
Article 10:	Right of detained persons to humane treatment
Article 11:	Right not to be subjected to imprisonment for inability to fulfil a contract
Article 12:	Right to freedom of movement
Article 13:	Right of aliens to due process when facing expulsion
Article 14:	Right to a fair trial
Article 15:	Right to be free from retroactive criminal law
Article 16:	Right to recognition as a person before the law
Article 17:	Right to privacy
Article 18:	Rights to freedom of thought, conscience and religion
Article 19:	Rights to freedom of opinion and expression
Article 20:	Rights to freedom from war propaganda, and freedom from incitement to racial, religious or national hatred
Article 21:	Right to freedom of assembly
Article 22:	Right to freedom of association
Article 23:	Rights of protection of the family and the right to marry
Article 24:	Rights of protection for the child
Article 25:	Right to participate in public life
Article 26:	Right to equality before the law, equal protection of the law, and rights of non-discrimination

Article 27:	Rights of minorities

International Covenant on Economic, Social and Cultural Rights

Article 1:	Right of self-determination
Articles 2–5:	Overarching principles
Article 6:	Right to work
Article 7:	Right to enjoy just and favourable conditions of work
Article 8:	Right to form and join trade unions, and the right to strike
Article 9:	Right to social security, including social insurance
Article 10:	Right to a family life
Article 11:	Right to an adequate standard of living. (This includes the right to adequate food, the right to adequate housing, and the prohibition of forced evictions. This right has also been interpreted to comprise the right to safe drinking water and sanitation.)
Article 12:	Right to health
Articles 13 and 14:	Right to education
Article 15:	Rights to take part in cultural life, to benefit from scientific progress, and of the material and moral rights of authors and inventors

B. ILO core conventions

In 1998, ILO adopted the Declaration on Fundamental Principles and Rights at Work. The Declaration committed members to respect four fundamental principles and rights at work: freedom of association and collective bargaining; elimination of forced and compulsory labour; elimination of discrimination in employment and occupation; and abolition of child labour. Each of these is supported by two ILO conventions, which together make up the eight ILO core labour standards.

1. Freedom of Association and Protection of the Right to Organise Convention, 1949 (Nº 87)
2. Right to Organise and Collective Bargaining Convention, 1949 (Nº 98)
3. Forced Labour Convention, 1930 (Nº 29)
4. Abolition of Forced Labour Convention, 1957 (Nº 105)
5. Equal Remuneration Convention, 1951 (Nº 100)
6. Discrimination (Employment and Occupation) Convention, 1958 (Nº 111)
7. Minimum Age Convention, 1973 (Nº 138)
8. Worst Forms of Child Labour Convention, 1999 (Nº 182)

ANNEX II

Examples of external expert resources

- Information and advice on human rights risks is increasingly available from some government offices or agencies, whether in general terms, for particular industries, in particular geographical contexts, or for particular issues such as labour rights or indigenous peoples' rights.
- Authoritative online information resources can assist, such as the websites of the Office of the United Nations High Commissioner for Human Rights (www.ohchr.org) and the International Labour Organization (www.ilo.org).
- Other credible sources of advice may be available, such as many national human rights institutions, the ILO Helpdesk for Business on International Labour Standards, as well as respected NGOs and academic institutions focusing on business-related human rights issues.
- The Global Compact is the United Nations global corporate responsibility initiative. The relationship between the Guiding Principles on business and human rights and the Global Compact is outlined. A range of tools and guidance materials, many of which are also relevant to small and medium-sized enterprises, can be downloaded directly from the website of the United Nations Global Compact (UNGC) **(www.unglobalcompact. org/Issues/human_rights, Guidance Material)**, for example:

    - **Business and Human Rights Learning Tool** (UNGC/ OHCHR, 2011): Web-based modules integrate exercises and case studies on current trends and expectations from business on the implementation of human rights principles, as reflected in the United Nations "Protect, Respect and Remedy" Framework. Upon successful completion of a test, users can obtain a certificate.
    - **The Human Rights Matrix** (Business Leaders Initiative on Human Rights/Global Business Initiative on Human Rights/Credit 360, updated 2010): The Human Rights Matrix is an initial selfassessment and learning tool that enables a company to begin to understand and address its human rights performance, by identifying its policies on human rights and the approaches it has taken towards human rights. It will help companies visualize, assess and manage their human rights programmes and performance.
    - **How to do Business with Respect for Human Rights** (Global Compact Network Netherlands, 2010): This publication builds on the "Protect, Respect and Remedy" Framework of the United Nations Special Representative for Business and Human Rights. Its descriptions, learnings and guidance points are based on the experiences of ten multinational companies of the Global Compact Network Netherlands and are intended to help companies implement a commitment to respect human rights in line with the Framework.

- ***Human Rights Translated: A Business Reference***

  Guide (UNGC/OHCHR/Castan Centre for Human Rights Law/ International Business Leaders Forum, 2008): The purpose of this publication is to explain universally recognized human rights in a way that makes sense to business. The publication illustrates, through the use of examples and suggested practical actions, how human rights are relevant in a corporate context.

- ***Guide to Human Rights Impact Assessment and***

  Management (UNGC/International Finance Corporation/ International Business Leaders Forum, updated 2010): This interactive online tool is designed to provide companies with guidance on how to assess and manage human rights risks and impacts of their business activities. While the Guide may benefit different types of organizations, companies are its main and intended audience. The Guide can be accessed free of charge, following registration.

II. Company, Community relationship in complex environment

A. Multinational Corporations in the Third World: Predators or Allies in Economic Development?[6]

By: James C. W. Ahiakpor

Multinational corporations (MNCs) engage in very useful and morally defensible activities in Third World countries for which they frequently have received little credit. Significant among these activities are their extension of opportunities for earning higher incomes as well as the consumption of improved quality goods and services to people in poorer regions of the world. Instead, these firms have been misrepresented by ugly or fearful images by Marxists and "dependency theory" advocates. Because many of these firms originate in the industrialized countries, including the U.S., the U.K., Canada, Germany, France, and Italy, they have been viewed as instruments for the imposition of Western cultural values on Third World countries, rather than allies in their economic development. Thus, some proponents of these views urge the expulsion of these firms, while others less hostile have argued for their close supervision or regulation by Third World governments.

Incidents such as the improper use in the Third World of baby milk formula manufactured by Nestle, the gas leak from a Union Carbide plant in Bhopal, India, and the alleged involvement of foreign firms in the overthrow of President Allende of Chile have been used to perpetuate the ugly image of MNCs. The fact that some MNCs command assets worth more than the national income of their host countries also reinforces their fearful image. And indeed, there is evidence that some MNCs have paid bribes to government officials in order to get around obstacles erected against profitable operations of their enterprises.

Several governments, especially in Latin America and Africa, have been receptive to the negative images and have adopted hostile policies towards MNCs. However, a careful examination of the nature of MNCs and their operations in the Third World reveals a positive image of them, especially as the allies in the development process of these countries. For the greater well-being of the majority of the world's poor who live in the Third World, it is important that the positive contributions of these firms to their economies become more widely known. Even as MNCs may be motivated primarily by profits to invest in the Third World, the morality of their activities in improving the material lives of many in these countries should not be obscured through misperceptions.

The first point to recognize about MNCs is that, besides operating under more than one sovereign jurisdiction, they are in nature very similar to local or non-multinational firms producing in more than one state or plant. We may call such multi-plant firms uninational corporations (UNCs). Thus, a UNC with branch plants in

[6] Available at: http://www.acton.org/pub/religion-liberty/volume-2-number-5/multinational-corporations-third-world-predators-o , visited on: 24/11/2015 at: 4:48 PM

Alaska as well as some other parts of the U. S. would have been known as an MNC had Alaska continued to be a non-U.S. territory. Indeed, the experience of European countries soon to become more unified economically or the former Soviet Union now breaking up into several sovereign or quasi-sovereign states should impress us of the fact that the United States or Canada easily could have been several independent countries, and some present UNCs would have been MNCs.

Like UNCs, MNCs are owned by shareholders who expect annual returns or dividends in compensation for funds they make available for the firm's production and sales activities. It is to enable MNCs to pay such dividends that their managers seek out the most efficient workers for the wages they pay, buy materials at the cheapest costs possible, seek to produce in countries levying the lowest profit taxes, and sell in markets where they can earn the highest revenues after costs. (This is no different from anyone seeking employment at the highest wage for the least amount of tedium, the most congenial work environment and location, and the highest employment benefits.) Perhaps the main difference between uninational and multinational corporations is that the latter have been more successful than the former, and as a result have expanded their activities to many more regions and sovereign states.

Many do recognize UNCs or local firms as helpful agents in the development of the communities in which they operate. Primary in this recognition is the employment they create and the (higher) incomes earned because of their having established in the region. These firms also rent buildings and land, or sometimes buy them, thus generating higher incomes for their owners. For example, in the absence of the present Japanese owners having bid for the Rockefeller Center in New York, the price its American owners would have gotten for it would have been lower. The same applies to the income prospects of owners of the Seattle Mariners should the sale of this club to the Japanese buyers go through. It is precisely in similar ways that MNCs enrich labor and other resource owners in the Third World. In their absence, the people would have had fewer or much lower paying jobs, and the demand for land and other local resources would have been lower. Without the operators of such hotels as the Holiday Inn, the Sheraton, the Hyatt, Four Seasons, and the Hilton having leased or bought beach-front properties in several of the popular tourist resorts in the Third World, their owners (individuals or government) might have received much less for their sale. Such purchases also release the capital of resource owners for investment in other enterprises.

Some of those who recognize little positive contributions from MNCs to the economics development of the Third World countries might, however, acknowledge that these firms pay higher wages to local employees than they typically would receive elsewhere, and higher rents for land and buildings. But they often argue that the wages in Third World countries are lower than those paid by MNCs in the more developed countries, and the working conditions are not of the same standard. However, the comparison misses several key points. For example, the skill or educational levels of workers in the Third World and those of the more developed countries are not the same. The amount of machinery and equipment handled by workers in the two locations are also different. In short, the amount of output generated by a worker in the Third World is typically smaller

than that produced in the more developed world. Indeed, if MNCs could hire enough of higher skilled workers in the more developed countries at the wages workers are paid in the Third World, they would gladly do so. They would thus earn higher profits while selling their goods and services at lower prices. But the fact is that the voluntary exchange system in which MNCs operate would not permit them. Besides those working for charity, few others would for long accept wages they consider to be less than their contribution to an enterprise.

The same explanation applies to wages paid by MNCs in the Third World. Unless workers find it most profitable to work for MNCs at the wages they offer, they would choose employment elsewhere. Similarly, unless MNCs can make as much profit as they can at home, as well as compensation for the additional risks taken to invest in the Third World, including the risk of asset confiscation by a hostile future government, they would not venture into those parts of the world. Thus, there have to be net benefits for both parties in a transaction (here workers and multinational corporations) for the transaction to take place, and on a continuous basis.

It may also be worthwhile to point out that research has not confirmed the frequent assertion that foreign firms, including MNCs, make excessive or higher profits per dollar invested than their local counterparts. On the contrary, private local firms on average earn higher rates of profits before taxes than foreign firms (as revealed by research in India, Brazil, Columbia, Guatemala, Ghana, and Kenya). And the simple explanation is that many Third World governments tax the profits of their local firms at a higher rate than they do those of foreign firms. Thus, the after-tax rates of profit are similar for foreign and private local firms in the Third World. Furthermore, new wealth created by any firm has to cover the wages, interest, equipment, and the rental costs of land and buildings incurred in production before profits are paid. And much of such payments stay within the host Third World economy.

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If we withhold our paternalistic instincts towards poorer people in the Third World, we would also respect their judgement to purchase products manufactured there by MNCs rather than accuse the firms of selling inappropriate products to them. Being poor does not make one’s choice of products less defensible or moral

than the choices of the rich. And without sufficient demand for the products, MNCs would not make profits from selling them in the Third World. In a free trading regime, the same products might have been imported had they not been produced by MNCs. There is thus no valid reason why Third World governments should require that MNCs manufacture and sell only second- or third-rate quality products in those countries, as some analysts from the more developed countries have suggested. Is there anything legitimate that Third World governments can do about the activities of multinational corporations in their countries? Yes; but nothing more than they legitimately and reasonably would do about local firms, bearing in mind that excessive taxation of profits or environmental regulations reduce total investments by both types of firms. Perhaps, MNCs may be able to offer bigger bribes than local firms to escape restrictions imposed on them by Third World governments. If so, such restrictions mainly work against the development of local firms. The solution ought to be a loosening of restrictions on businesses so they may create more wealth and in the process facilitate the development of local enterprise and lessen the incidence of corruption in government.

Adam Smith, who was also a moral philosopher, long observed that an individual "by directing . . . industry in such a manner as its produce may be of the greatest value, . . . intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it." These observations apply with equal force to the investment activities of multinational corporations in Third World countries. And it is no accident that people in those Third World countries whose governments have been more open to the presence of multinational corporations have experienced significant improvements in their standard of living (e.g., Bermuda, the Bahamas, Hong Kong, South Korea, Singapore, and Taiwan) while many in countries hostile to these firms continue to be mired in poverty. It may not be the intent of Third World governments, but perpetuating poverty in the name of protecting their people from alleged exploitation by MNCs has little moral justification.

B. Corporation-Community Collaboration for Social Development: An Overview of Trends, Challenges, and Lessons from Asia[7]

By: Joaquin L. Gonzalez III, Ph.D.

> *In East Asia, Confucius said, "If one's actions are motivated only by profit, one will have many enemies."*
>
> *In North America, Chase National Bank CEO George Champion pointed out that,"Business must learn to look upon its social responsibilities as inseparable from its economic function"* (Wilson 1986).

Thousands of years apart, these parallel thoughts emerged from two continents on opposite sides of the Pacific Ocean.

Interestingly, Corporate Social Responsibility (CSR) is one of the panaceas prescribed by an emerging "school" of academic institutions and international consultants who seek to boost firms and economies out of the world business slump. Broadly, they see CSR as the antidote to market lethargy and corporate decay, and as the shock therapy needed to resuscitate and revive the private sector as the engine of growth and progress, especially in transitional economies. In East Asia, the miracle-turned-crisis situation provided the perfect operating setting for these "doctors of management," most of whom came from the West, to perform surgical CSR procedures and prescribe corrective CSR dosages for both domestic and multinational firms (Reder 1994; Economist Intelligence Unit 1997; Dunong 1998; Emerson 1998; Wu and Chu 1998; Richter 2001; Li and Batten 2001; Asia Africa Intelligence Wire 2003). Four major CSR conferences in 2003 alone also attest to this.

The infusion of CSR interventions into the business and economic bloodstreams of Asia has been quite pervasive in this era of intense globalization, from the boardroom to the supply chain, corporate headquarters to regional subsidiaries, business models to operational applications, as-sembly line workers to front line clients, and human rights to the protection of the environment. As a result, CSR is becoming a popular reinventing and reengineering tool of the 21st century, particularly in business circles. Not surprisingly, as CSR remedies have taken effect and Asian economic recovery has come into sight, a plethora of research and conferences have emerged, sharing "best practices" culled from successful experiences. In contemporary Asia, CSR is not only being touted as a cure-all but also a potent tool that could help sustain reforms and prevent future outbreaks of organizational infections and managerial dysfunctions. Asia is witnessing a paradigm shift in terms of revitalized business practices.

The principle argument of this paper is that while many of the CSR interventions applied globally are relatively "new" to Asia, when CSR is operationally defined as "corporation-community collaboration (CCC) towards social development" it is a familiar concept to generations of Asian entrepreneurs and the

[7] Retrieved from: http://www.iadb.org/wmsfiles/products/publications/documents /2220311.pdf chapter-1, visited on: 27/11/2015

communities they serve (Carroll 1977; Aquino 1981; Dhiravegin 1985; Cox et al. 1987; Harivash 1990). However, in spite of its extensive history, Asian corporation-community collaboration in social reform is an under-studied area of policy research and attention, even in recent CSR conferences and publications in Asia (Kawamoto 1977; Takeuchi 1978; Singh et al. 1980; Krishnaswamy 1986; Mahmud 1988). Throughout Asia, scholars and practitioners are focusing on global and regional-level CSR issues such as human rights, environmental and health concerns, worker welfare, corruption, and social safety nets as well as company-level CSR issues such as board governance, ethical fund management, shareholder accountability, corporate restructuring, and corporate citizenship (Chowdhury and Kabir 2000; Gescher 2002; Holland 2002).

Moreover, CSR is not the only development concept that is evolving in theory and in practice. The content and context of social development itself, including its policies and processes, are also experiencing marked changes. Asia is a mix of countries experiencing varying degrees of westernization, democratization, modernization, and globalization. These processes have made Asia a region of contrasts and, at times, extremes. On the one hand, there are Asian sub-regions with "nouveau rich" countries, particularly in the northeast. On the other, there are Asian sub-regions with some of the poorest countries in the world, especially in the south. Another underlying argument of this paper is that in both rich and poor areas we can find a range of local firms, from SMEs to family-owned conglomerates, that over the years have been heavily involved in community projects such as creating access to health care, safe drinking water, and sanitation. In the poorest areas, local firms have had to "eat and breathe social development" every day for decades (Collins 2000).

The research presented in this paper attempts to move beyond CSR motivations that have already been more than adequately dealt with, into an examination of new trends within relatively "old frontiers." The goal is also to give a "social dimension" to the abundance of financial and economic stories about CSR. To achieve this, the paper has been divided into four sections and responds to a series of "guiding questions."

The first section examines the context of Asian business and civil society interactions from the "miracle period" and the "crisis years" into the "recovery trajectory." The discussion in this section responds to these questions: How are corporations addressing not only their own basic and strategic needs, but also the overall needs of society, in particular those of local communities? Which forms of CSR interventions have been applied for promoting community development in Asia? How has social development been enhanced by CSR?

The second section elaborates on company-community collaboration in particular, addressing: What are the benefits for companies and communities who collaborate? Who are the CCC stakeholders? What mix of assets do they bring to the CCC? What commitments can they make? What kind of partnerships can be developed between corporations, government, and communities in the context of CSR? Is government still needed in CCCs? What role will it play?

The third section deals with the internal and external obstacles or "disincentives" to Asian CCC formation, especially the issue of trust and the appropriate role of government in business-civil society partnerships. In

particular, this section is focused on obstacles and opportunities inherent to Asian communities' effecting participation in CSR activities and in effect contributing more fully to social development.

The final section of this paper concludes with policy, research, and practical lessons on overcoming these Asian CCC challenges, identifying the types of policies that could be implemented to effectively promote and facilitate such collaboration and participation from the community to the international level.

Contextual Trends: Asian Business, Social Development, and Modes of CSR

It is difficult to examine current CSR practices in Asia without situating country experiences in the dynamic context of Asian business-civil society interactions from the "miracle period" and the "crisis years" into the current "recovery trajectory." The research presented here looks into: how Asian corporations address not only their strategic business needs, but also the overall needs of the society, in particular those of the local communities; how Asian community organizations have participated in economic development, community development, social service delivery, public policy dialogues and the decision-making processes through CSR interventions; whether local and foreign firms have been able to contribute directly to community development in Asia beyond the traditional philanthropies; and whether they have been able to provide development assistance beyond financial capital. In short, is Asian CSR bringing wealth and social safety nets from the boardroom to the backyard?

The inter-relationships between and among business, government, and society in Asia are more than 4000 years old. Merchants from the Arabian peninsula, Central Asia, South Asia, Northeast Asia, and Southeast Asia have been exchanging goods for centuries, traveling enormously long land routes and treacherous sea lanes. During these hundreds of decades, trade, and commerce have been regulated and controlled by Asian empires, kingdoms, sultanates, and dynasties located in their respective seats of power in China, Japan, India, Korea, and Southeast Asia's Srivijaya, Siam, Malacca, the Majapahit Empire, the Khmer Empire, and the Sukhotai Kingdom. Asian civilizations flourished. Business and government practices were intertwined with the teachings of Hinduism, Buddhism, Confucianism, Taoism, and other Asian religions and philosophies. Later, Islamic and Christian proverbs and insights also found their way into Asian business practices.

The fusion of business, government, and societal values became the basis for ethical relationships and community giving, not only between individuals and society, and between citizens and government, but also between buyers and merchants. Confucius famously explained that, "if one's actions are motivated only by profit, one will have many enemies." While in India, Buddha also reflected on the social pact between business and society: "Look back at your business and life, at their end, and honestly say that the years of doing business have had some meaning. We should be able to look back and see that we have conducted ourselves and our business in a way that had some lasting meaning and which left some good mark on the world." We begin and end this paper with these two Asian quotations.

Capitalism replaced feudalism in the global economy of the 20th century. European colonizers gave their Asian colonies independence and the United States of America emerged as the new power in the Asian Pacific region. America promoted the tenets of capitalism in Asia with its prized Asian possession: its "capitalist" headquarters in the Philippines. In line with capitalist ideals, Northeast Asian countries

implemented importsubstitution industrialization (ISI) policies which allowed the region to move from agriculture based businesses to heavy industries giving the region a comparative advantage over the west. South Korean conglomerates (*chaebols*) like Daewoo, Samsung, and Hyundai, as well as Japanese corporate giants such as Honda, NEC, Toyota, Suzuki, and Mitsubishi were the results of these ISI economic policies. Later, export-oriented industrialization (EOI) policies supported by both domestic firms and multinational companies further reinforced the capitalist structures introduced in Asia.

Investment combined with research and development resulted in high value-added manufacturing, especially in the consumer rich electronics sector. The results were Asian televisions, computers, VCRs, cameras, and radios (produced by Sony, Toshiba, Acer, Panasonic and Samsung) that out-performed their western competitors (such as IBM, Compact, Zenith, and Magnavox). Financial capital also grew and diversified as the demand for funds to fuel investments and trade increased. Japanese, Korean, Taiwanese, Hong Kong, Singaporean, and Indian banks worked in tandem with western financial institutions to support businesses in the region (Selwyn 1992; Sekimoto 1994; Wokutch and Shepard 1999).

The Asian Business Miracle Period (1965-1996)

> In the *Art of War*, Asian philosopher-strategist Sun Tzu said, "A leader, who takes on the role of the commander, without understanding the strategy of warfare, invites defeat" (Tzu and Gagliardi 1999).
>
> In *Capitalism and Freedom*, distinguished US economist Milton Friedman called CSR a "fundamentally subversive doctrine in a free society. In such a society, there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engage in open and free competition without deception or fraud" (Friedman 1982).

Are Chinese sage Sun Tzu and US economist Milton Friedman in intellectual harmony? Apparently so. In Asia, especially during its "renaissance" years, Sun Tzu's appeal extended beyond the military realm into the world of business. Since business, by definition, focuses on competition, Asia's business leaders claimed that Sun Tzu's principles are ideally suited for competitive business situations. Business, like warfare, is a dynamic and fast-paced contest of wills, based on both morale and machines, and deals with the effective and efficient use of scarce resources. Many business people around the globe have found *Sun-Tzu ping-fa* (Sun Tzu's *The Art of War*)—similar to Milton Friedman's ideals—a valuable text, which, though written more than 2,000 years ago, is still one of the most important works written on the subject of Asian military and business strategy today.[8] Hence, a long period of robust economic and business growth preceded the implementation of ISI and EOI policies in East Asia.

Disciples of Friedman's school of thought, meanwhile, argued further that companies are only liable for social development through the many taxes they pay to government. Firms should not allow themselves to be distracted from profit maximization. If businesses wish to contribute beyond what they give to the

[8] Sun Tzu's work is similar to Roman Flavius Vegetius Renatus' "Military Matters," Lao Tzu's "Tao Te Ching,"and the Italian Niccolo Machiavelli's "Art of War,"among others.

government for social spending, companies could also opt to channel philanthropy to non-profit organizations and foundations that will allow them to write-off their contributions against their tax liability.

The Asian corporatist model of growth created: Japan Inc., Korea Inc., Taiwan Inc., Singapore, Inc. and Hong Kong Inc. Businesses were able to influence policies through deliberation councils like Japan's Ministry of International Trade and Industry, the Singapore National Wages Council, the Vietnam Chamber of Commerce and Industry, and the Malaysia Business Council. The role of government was to create physical infrastructure for the smooth operation of business, similar to roads and bridges, transportation, communication, airports, ports, terminals, special economic zones, and techno parks (Campos and Gonzalez 1997; Campos and Taschereau 1997). However, sub-contracting the work to businesses created opportunities for public-private sector collaboration. Public-private partnerships through build-operate transfer schemes became key and this approach eventually helped breed Asia's business tigers and dragons.

During the Asian "economic miracle,"CSR strategies concentrated on tackling social development issues such as human rights, political rights, labor and employee rights, occupational health and safety, and women's rights at the level of company operations and national governance (Roberts 1994; Shrvastava 1995; Sethi and Steidlmeier 1995; Naya and Tan 1996). Business provided tax-deductible philanthropic support directly to community beneficiaries by sponsoring charities, raffles, beauty pageants, sports events, training and art exhibits, or else through civil society groups like religious organizations, hospitals, churches, temples, mosques, orphanages, old age homes, homeless shelters, food banks, unions, schools, and clan and ethnic associations (Rufino 2000).

In the late 1960s, a group of 50 Philippine CEOs formed the Philippine Business for Social Progress (PBSP) to finance community and social development projects. In Thailand, at the height of the miracle, a network of local and international hotels and restaurants led by the Pan Pacific formed a consortium that launched a "Youth Career Development Program" in 1995. PT Astra International (Indonesia) linked with Toyota (Japan) to provide student scholarships, help small entrepreneurs run car maintenance classes, and provide teaching aids for schools. This intraAsian business philanthropy partnership also financed the restoration of Borobudur, Indonesia's most famous temple.

However, these were not large-scale efforts since many companies continued to adhere to Friedman and Sun Tzu's principles of business: social development is not the responsibility of corporations. Genuine socio-economic initiatives were curtailed by repressive regimes in the Philippines, Indonesia, Malaysia, Singapore, Korea, Taiwan, Thailand, Sri Lanka, Pakistan, Bangladesh, and China. Governments were afraid that citizens would think that they were not doing their work in providing public services, welfare, and social development. The trickle-down of wealth through the taxes paid by the business sector went toward rural development and poverty reduction.

Asian Economic Crisis Situation (1997–2000)

During the height of the East Asian crisis, concerns about the magnitude of graft and corruption, and the lack of transparency, predictability, and rule of law were revealed in Indonesia, Thailand, Japan, and Korea. Moreover, the crisis threw cold water on the "growth with equity" arguments. Was there really income

redistribution? Many people in East Asia felt some form of "trickle down" of economic rewards. But it seemed that the main beneficiaries were still a select segment of society—the traditional political elites, the greedy economic warlords, well-connected wealthy ethnic Chinese immigrants, and established families and their conglomerates. One thing is for certain: throughout East Asia those who suffered the most devastating effects of the political-economic crisis were on the lower rungs of the social ladder. In essence, the crisis forced a reconfiguration of the relationship between business, government, and civil society stakeholders of social development. Civil society emerged as an integral partner of development and not just a beneficiary or social welfare recipient. Corporations realigned their business models and operations to increase competitiveness and perform more risk analysis and forecasting.

Consequently, local and foreign firms adjusted their CSR strategies, moving up the company hierarchy from a focus on employee relations to deal with ethical practices in their boardrooms (Jomo 1998; Asiaweek 2001; Charumilind 2002; Hanazaki et al. 2003). Shareholders were calling for improvements in public transactions and corporate board governance. Confucius' saying: "If one's actions are motivated only by profit, one will have many enemies," seemed to challenge the assumptions of Sun Tzu and Milton Friedman in the boardroom. Moreover, corporations began to re-examine their idea that businesses' contribution to social development was simply "philanthropies to civil society and tax payments to government." They began to develop social safety nets and "codes of responsibility" towards the environment and the visually, physically, mentally, and socially challenged members of the community. They also gave less to building physical infrastructures and more to building capacity and institutional development programs, like CSR-oriented training, incentives, conferences, certifications, and workshops.

In Bangkok, the Stock Exchange of Thailand (SET) and the Securities and Exchange Commission (SEC) adopted 15 core principles of corporate governance that it would monitor, ranging from protecting shareholder rights to revised board responsibilities. The SET and SEC pledged to reduce fees for listed companies and expedite regulatory procedures for firms with good governance. Asia's business sector also supported moves to make their host governments more efficient, responsive, and accountable especially vis-à-vis relations with firms. For instance, the Makati Business Club, an organization of 400 top corporations in the Philippines, allied with advocacy groups (Social Weather Station and Philippine Center for Policy Studies), the media (Philippine Center for Investigative Journalism), and the US-based Asia Foundation, to establish the "Transparent Accountable Governance" Project.

In the late 1990s, the South Korean *chaebol* Samsung established the Institute for Environmental Technology through which the company or one of its affiliates selects a river, lake or mountain and then takes the responsibility to keep it pollution-free. In Japan, corporate community investment is exemplified by the Cable & Wireless partnership with the Tokyo-based Centre for Active Community and the international consultancy and thinktank Sustainability, which developed a strategic community investment program with a close link with both core business objectives and also the needs and requirements of Japan's local communities. Various Asian companies and Asia-based multi-national corporations (MNCs) have also turned to ISO 14001 and Social Accountability 8000 certifications, which evaluate compliance to ethical environmental and

employment standards. Others have even raised the bar to subscribe to UN Global Compact, ILO conventions, OECD Guidelines for Multinational Enterprises, the ISO 14000 Series, Accountability 1000, the Global Reporting Initiative, the Global Sullivan Principles, and even the latest AA1000S Assurance Standard, the first international standard developed to help ensure quality in corporate social and environmental reporting (Nair 2001; Mosher 2003).

Asian Business in Recovery (2001-present)

Economically, Asian economies account for more than half of annual growth in world trade and attract a significant portion of global business. Asia's growth is led by China, which is now the seventh-largest economy in the world and is set to overtake Germany and Japan within the next two decades, according to economic forecasters. Various Asian companies, including Mitsui, Itochu, Mitsubishi, Toyota, and Marubeni, have gross sales exceeding the GNP of Singapore, New Zealand, Pakistan, Portugal, Venezuela, and Egypt. In terms of finance, Japan's Sumitomo Bank had higher gross sales than U.S.-based Citicorp in 2001. There are more than three billion people in the Asian market, representing about three-fifths of the world's population. Just China and India combined account for two-fifths of the global population. Asia is also a major global source of cheap labor and raw materials. *Global Competitiveness Report* data shows Asian companies as the most reliable sources of competent managers (Philippines, India, Hong Kong, Singapore) and as having quality skilled laborers (India, China, and the Philippines). Global business is so tied to Asia that the last global recession was precipitated by the Asian financial crisis with the collapse of the high-performing East Asian economies.

Paradoxically, Asia is the home of some of the poorest economies and populations in the world. In a 2001 *International Survey Research* report on employee satisfaction, some of Asia's companies received the lowest ratings. In the last overall rankings (2003) of global competitiveness, business competitiveness, microeconomic competitiveness, only four Asian countries (Singapore, Japan, Taiwan, and Hong Kong SAR) were in the top 20, based on surveys of the global business community. Many Asian countries, including Thailand and Indonesia, rank at the bottom of the CSR scale for criteria such as shareholder rights, social responsibility and insider trading. An examination of Asia's Gini coefficients, poverty indexes, and other income inequality measures shows very weak performances by countries, especially in South Asia. Social improvement in Asia, therefore, is still urgent business.

Democratization in Asia has enhanced the confidence of civil society organizations, creating more avenues for multi-stakeholder partnerships between and among government, businesses, and civil society stakeholders in social development. The recovery and continued growth of Asia can no longer be hinged solely on the business sector or public-private partnerships; civil society groups need to be involved. Local and international businesses in Asia have also learned that dealing directly with civil society organizations can bring both social and financial returns. After all, new business models call for greater reliance on suppliers and outsourcing agents. But most of all, corporations have discovered there is a large untapped market at the base of the societal pyramid. With the right products they could make significant profits from Asia's poor.

It is not surprising that as Asian business and economy have recovered, CSR strategies have been focused on sustaining relatively successful short-term milestones in the first years of the new millennium. Reinforcing these gains requires further re-examination of past CSR approaches and the introduction of new ones relating to corporate citizenship, business transparency and openness, socially responsible investments and a deeper commitment to community-level social development. The crisis situation further motivated political and business leaders to implement the many laws and policies that encouraged CSR. Several legal motivators can be cited.

In the Philippines, the inspiring 1986 People Power revolution and the rise of non-governmental organizations (NGOs), the overwhelming approval of the 1987 Constitution, the unprecedented enactment of the 1991 Local Government Code and Build-Operate-Transfer Law of 1993, and the implementation of the pro-people *Philippine National Development Plan: Directions for the 21st Century* (1998) were all crucial events that made a significant contribution to the interaction of groups representing the Philippine government, business, and civil society. They came after decades of suppression under martial law and heavily centralized control by the national government.

Similarly in Thailand, the landmark passage of the Tambol Authority Organization Act of 1994, the enthusiastic approval of the 1997 New Thai Constitution, the swift launching of the Eighth National Economic and Social Development Plan (1997), and the recent passage of the National Decentralization Act (1999) were critical turning points that enhanced power-sharing among the public, private, and civil society sectors. Citizen business partnerships increased most notably at the sub-district (*tambon*) level. A progressive, charismatic senator, Mechai Viravaidya, moved to create the largest civil society-business poverty alleviation partnership through the Population and Community Development Association (PDA)'s Thai Business Initiative in Rural Development (TBIRD).

In Indonesia, post-Soeharto leaders, calling for "Reforms," have moved for greater citizen participation in the political process and deregulated the business sector. Local assemblies, which did not have much power in the past, are becoming more important, especially at the regional level. The central government used to earmark large quantities of revenue for subsidies to failing public enterprises to the dismay of the taxpaying business community. Recently, however, the Ministry of Finance has initiated moves to devolve more than 50 percent of financial resources from a virtual national government monopoly to the coffers of provinces and districts as well as to provide more incentives for small and medium enterprises. National legislation helping to ensure further fiscal and administrative devolution include: Law No. 22 (1999) on regional government; Law No. 25 (1999) on fiscal balance; and Law No. 34 (2000) on regional taxes and levies.

Content analysis of four major CSR conferences in Asia in 2003 revealed that local and foreign companies have continuously been applying various kinds of CSR, including employee relations, product and process responsibility, and community involvement (Koh 2002; Limpaphayom 2002; Roman 2002; Shinawatra 2002; Tong 2002; Wong and Jomo 2002; Young 2002; Mosher 2003; Wiriyapong 2003). This further illustrates the resolve of the Asian business community to implement CSR policies not just at the national level but also in local communities and firms. Hence, the first "CSR in Asia Conference" in 2003 was held March 26-27 in

Kuala Lumpur, Malaysia. The International Centre for Corporate Social Responsibility at Nottingham University (United Kingdom) sponsored it. Presenters ranged from Glaxo Smithkline, Affin Bank (Malaysia), Rolls Royce, and Malaysian Securities and Exchange Commission. Panel topics ranged from the elimination of child labor practices in the soccer industry in Sialkot, Pakistan, to online CSR reporting and monitoring practices in Japan, Malaysia, and India. The second major conference was the Third Asian Corporate Governance Conference held May 15-16, 2003 in Seoul, South Korea, as a collaborative effort between the Asian Institute of Corporate Governance at Korea University and Yale University's International Institute for Corporate Governance. This third conference builds on the themes from the previous two conferences on global corporate governance. The discussions covered areas from disclosure and corporate governance issues in Hong Kong and Korea to the decentralization of Chinese, Japanese, and Malaysian corporate boards

The third major CSR in Asia gathering, the "Asia Forum on Corporate Social Responsibility" was held in Bangkok, Thailand, September 18-20, 2003. This largest gathering of CSR practitioners and researchers in Asia was co-hosted by the Ramon V. del Rosario, Sr. Center for Corporate Responsibility (of the Manila-based Asian Institute of Management) and the Population and Community Development Association of Thailand. More than 400 participants from business, government, and civil society made presentations on best practices for collaboration that leads to bottom line benefits, using innovative techniques. CSR awards were given to innovative projects dealing with environmental excellence, best CSR policies, support and improvement of education, and poverty alleviation. Nestle Philippines and Union Cement won awards in the proactive CSR solutions category.

This meeting was followed a week later by yet another Asia regional CSR conference, the "Ethical Corporation Asia 2003 Conference," in Singapore. At this fourth CSR gathering, companies like Sony, the Gap, Hewlett Packard, the Tata Group (India), BASF, Premier Oil, British American Tobacco (Malaysia), Standard Chartered Bank, NEC

Corporation, DHL Worldwide Express, Ballarpur Industries (India), The Rainforest Alliance, and Citibank shared experiences on how incorporating a CSR strategy in Asian markets could positively impact shareholder value by making a real difference in company environmental, social, and regulatory compliance policies.

The challenge is to balance three philosophical tenets: first, the tenacity and aggressiveness of Sun Tzu at the factory and on the front lines; second, the wisdom and ethics of Confucius in the boardroom; and third, the harmony and compassion of Buddha and the Dalai Lama in relations with the community-consumer. The examination of these three critical operating contexts of CSR and social development in Asia have emphasized that company-community collaboration has always been present in CSR strategies from the Asian "miracle" period to the Asian "crisis years." However, the recent 2003 meetings of professors and practitioners of business and CSR have revealed that the toughest course is at another level of engagement between business and civil society: how to operate responsibly without looking at persons at the bottom of the pyramid as simply "profit centers." Institutionalizing "giving back to society" beyond the traditional

philanthropic modes is business for business. Moreover, the direct impact of CSR on social development is difficult to measure.

Community-Corporation Collaboration and Social Development

At the height of Asia's regional economic boom, groups representing civil society became critical partners in development governance. Their expansion was bolstered by many factors, including the generous shift of financial and other resources from governmental to non-governmental organizations, and support was channeled from the national, regional, and international levels. Organized groups, representing segments of Asia's non-government sector, such as non-governmental organizations (NGOs), community-based organizations (CBOs), and private voluntary organizations (PVOs) often became useful alternative service delivery agents, especially for health care and agricultural extension services. Many also became strong political advocates of women's, environmental, social, and human rights, as well as consumer issues. Tired of the dominance of "big business" and multinational interests, various NGOs even focused on entrepreneurship and financing targeted at assisting the growth of small and medium enterprises (SMEs) and community-based credit cooperatives. Compared to their government and commercial sector counterparts, Asian civil society groups concentrated on operations beyond trade, investment, infrastructure, finance, and other economic issues. South, Northeast, and Southeast Asian NGOs, CBOs, and PVOs delved into poverty, human settlements, equity, education, health, population, the environment, and many other social concerns.

"Civil society" and "sustainable human development" became the buzzwords of the 1990s in Asia, driven in theory and practice by local, regional, and international development agencies, research and academic institutions, governmental organizations, and community groups. Despite this trend, some Asian governments took cautious stands and closely monitored the development activities of civil society groups. This was especially relevant in countries like Singapore and Sri Lanka, where national security agencies suspected NGOs of being radical fronts for extra-legal and destabilizing political and social change, and in countries where the challenge was to ensure racial harmony. In order to emulate the NGOs' ad hoc nature, which seemed to give them greater flexibility, responsiveness and trust at the community level, a number of Asian governmental institutions set up Government-Run or Initiated NGOs, popularly known as GRINGOs. Like the government, many Asian businesses were suspicious of NGOs. Nevertheless, there were companies in the business sector who learned to build alliances with them as part of their corporate governance and community outreach strategies.

Chit Juan, Chief Executive Officer of Philippine-based Figaro Coffee Company and 2003 Asia CSR Bangkok conference award winner, said:

> *The commitment of a company to social responsibilities is a major driving force. Establishing a corporate culture that espouses values and programs that go beyond the norms of business inculcates trust and pride in one's organization, which in turn propels it to greater heights. Companies, which are driven by absolute commitment to its targeted publics—including the communities they serve—are truly those worth emulating (Business World 2003).*

CEO Chit Juan's thoughts reveal the many avenues for community-level partnerships for social development between business and civil society entities. Although not yet a large-scale trend, as emphasized in the conference analyses in the previous section of this paper, new configurations of community-corporation partnerships for social development seem to be emerging in Asia.

What Benefits Exist for Company-Community Collaboration?

Historical evidence shows that actors in any one sector in Asia, operating independently, do not have all the needed resources, all the public faith and confidence, and all the knowledge needed to address social development issues effectively. When stakeholders from Asia's business and civil society sectors align together, social development concerns are more likely to be addressed in a way that is effective, responsive, economical, and sustainable. Power over social development issues is held by a great variety of individuals and organizations. The media, religious organizations, community groups, employees, entrepreneurs, and corporate bureaucrats all have some influence and shape public concerns. There are many factors pushing communities and business to operate against one another, take competing views and positions and play adversarial roles, as will be elaborated on later. However, past experiences from India and Bangladesh in South Asia to the Philippines and Thailand in Southeast Asia have demonstrated that more can be achieved by harnessing the strengths of various players and aligning multiple centers of power around an issue, than by fragmenting the available resources and competing for power.

The regional economic crisis and recovery periods have demonstrated that Asians live in a rapidly changing, interconnected and unpredictable globalizing and regionalizing environment. Increased access to education and the Internet have empowered more Asians with the skills and knowledge to choose their own futures, and to ensure that Asian businesses, governments, and civil societies fulfill their promises. All these factors have combined to dramatically alter the context in which social development is defined and delivered.

Not only have social concerns in Asia taken on new complexity and interconnectedness, the methods to address these concerns are necessarily changing too. Sources of power and legitimacy to address public issues are increasingly fractured. Asians no longer live in a region where the nation-state is regarded as the sole legitimate decision-making actor in social development. In fact, the number of domains in which governments can credibly claim to hold overwhelming pre-eminence is in relative decline, especially with the rise of the private and civil society sectors.

The benefits for both Asian companies and communities are plentiful. For domestic and international companies, these include tax write offs, market penetration, social advertising and risk-mitigation incentives. These have a direct impact on the bottom line of business revenues. Civil society organizations benefit from the sustained flow of supplemental financial resources, material donations, more "warm bodies" as supporters, lobbying credibility, social marketing visibility and strategic thinking. These have a direct impact on civil society's bottom line—societal change.

Who Are the Actors Representing Business and Civil Society in Social Development?

Community or the civil society sector is represented by: individual consumers or citizens, NGOs, CBOs, PVOs, advocacy groups, public or special interest groups, academic and research institutions, media, religious

organizations, women's groups, labor unions, human rights, environmental, student associations, family and clan associations, ethnic and indigenous groups, youth clubs, sports teams, foundations, citizen's committees, urban poor organizations, farmers' and fishermen's associations, training and education organizations, and others. These organizations have relatively long histories of partnership with business.

Corporations and the business sector are represented by: sole proprietorships, entrepreneurs, multinational corporations and their subsidiaries, chambers of commerce, SMEs, local business, trade, credit unions, savings and loan associations, investment companies, banks and other financial institutions, marketing and advertising firms, investment associations and cooperatives, utilities (energy, water and power) cooperatives, Internet business and business councils, among others. Examples of CSR-oriented business organizations in Asia that are doing work with local communities are found in Appendix 1.1. These business associations have relatively long histories of partnerships with civil society groups. Appendix 1.2 lists multi-national corporations operating in Asia that have made a commitment to CSR. These organizations have histories of partnership with civil society.

A number of ongoing partnerships between business and civil society organizations provide lessons for social development at the community level.

Vietnam: Vietnam Business Council is a consultative and deliberative forum comprised of representatives from business, government, and civil society. The VBC meets periodically to address issues related to the development of economic, and social business policies and laws. The Vietnam Business Council was created under the leadership of four key organizations: (1) Vietnam Chamber of Commerce and Industry, a national organization which assembles and represents business enterprises and associations from all economic sectors throughout the country; (2) Prime Minister's Research Commission, the Prime Minister's think-tank on economic, social and administrative reforms, which provides advice and proposals to the Prime Minister and leaders of the Vietnamese Government; (3) Central Institute of Economic Management, the research institute which helps the Vietnamese government work out economic laws and policies; and (4) Association of Small Entrepreneurs in Hanoi, started up after a careful study of similar types of deliberating councils operating in Southeast Asia—for example, the Singapore National Wages Council and Malaysia Business Council. The VBC has now started to develop an organizational culture of its own, blending the best of these two models with Vietnamese-style policy consultation and discussion.

Malaysia: The Sustainable Penang Initiative pioneered a community-based indicators project aimed at creating a process for more holistic and sustainable development planning in the State of Penang, Malaysia. The project involved five roundtables on different areas of sustainable development: ecological sustainability, social justice, economic productivity, cultural vibrancy, and popular participation. At the roundtables, government, business, and civil society participants from Penang identified community-based indicators they could use to monitor development in Penang. the civil society groups involved were: Water Watch Penang; Sustainable Transport Environment Penang; Sustainability, Independence, Livelihood, Access, a network of people with disabilities; and manufacturing groups that banded together to form Sustainable Penang Initiative

for Corporate Environmentalism. The initial monitoring results were presented at a People's Forum, through a People's Report Card and a State of Penang Report.

Indonesia: Since two decades ago, a primary-school-based intestinal worm control program covering nearly 700 schools and 180,000 students has been in place in Jakarta and in a number of schools in the Seribu Islands in the bay of North Jakarta. Behind the success of this program is Yayasan Kusuma Buana, a health NGO working on maternal child health and reproductive health, focused on the middle-lower income community in Jakarta, partnered with Pfizer Inc., a US-based pharmaceutical company that produces anthelmintics (de-worming drugs). The civil society MNC partnership conducted: (1) health education for students, teachers, and parents on the problems of intestinal worms and how to prevent them; (2) a semi-annual stool examination; and (3) treatment for those infected with the worms.

Philippines: Water shortages have been a chronic concern in Baguio, a city in the northern Philippines. This serious environmental issue is being alleviated through the Baguio Regreening Movement, a CCC composed of business associations: Benguet Electric Cooperative, Carantes Gibraltar-Mines View Drivers and Operators, Mountain Province

Electric Cooperative, North Com, and Rizal Commercial Banking Corporation; and civil society groups: school children of Baguio City, Baguio Correspondents and Broadcasters Club, Archdiocese of Baguio and Benguet, Timpuyog ti Iit (an NGO composed of Barangay officials), Association of Barangay Councils of Baguio City, and Jaime Ongpin Foundation. BRM partners jointly designed and implemented an indigenous community-driven program called Eco-Walk, which promotes regular, organized walks by school children into a watershed area to explore and to plant and tend tree seedlings under the guidance of forestry volunteers and personnel. Aside from being a watershed rehabilitation program, BRM lets children help restore the local environment they will inherit and manage in the future.

Thailand: One of the well-developed and successful CSR programs in Southeast Asia, involving hundreds of private firms, has been the TBIRD by the PDA**.** PDA began operations in 1974 by promoting family planning in urban and rural areas of Thailand. Using a participatory community-based approach, PDA's family planning efforts helped to reduce Thailand's population growth rate from 3.2 percent in 1970 to less than 1 percent today, a success recognized worldwide. PDA has since expanded operations to include primary health care, AIDS prevention, education, gender equality and democracy, promotion of income-generating activities, small medium enterprises and rural industries, forestry and environmental conservation, water resources development and sanitation among others. For many years PDA has worked with private companies to develop the poorer regions and strata of Thailand. PDA is one of the pioneers of the "privatization of poverty reduction" concept, which is based on the premise that only private sector companies can improve people's natural environment and socio-economic living conditions in countries such as Thailand. Compared to most governments and NGOs, private companies have the necessary human, technological, marketing and financial resources, a small part of which they could make available to the development of the country they operate in.

Singapore: Singapore Telecom (one of Singapore's major government-linked companies) has contributed to improving the lives of the less privileged Singaporeans and to overall human resource development in

Singapore. Singapore Telecom (SingTel) believes in playing an active role in supporting the community and social development in Singapore. In 2002 it set up *Touching the Lives Fund*, the largest philanthropy project in the company's history, supporting children's charities. SingTel has partnered with the National Council of Social Service, associated with organizations such as the Rainbow Center, the Singapore School for the Deaf, the Singapore School for Visually Handicapped, the Spastic Children's Association School, and the Singapore's Children Society. Contributions from the Fund go towards helping the beneficiaries run programs, including education, training, and therapy for children with disabilities.

Another form of CCC now emerging in Asia involves the concept of Community Foundations.[9] The following are some examples of how it has been interpreted in Asia.

Bangladesh: The Bangladesh Freedom Foundation was launched in 1999 along community foundation lines with the support of the Ford Foundation. Its mission is to promote three fundamental freedoms in Bangladesh: freedom from poverty, freedom from ignorance, and freedom from oppression. It works through partnerships with civil society groups and organizations, and by supporting programs that strengthen civic initiatives and citizen participation.

India: India has two community foundations, one in Mumbai (Bombay) and the other in Ahmedabad. The directors of the Centre for the Advancement of Philanthropy in 1991 established the Bombay Community Public Trust. The second community foundation, the Ahmedabad Community Foundation, was formed with the support of The Ford Foundation in 2001. Sampradaan Indian Centre for Philanthropy is actively researching and promoting the community foundation concept. Other efforts to develop new community foundations are underway.

Japan: There are two community foundations in Japan. The first, the Osaka Community Foundation, was established in 1991 with the support of the local chamber of commerce. The second was formed by a group of volunteers in Kobe in the wake of the Great Hanshin/Awaji earthquake. The Citizens Fund Kobe is part of the growing nonprofit movement in Japan to increase local support for the emerging voluntary sector.

Philippines: The Kabalaka (Concern) Development Foundation of Negros Occidental has set out to transform

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[9] Community foundations: formed to improve the quality of life in a geographic area;

- independent from control or influence by other organizations, governments or donors;
- governed by a board of citizens broadly reflective of the communities they serve;
- make grants to other nonprofit groups to address a wide variety of emerging and changing social needs in the community;
- seek to build, for the long term, a permanent resource for the community through the creation of endowed funds from a wide range of donors, including local citizens, other nonprofits and businesses;
- provide services tailored to the interests and the capacity of donors to give;
- help donors achieve their philanthropic and charitable goals;
- engage in a range of community leadership and partnership activities, serving as catalysts, conveners, collaborators and facilitators to solve problems and develop solutions to important community issues;
- have open and transparent policies and practices concerning all aspects of their operations; and
- are accountable to the community by informing the general public about their purposes, activities, and financial status on a regular basis.

itself into a community foundation. A research survey is being conducted to identify other foundations with characteristics similar to those of community foundations, in preparation for a community foundation development program in the Philippines.

What Assets or Commitments Does Each Collaborator Gain?

When a CCC in Asia is formed, each actor from business and civil society brings to the new relationship a set of assets and commitments that become the foundation for negotiation, communication, agreement, and engagement. In absence of a formal contract, in most cases, their exchanges and discussions become the terms of reference for the collaboration.

These could be grouped into the following categories:

- **Physical:** financial, technical, and material resources
- **Organizational:** personnel, structure, leadership, capacity to manage, plan, implement, monitor, evaluate, and train policies and legislation through campaign contributions to legislators, playing money politics to gain favors from politicians. They are also good at providing political risk analysis to investors, clients and citizens. Intellectual information and intellectual property rights are power. Entrepreneurs are also very product- and service-oriented and have the skills and acumen to make money. Their business models always incorporate competitive strategies.

The two strongest areas for corporate sector partners are in physical assets and organizational commitments. In terms of physical assets, business brings to the partnerships vital financial resources, investments, donations, employees, materials, and supplies. In addition, the institutionalization of funding support through diverse sources has always been a challenge for civil society organizations. Business persons are also steeped in organizational capital like transformational leadership, strategic thinking, entrepreneurial skills, formal networking, results- and profit-driven management, performance-based product marketing, market survey and analysis, budgeting and accounting skills, shareholder accountability, and niche advertising. These entrepreneurial skills and technical knowhow required to mobilize local financial resources, which are critical to sustaining community development, are things that civil society groups could learn from the business sector.

Similarly, the **civil society or communities** could make credible commitments and resource contributions in all five areas towards social development in Asia. But their strongest asset is their ability to harness grassroots socio-cultural commitments, from individuals to families, relatives to friends, urban poor to rural farmers, marginalized to indigenous groups, youth to women's organizations, and NGOs to PVOs. Civil society groups are adept at social relations, informal networks, kinship ties, emotional commitments, local traditions, beliefs, customs and practices that promote and produce community self-help as well as self-reliant attitudes and behavior. They bring with them knowledge from history, traditions, customs, and beliefs, including wisdom, ethics, and values.

Their next strongest trait is political capital—essentially lobbying, advocacy, and representation of social issues that affect the poor, common folk, marginalized groups, indigenous people, and ethnic communities.

Civil society organizations also bring intellectual assets to the collaboration, including the wisdom of village elders, indigenous methods and ways of doing things. Certain communities are also naturally endowed with physical resources like raw materials and skilled labor.

Organizationally, civil society organizations bring strong community-based networking techniques, an ad hoc structure but task-oriented approach, community-based education and training, social marketing and communications. They are very comfortable interacting with grassroots representatives. Like business, civil society tends to be weak when it comes to ensuring political stability and institutionalization, and often lacks authority and administrative capacity. Additionally, civil society does not have the legal, judicial and regulatory authority to require the business community to be more accountable and responsible, since that has been best accomplished by government agencies or quasi-judicial authorities, leading us to the role of government in company-community alliances.

Based on this rich inventory of assets, Asian corporations and communities will have mutually beneficial exchanges. The incentives for businesses to join CCCs—besides tax write-offs—are non-monetary dividends such as: increased market penetration, more extensive word-of-mouth advertising, greater emotional appeal and popular respect, more community allies and enhanced networks, an understanding of local preferences and access to information. Communities get access to supplemental funds, materials, expensive technology and advertising, risk analysis and financial management skills, boardroom audiences, and possibly, respect. There is also the ability to get their social message out, gaining corporate allies—from firm to clients—as well as acquiring strategic planning and implementation skills.

Is There a Role for Government in CCCs?

There is a critical role for Asian national and municipal governments in CCCs since political legitimacy and institutional security are best provided by government bureaucracies or public enterprises. Many private corporations cannot guarantee social equity and economic rationality. In fact, many of the Asian CSR experiences in the crisis period showed that, left solely on its own, the market tended to generate economic and income inequalities—hence the compelling need for the civil society and government sectors to jointly check and balance the operations of the free market with regulatory activities and programs that reduce these socioeconomic inequities.

In terms of physical assets, the government's role is clear as the primary provider of social services and development, especially among the developing countries of Asia. Citizens and corporations expect the government to fulfill this role. In this respect, corporations view themselves as supplementing but not replacing government, which has the power to reallocate tax collections and other sources of public revenues towards social infrastructure, welfare, the environment, health, and other community concerns at all levels. Organizationally, public agencies have the capacity to formally link and coordinate across the various levels of government into the realms of the private and civil society sectors. They provide the bureaucratic structure and create the rules, procedures and directives to efficiently and effectively carry out political, economic, and social development programs.

Civil servants, legislators, politicians, and judges understand the relevant laws and policies, and the legal and institutional context, as well as having technical expertise in specific areas of development. They are also the repository of socio-cultural capital, including government ideals, values, ideology, patriotic fervor (respect for the flag and country), rule of law, and the constitution, which builds community cohesion, loyalty, cooperation, collaboration, civic-mindedness, and democratic practices. But most of all, CCCs may lack an understanding and expertise in law, regulations, procedures, and bureaucracy. Government is expected to provide political will, leadership and support, as well as formal authority, access to political systems, internal political and administrative influence and control, and law-making. Hence, certain CSR-oriented social development strategies, if not all, might well benefit from a multi-stakeholder partnership involving business, civil society, and government, rather than simply a CCC.

Challenges and Barriers to Community-Corporation Collaboration

In the previous section, there seems to be an inherent logic that generally community-corporation partnerships are more participatory, more democratic, more effective and more responsive in addressing social development concerns in health, environment, labor, sanitation, safe drinking water, child and maternal health, and so on. It was also stressed that government will have to play a significant role in CCCs. However, the research findings of Gonzalez (2004) also revealed various obstacles to alignments between and among business (private sector), civil society (the people), and government (public sector). In particular, that the weakest link among the multi-stakeholder partners was business, especially in terms of corporate connections to civil society and corporate contributions to social development.

What are the main obstacles that hinder participation by business in social development? For starters, Asian boardrooms and entrepreneurs have generally held conservative business values. There are many Asians of the "old guard" who still think like Sun Tzu and Milton Friedman. Convincing them respectfully means appealing to their wisdom and seniority. Despite gains, media coverage, and philosophical impetus, a certain degree of skepticism still exists about the real effectiveness of CCCCSR in Asian business.

A most compelling issue that cuts across private, public, and civic sectors is the inherent lack of trust among partners. Deeply ingrained attitudes of blaming government for its inefficiency, criticizing civil society for its narrow and biased interests, and viewing business as pursuing only its own bottom line, do not auger well for strong, supportive relationships. An additional obstacle to effective CCCs and multi-stakeholder partnerships is a reluctance to share power. And after many years of taking the lead, government actors often still believe that the people expect them to continue setting and implementing the agenda. Finally, the comfort and security of maintaining the status quo is a significant force mitigating against the formation of new CCCs or multi-stakeholder partnerships.

Initially, it could be a very daunting challenge to change historically adversarial relationships to supportive ones. Asian cases demonstrate that obstacles such as these are continuously present. The creation and design of these innovative collaborative arrangements also have their financial costs, although the long-term pay-offs are well worth it. Multi-stakeholder arrangements seem to work better with certain concerns than with others—for instance, environmental issues. In two books, *Governance Innovations in the Asia-Pacific Region*

(Gonzalez and Bhatta 1998) and *Opting for Partnership* (Gonzalez, Lauder, Melles 2000), a number of development colleagues and I shared the results of the Canada-ASEAN Governance Innovations Network, a four-year project planned and implemented by the Institute On Governance, and supported largely by the Canadian International Development Agency to evaluate the "barriers" to partnerships among business, civil society, and government. The findings presented in this section of the paper build on this extensive research with new and updated information.

Internal and External Concerns—Civil Society in Asia

In Asia, NGOs, CBOs, and PVOs are most concerned about their capacity to contribute and commit to a CCC without money. Asian civil society entities feel that if they do not have money to offer, they will not be an equal and credible partner in the CCC, since the private sector considers funds to be a critical indicator of commitment. Are NGOs simply going to be followers and doers since they do not have the funds to contribute? Asian not-for-profit organizations are quickly learning that the first step they need to take is to make themselves "profitable," that is, financially viable. Many Asian civil society groups also feel that they speak a non-business language, e.g., emotional, critical, social, cultural, supportive, psychological, educational, and environmental. Many boards of directors of Asian companies, especially those from the "old, traditional school" who are steeped in the Sun Tzu and the Milton Friedman principles of business, are not interested in listening to sales pitches by young, dynamic, passionate civil society representatives who use non-business discourse. Senior company directors and regional managers believe that NGOs have no business telling them how to run private business unless what civil society has to say will directly affect revenues.

Asian NGOs and CBOs are used to using ad hoc, informal, and task-oriented approaches in everyday operations. Conversely, corporate inter-office dynamics in Asia utilize formal, bureaucratic hierarchies and processes in their daily transactions, including firm superior-subordinate relationships. How could these two operating settings mesh? Although marked improvements have been made, there is still a gender divide in civil society and business work. Many argue that the "soft work" done by civil society organizations is for women, while the "hard work" of business is for men. Certain segments of Asian civil society lack confidence in their leadership abilities. Some think that NGO leadership skills are not valued in the "real world." That the only leadership acknowledged by the working world is either corporate or governmental and there is no room for discussion. This insecurity makes them unsure about who should lead the collaboration.

Generally, comfortable relationships between government and business have been criticized by citizens as corruption at the expense of the society. There is a dearth of literature on "iron triangles" or sub-governments that expand on these cozy public-private relationships. Civil society is wary that a relationship between them and business could be viewed in the same light. Local CBOs and NGOs ask: Is a CCC moral or ethical? Isn't a CCC a western ideal? If so, is it compatible with the country or culture? Maybe the country or culture is not ready for such a relationship? Maybe our citizens and institutions still lack democratic maturity?

Is a CCC simply a MNC's way of co-opting militant groups, especially labor? Development beneficiaries from the community also have their doubts: Does the community partner really have credibility with the local community? Or, is the community partner really a GRINGO or a BINGO (Business-run International NGO)?

Internal and External Concerns—Corporations in Asia

What are the concerns of the Asian business sector? Although there is a growing trend toward socially responsible investments, many shareholders, managers, and boards are still uncomfortable with a number of CCC features (Chen 2001). A primary concern of businesses in Asia is how it affects their business model and the profits they have projected over the short, medium, and long term. They are also thinking about how much CCC will cost and if there are any financial returns. These concerns, and others involving the time frame for partnership, return to the business equation that "time is money." How many meetings and discussions do senior managers or their representatives have to attend? How many CCC meetings will they have to host? Asian business meetings are always long and costly, since food and drinks have to be served. Will they have to continuously listen to long-winded, impassioned speeches about "business' sins" and how much corporations "owe to society"? If there are tangibles (or intangibles) to be secured from the relationship, what are they in US dollars or in the local currency? Will they be able to write off contributions against taxes? Will CSR increase the price of shares or stocks? Will CCC provide the firm with market visibility or consumer advertising? Are the representatives of the community a part of the business' consumer market or are they simply "spies" working for competitors or for the government? Will civil society representatives reveal too much about our comparative advantages, intellectual property, product secrets, as well as special formulas and processes? There is a broad spectrum of community groups. With which civil society organizations should business partner? Do they have a choice?

Businesses in Asia are also concerned with whether Asian civil society will understand business language, that is, profits, competition, markets, risks, supply and demand, price elasticity, wages, contracts, and liabilities. Conversely, corporations are worried whether they will be able to understand civil society's discourse and rhetoric. Various corporations feel strongly that CSR extends beyond their "business operations" and consider social development the responsibility of the government. They ask: If social development is truly the role of the government, then doesn't the CCC's mission overlap with the governments? Are there any liabilities or legalities involved in a formal CCC or will an informal CCC work? Will we have to go to court to resolve conflicts or will an arbitrator or mediator suffice? Who assumes losses or costs of litigation? Is CSR in fact linked to corporate core values? Will our corporation need to remake its core values, mission, and vision? Could this simply be a corporate fad? Can these "radicals" who are partnering with the corporation be trusted? Is this about human rights again? Depending on the answers to these questions, business may be not interested.

Governmental Concerns—Social Development Is my Turf!

Asian governments may be reluctant to endorse, support, or help institutionalize CCCs. There are many public servants who feel that social and community development is the main reason for the existence of government, that this is their traditional role and that nobody can do it better than them. In other words, Asian governments, especially at the national levels are afraid of losing control, power, and influence. Asia's "benevolent leaders" may be afraid to lose face and do not wish to appear weak by seeking help from a CCC to implement social development. Involving government in a CCC might be misinterpreted as politicians and

bureaucrats not wanting to do what they were elected or appointed to do, leading to a loss of credibility among voters and poor results in the next elections or their next performance evaluation.

Asian legislators and executors are also concerned about how to craft laws to regulate CCCs as a new public entity or whether CCCs should be regulated at all. If their social development assistance is institutionalized, CCCs have to be held accountable for the sustainability of results. There is always the temptation to create a GRINGO as an intermediary in partnership with business, rather than relying on an NGO that might be overly-critical of government.

Finally, CCCs lack a broad geographic and global view of social issues, whereas government, with its vast reach and with the help of the Internet, can communicate and coordinate above and below the chain of command faster than many company subsidiaries or civil society field offices. Which government representative, agency or entity is willing to cooperate with a CCC?

Conclusions: Lessons for Policy, Research, and Practice

Is there a relationship between CSR and social development in Asia? A CSR study of seven Asian countries (Chambers and others 2002) performed by the UK-based International Centre for Corporate Social Responsibility at Nottingham University, evaluated the extent of CSR penetration for both local companies and MNCs in Singapore, India, Thailand, the Philippines, Malaysia, South Korea, and Indonesia, as well as CSR impact on social development, measured as adult literacy and life expectancy. There seemed to be no significant correlation between the two on the basis of macro-level indicators. One interpretation of their data is that even with increasing private sector development, divestiture of government shares, contracting out of public services, privatization of state-owned enterprises, and a shrinking government share in Asian economies, Asian and Asian-based corporations have not taken on increasing responsibilities to address social development issues at a magnitude comparable to their growth. Another interpretation of the data could be that testimonies at the community level are not adequately covered by the statistical aggregation, particularly in a case-by-case analysis. Individual cases have highlighted that there is actually high community satisfaction with the work of CCCs. The succeeding Asia case studies from the Philippines, Thailand, Indonesia, and Singapore will provide strong evidence for this argument.

This final section concludes with policy, research, and practical lessons that could possibly be used to guide specific policy initiatives to effectively promote and facilitate CCC partnerships and participation. Policymakers who wish to replicate lessons from Asia should be aware of these three inter-connected motivators:

- **A profitable or competitive business climate and wealth accumulation are necessary preconditions to initiate CSR**. This is not a chicken and egg argument. Profits must first accrue in shareholders' bank accounts before firms think about giving back to the community and contemplating issues that conservative Asian boardrooms are not accustomed to, including human rights and environmentally sustainable development. That is what happened during the economic miracle years. From philanthropy to CCCs, increased wealth allowed Asian corporations to channel some of their energy and resources to

what they consider to be areas that only indirectly affect their revenue targets. Even after the centuries of business in the region, there are still many Asian business leaders who subscribe to the Milton Friedman/Sun Tzu paradigm of profit maximization. Interestingly, even Buddhism points out that making money is acceptable, since a person with greater resources can do more good for others than someone who does not. Meanwhile, Hindus believe that the more a company makes, the more should go back into the dharma. Also, there is a traditional saying in

the region that "rice bowl" issues at home need to be addressed before one can reach out to others. Charity begins at home.

- **CSR culture in Asian business derives from spiritual and philosophical underpinnings**. Some Asian firms may appear to be schizophrenic to western observers, when Asian spirituality is factored into a company's operations and it adheres to the Milton Friedman-Sun Tzu outlook while also believing in the *karma* of corporate altruism. Good fortune charms from golden Buddhas to Hindu images remind them that only "kindness begets kindness." As successful moneymakers, Asians know that greed is not good according to the teachings of the popular Eastern religions many of them adhere to, including Buddhism, Islam, and Hinduism. Asians are constantly bombarded with this message when they worship, pray, reflect, chant, or meditate in the many temples, mosques, churches, and other spiritual sites that are interspersed with their corporate skyscrapers. Moreover, many Asians believe you do not have to be necessarily religious to subscribe to any of these beliefs. After all, Asia is a mix of "theocratic-fundamentalist states" especially in parts of South Asia and Southwest Asia and more moderate religion-influenced states in Northeast Asia and Southeast Asia.

Asian spirituality and philosophy could be covertly or overtly applied to CSR-oriented business. In Malaysia, Bank Muamalat provides banking products and services to all levels of society, based on Islamic Law or Syariah, and practicing a banking concept that entails no "*riba*" (no interest). In Indonesia, the largest Muslim country in the world, the Jakarta Institute of Islamic Finance and Capital and the Islamic Chamber of Commerce ensure that member companies get involved only with *halal* (permissible) activities; they do not endorse business or investment that promotes alcohol, pork, gambling, tobacco or armaments, for example. Confucius, in his proverbs, pointed out that there is nothing wrong with obtaining wealth in the right way, as long as one proceeds virtuously thereafter. Many Hindus believe that helping people toward achieving their higher being leads one's own business to reap many benefits.

- **CSR requires a legal framework that promotes openness, partnerships, and democratization.** It is acknowledged that the regional business environment and philosophical underpinnings were critical to overall CSR introduction. However, reinforcing, sustaining, and monitoring changes especially to achieve CCC, could only be accomplished with policies and legislation that encouraged changes in corpo-rate operations and human behavior. As part of a larger private sector development regional trend, international consultants, multinational companies, and development agencies worked together with Asian bureaucrats and politicians to include CSR innovations. One government initiated move that promoted the CSR activities and interventions described above in Asia was the enactment of business-friendly legislation and laws that

encouraged partnerships, openness, and a more democratic relationship between and among government, business, and civil society actors. In this legal framework, policymakers should:

 Recognize that CCC is both a CSR process and a CSR product. As a process, CCC is a learned human and organizational behavior. It is especially powerful when business and community stakeholders bring physical, organizational, political, socio-cultural, and intellectual commitment. CCC begins at the national and international level with business and civil society representatives wanting to be trained and taught how to coordinate, network, collaborate, and share information. At the leadership level, it is corporate CEOs wanting to partner with NGO executive directors. It is CEOs, their board of directors, and shareholders learning to listen to and participate with executive directors, their advisory boards, and stakeholders, and vice versa. Side by side, they address health, environmental, and social development concerns. As a product, it emerges as an evolving culture of democratization, openness, and transparency. CCC is a dynamic product that is constantly innovated and replicated.

 Encourage trust- and confidence-building activities since they seem to be the most important components of formal CSRCCC conceptualization and institutionalization. Having the political will to want to work together is crucial. However, it takes a certain amount of quality time and interaction among individuals from the prospective organizations, from after-work socializing at a local bar in Manila or karaoke singing in Seoul, to picnics and joint recreational activities at a park or sports club in Jakarta or Taipei. Asians are fond of involving families in many of these trust-building activities to create even stronger and longer-lasting bonds. Beyond these informal activities, which may be difficult to put in a formal policy document, are formal business-government-civil society exchanges, conferences, workshops, and retreats which could be budgeted by firms, state agencies, and community-based organizations.

 Signal to private firms and civil society groups to factor CCC and other CSR interventions into their business models early on. CSR should not be viewed simply as an afterthought or a temporary trend. For new private firms, it should naturally flow from their mission statements and vision, as well as from their operations, marketing, and organizational culture. Older and more developed private companies should "sell it" from the boardroom to the worker base and institutionalize it. Conversely, NGOs, PVOs, and CBOs should also learn about ways to partner with private business early on. Civil society groups must realize that, included as part of their operations, CCCs are a more powerful force towards achieving social development. However, both stakeholders have a lot of work to do.

This paper began with Confucius and now ends with Buddha's thoughts on CSR:

> *Look back at your business and life, at their end, and honestly say that the years of doing business have had some meaning. We should be able to look back and see that we have conducted ourselves and our business in a way that has had some lasting meaning and which has left some good mark on the world.*

In Asia, this would seem to be the ultimate measure of a CCC's success.

C. Business Ethics and Social Responsibility for the Multinational Corporation (MNC)

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Business ethics and social responsibility in multinational corporations (MNCs) are more and more challenging, because they are operated in culturally varied environments, which vary from host to host country of each foreign subsidiary and are often very different from the MNC headquarters' (HQs) home country culture. A host country's societal and cultural factors, combined with local economic conditions and business practices, play major roles in determining the preferred business ethics and social responsibility in each foreign subsidiary. An MNC's global HQ should partner with all foreign subsidiaries to determine the global corporate business ethics, social responsibility core, general values, and objectives. Further, each foreign subsidiary should develop in partnership with the HQ, the customized details of its business ethics, social responsibility objectives, goals, strategies, and specific programs for its host country's environment.

Keywords: international business ethics, international social responsibility, management of foreign subsidiaries

Introduction

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, with its enactment of many countries as its relevant task environments, 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.

An MNC may pursue: (1) a monolith and standardized global approach to suit its social responsibility; (2) multiple and customized approaches to suit each country's needs; and (3) a combination of the two approaches. An MNC should decide the extent of the combination.

It may develop core values and philosophy of its global social responsibility and provide flexibility for customizing its detailed activities to suit each country's unique needs.

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Review of Literature

The important business ethics and social responsibility ideas have been the topics of study for the philosophically-minded scholars who go beyond the economics-oriented business studies that make a corporation to optimize its potential and resource utilization process. Business ethics, social responsibility, and community involvement topics, although often inter-related, are treated in business and economics body of knowledge that reveals a divergent set of views. The body of knowledge and research reveals discussions of a wide spectrum of topics that focus mainly on corporate profit orientation, such as what is espoused by the Milton Friedman's (or, often referred to as the University of Chicago) school of thought. It is a thought that argues for a total and single-minded pursuit of profit maximization for the stockholders as the sole objective to many activities of various philanthropic blends as argued by Senser (2007). It shifts from almost no major involvement in local community or broad global or regional developmental and civic-minded activities, to a major focus on them. It shifts from a strong emphasis on a single-minded economic focus of business with a very clear and strong profit motive, to members; and from chasing economic objective and strategy without any civic and social considerations, to a major effort for these activities from the very inception of the objective formulation as in professor Perez Lopez's forming "a solid base for that ethics, which starts from the decision-making process", as quoted in the study by Argandona (2008, p. 436).

These different ideas and viewpoints are the subject of inquiry of many scholars specializing in business ethics and social responsibility. Their ideas and viewpoints are divers, and they are reflected by many different types of studies, such as those in this sample of several studies which are cited as follows.

These studies include studies by Argandona (2008), Asgary and Mitschow (2002), Brady, Crittenden, Hoffman, and Robertson (2002), Cottrill (1990), Clikeman (2004), Donaldson (2003), Ekanold (2006), Freeman and Gilbert (1988), Freeman and Liedtka (1991), Grant (1991), Heidorn (2006), International Conference of Logistics Engineering and Management (2010), Jenkins (2010), Kapp and Anderson (2010), Kraft and Hage (1990), Salbu (1993), Saunders and Thorne (2002), Snider (2003), and Stoffman (1991). Researchers have formulated several perspectives and paradigms as they express their ideas and assumptions for either universalism or relativism, when they study ethical and social responsibility issues. The direct and inseparable relationship between ethical business conduct and social responsibility issues and activities is the usual focus of many studies, and the discussion cannot proceed without studying them.

It is understandable that many prominent and big firms generally have more social responsibility activities and focus than smaller firms do, because they have greater resources and are more conspicuous in the public eye. In-built in the strategic management process is the requirement of a significant commitment to such social responsibility values because of the need for formal core values of ethical conduct and also the need for a more heightened social responsibility consciousness. In this context, the author may review a range of viewpoints and arguments from many scholars. There are varied, even divergent views from them. Some scholars emphasize the need for a fundamentally ethical philosophy and a conviction about an ethical core in a firm's strategic management process as prerequisites to truly effective social responsibility programs. Many scholars have expressed this viewpoint, as shown in the several studies that have been cited here (Argandona,

2008; Armstrong, 2003; Asgary & Mitschow, 2002; Brady et al., 2002; Chaudhri, 2007; Donaldson, 2003; Epstien, 1987; Jenkins, 2010; Kapp & Anderson, 2010; WorldatWork, 2010; Schwab, 2008). These studies provide varied ideas on social responsibility, and more importantly, they raise issues and discussions about the correct extent to which an organization should commit its resources to extra or above the industry or regional norm for social responsibility activities. These studies also assume that the firm has a reasonably sound economic performance.

Another approach, which is quite popular, is the stakeholders approach. This is the central concept for developing social responsibility objectives and activities, as cited by several studies (Bartkowiak, 2006; Cottrill, 1990; Freeman & Gilbert, 1988; Gil Estallo, Giner de la Furnte, & Griful-Miquela, 2007; Jenkins, 2010; Kapp & Anderson, 2010; Tkac, 2006).

Yet, others emphasize a strategic approach to social responsibility and state that the strategic management must start with a strong moral, ethical, and socially responsible core. These are expressed in these studies that are cited here (Epstien, 1987; Freeman & Gilbert, 1988; Kraft & Hage, 1990; Senser, 2007; Svensen, Neset, & Ericksen, 2007). The focus on the long-term and the continuous relationship between the organization and the environment is the heart of the whole social responsibility process.

Scholars have often been against the Milton Friedman's approach, which regards firm's activities for social responsibility. His approach is that firms should single-mindedly serve the interests of shareholders, not just any stakeholder, since other stakeholders, workers, suppliers, customers, channel distribution members, local communities, and other collaborating firms are not central to the core interests as the abovementioned shareholders are. Friedman believed that there would be no place in a firm for social responsibility or community-related contributory activities, unless they improved shareholder value (Grant, 1991; Stoffman, 1991). According to the Milton Friedman's school of thought, a business organization is an economic and financial entity that should aggressively and tenaciously pursue an economic motive within the scope of law. The economic motive should be the exclusive approach so long as the firm adheres to the letter and spirit of the law.

Many exponents of international relations and international business cite the cultural gap and the social division among countries as major challenges for international activities and business organizations, such as MNCs, have formulated worldwide worthwhile socially responsive and other community-related contributory objectives and programs. These ideas are cited in studies by several scholars (Asgary & Mitschow, 2002; K. Brouthers. & L. Brouthers, 2001; Giacalone, Paul, & Jurkiewicz, 2005; Gold & Dienhart, 2007; Jenkins, 2010; Saunders & Thorne, 2002; Snider, 2003; WorldatWork, 2010; Wozniak, 1997). Studies in this regard address business and community-based and non-profit organizations. The posited opinion in this context is that an organization's administration and leadership process are culture-bounded activities and that social responsibility is a culture-bounded activity too.

The host country's task environment and cultural setting are strong factors in formulating the details of a foreign subsidiary's social responsibility goals and programs, which have exhibited the specific nature of its host country's cultural, ecological, and operating environments (Bartkowiak, 2006; Dias, 2007; Ekanola,

2006; Gil Estalo et al., 2007; Hutchins, Walck, Sterk, & Campbell, 2007; Heidron, 2006; Jenkins, 2010; Lodge & Wilson, 2007; World at Work, 2010). The scholars have raised issues of the role of international business, namely, playing a proactive role in the host country, in as much that local and foreign firms and foreign subsidiaries can be the agents of social and economic change (Aguilera, Rupp, Williams, & Ganapthi, 2007; R. Jenkins, 2005; W. Jenkins, 2010; Spence, 2007). In this context, smaller-sized companies, which are led by an owner-manager paradigm, pursue not so much of profit maximization, "but rather by the challenge of their chosen profession and independence" (Spence, 2007, p. 535).

The diverse and different opinions of the many scholars make it necessary to develop a cohesive and well-synthesized scheme for social responsibility. A moral core, which is driven by a strong and ethical conscience as the basis for strategic management, is a central argument in this context. A well-thriving and prosperous company may find it fitting to pay back to the society, because it is the society that allows it to exist within its midst by patronizing its products and services. The integration of the two polarized approaches will benefit the development of a pragmatic organizational perspective on business ethics and social responsibility.

A broader way to visualize the very idea of social responsibility is to believe that "The firm considered and responded to issues beyond the narrow economic, technical, and legal requirements of the firm to accomplish social benefits along the traditional economic gains for which the firm sought" (Spence, 2007, p. 537).

For much bigger conglomerate organizations, having important and long-term policy decisions will certainly have significant and long-term directional changes in the courses of the organization regarding the social responsibility issue, as in the case of General Electric's "ecomagination", which has four major initiatives that are specific to General Electric and are expected to have an important, measurable, and ecological impact (Tarnowski, 2007).

Those MNCs in the business of extracting natural resources, such as in the industries of mining and petroleum, usually have environment-friendly practices, as well as ethically and socially responsible methods, as indicated by some studies (Hutchins et al., 2007; Kapp & Anderson, 2010; Jenkins, 2010; O'Riordan, 2006; Pickard, 2007; World at Work, 2010). It is not only in the industrialized countries that "going greener" is a strong commitment as in the vehicular industry in the US (Wagner, 2007). It is also increasingly important for organizations in the recently growing and the newer, emerging, and developing economies (Henderson & Sethi, 2007).

Like the Maslow's hierarchy of need, there appears to be a hierarchy in corporate social responsibility. Archie Carroll's (1991) hierarchy of corporate social responsibility is presented:

Level 4: Philanthropic responsibilities;

Level 3: Ethical responsibilities;

Level 2: Legal responsibilities; Level 1:

Economic responsibilities.

A for-profit business corporation should firstly display an on-going, financially adequate, and profitable activity for it to embark upon or continue with social responsibility, corporate charitable programs, or community developmental programs.

Helpful corporate activities for the disadvantaged segments of the society and other activities may include philanthropic programs that are part of the organization's paying back to the society. Continuous social responsibility is viable only if a financial and economic growth is extant. Corporate progress for an on-going organization could take place by increasing sales revenues, financial stability, and market share, by improving financial ratios, continuous product innovation, augmentation progress in total quality management, continuous quality improvement, by improving and expanding product range and mix that are congruent with the contemporary market trends and expectations, by better targeted market segment performance, better product's use and application, their enlargement, improved organizational development efforts, a focus on career enhancements of its employees, and finally, by a real progress in improving competitiveness. Organizational growth and improved profits are interrelated, so are profits and sustainable social responsibility. It is only with a solid progress toward growth and prosperity that a corporation can meaningfully provide substantial and continuous programs for the society. If the corporation is hardly pressed in terms of its corporate financial performance, then it would have to re-think its commitment to these corporate charitable and social programs.

To set the parameters of social responsibility, Schwab (2008) argued that because innovation usually facilitated the rapid transferring and proliferation of information, goods, and services, globalization prompted a greater need for MNCs "to exceed imposed standards and set goals for sustainable development" (Schwab, 2008, p.110).

In this context, Schwab suggested the concept of corporate engagement. It has five core concepts: (1) corporate governance; (2) corporate philanthropy; (3) corporate social responsibility; (4) corporate social entrepreneurship; and (5) global corporate citizenship. Thus, the five core concepts can be the basis for providing the scope and the nature of an organization's business and social responsibility engagement.

Further, Logsdon and Wood (2005) also made the argument that the notion of global corporate citizenship was important. It had three attributes: orientation, implementation, and accountability. They suggested that the process for pursuing global corporate citizenship required: a set of core values throughout the organization; an analysis and experimentation to deal with major problem cases; and a systematic organizational learning process to communicate the results of implementation and experiments which are internally within the organization and also externally to its stakeholders.

Similarly, international organizations provide maintenance and performance standards (e.g., International Standardization Organization □ISO□ 14001 and ISO 260), which in effect have set similar standards to meet ecological standards as a basis to do business globally. These approaches were argued in several studies (Boiral, 2007; Castka & Balzarova, 2008; Duggan, 2007; Husthins et al., 2007; Kapp & Anderson, 2010; World at Work, 2010; Tarnowski, 2007; Wiist, 2006). In this context, Castka and Balzarova (2008) provided 10 good propositions for an organization's supply chain to meet ISO 2600 standards.

A for-profit business organization must be efficient, and it must create a good profit before it can pursue continuous and serious corporate charitable giving or socially responsive programs. Firstly, a for-profit business corporation must demonstrate to its stockholders and the society in general that it is an efficient economic and producing unit, by providing worthwhile products and services to the customers, otherwise, the society will eventually subscribe less and less of its outputs. It must also win the society's trust through its legal and ethical conduct. It may display increasing social responsibility, if its fortunes allow. It must firstly be financially and economically sound, and afterwards it can pursue socially responsibility activities. It may be said that a firm is an economic organ in a society, which must justify its economic existence and social acceptance. In general, the objectives of an established business corporation should go beyond the profit maximization. This is well-articulated in a landmark article by Freeman and Gilbert (1988, p. 89), "Firms are social entities, so they should play a role in social issues of today. They should take seriously their 'obligations to society' and actively fulfill them".

For an international company, the argument needs to be pressed a step further. An MNC operates in multiple countries' (cultural and operating) environments. Each country has its own unique culture and operating infrastructure. Social responsibility expectations of each country are rooted in the country's culture. An MNC must tailor-make its detailed social responsibility programs for each country's unique expectations and needs. The local foreign subsidiary unit must interact with its host country's environments and determine the appropriate details for an effective social responsibility program. The foreign unit should also integrate many expectations of different stakeholders of the foreign unit.

Stakeholder's approach is an effective vehicle for developing appropriate social responsibility programs to suit the host country's unique culture. Epstien (1987) argued that the stakeholder's approach served as a cause-effect relationship between an organization's social responsibility and the effect that it would have upon its stakeholders. His views on social responsibility activities were those "relating primarily to achieve outcomes from organizational decisions which concern specific issues or problems that have beneficial rather than adverse effects upon pertinent stakeholders" (p. 104). Also, a sound integration of stakeholder's expectations as a central concept for effective foreign unit social responsibility endeavors was well-espoused by Freeman and Liedtka (1991), as they expressed the following statement:

> If we come to see corporations as connected sets of stakeholders, all of whom are "in it together", then we are able to live in a way that doesn't carve up the world into "economic, social, political, and technological" parts. (p. 97)

Many MNC's foreign subsidiary units provide additional challenges, as they try to deal with the wide cultural differences of their host countries. The significant cultural division among the headquarters (HQs), the foreign subsidiary unit, and the multiple host country's environments poses complexities, for which a firm with a domestic orientation does not have much experience.

An example explaining that a firm would deal with the additional challenge which was placed upon an organization and operated in a multiple and diverse environment was given by Wozniak (1997) when he stated:

> Business behavior emanates from the complex set of factors that define a culture. These factors include how we perceive the environment, time, power structures, space, and the emphasis we place on relationship or tasks, on individuals or the collective; how we think and communicate. Confucianism focuses on collective order and hierarchy. The social corporatism of Sweden stresses social class and equality of results. (p. 1)

Hofstede's cultural dimensions (uncertainty avoidance, power distance, masculinity, individualism, and Confucianism) are commonly used in analysis of culture of host countries. These are useful factors, because they are "regarded as the most extensive examination of cross-national values in a managerial context" (K. Brouthers & L. Brouthers, 2001, p. 188). These dimensions can provide a descriptive picture of a country's society.

At the MNC's HQ level, the business ethics and social responsibility perspectives may be broad, general, universal, and overall. At the foreign subsidiary unit's level, the perspective may be one of a relative kind, or, of a contingent kind that is based upon the host country's environment (Argandona, 2008; Bartkowiak, 2006; Kapp & Anderson, 2010; World at Work, 2010). The basic core values of business ethics and social responsibility must be shared throughout the organization through the Internet, as demonstrated in a study by Chaudhri (2007). The core values provide a set of guidelines for developing responsive and proactive social responsibility plans for the host country's environment.

Some Inferences

Some more important trends, which are the implicit assumptions of this paper, are delineated here. A foreign subsidiary unit's social responsibility must fit with both the MNC's overall picture and its host country's social scene. Social responsibility, together with ethical issues, must be an integral part of strategic management of MNC.

At the MNC unit of analyses, social responsibility may be broadly and generally described. At the MNC's HQ level, the global overview of preferred social responsibility values, perspectives, and (overall) goals rather than detailed programs should be pursued, unless a few detailed programs are of universal nature and are applicable to most country's settings.

The stakeholder's approach would be useful. It may be applied at both units of analysis: (1) MNC's HQ; and (2) each foreign subsidiary unit. At the MNC's HQ level, the stakeholders may be viewed as global, i.e., who view the world as a whole. In the case of each foreign subsidiary unit, it may be evolved from the host country's setting. Each foreign subsidiary unit should have a local focus, but it must simultaneously reflect the overall, global, and core social responsibility preferences of MNC. Fine-tuning the social responsibility goals and programs to the host country's cultural and economic conditions would make the social responsibility programs more effective.

An MNC's HQ will initially regard its home country culture for its business ethics and social responsibility foundation. Thereafter, it may enlarge the scope of business ethics and social responsibility as it expands into different regions of the world. As it regionally expands, it enacts newer cultural and operational environments.

At the heart of universal core values are the values that are common to the world's great religions (Kapp & Anderson, 2010; Logsdon & Wood, 2005). These generic and fundamental core values may include such universal ideals as: Treat others well; all of us are God's children; be kind (do not cause harm); be ecologically responsible; good deeds bring good rewards; stand for truth; follow the spirit (not only the word) of the law; practice moderation; be kind to the poor; be hospitable to others; share your wealth; knowingly do not do wrong or cause harm; and then live in harmony and unity (Logsdon & Wood, 2005).

These religious and morality-based values may be considered to be universal. They are good candidates for MNCs' organization-wide values. In an important part, they may become a basis for MNC's core global values, upon which may be based on its basic mission, primary purpose, vision, and corporate strategy.

For the foreign subsidiaries, the quintessential parts, which are followed by an adaptation to local host country's cultural and other environments, their basic mission vision, objectives, goals, business ethics, and social responsibility goals may also be derived from the MNC's basic mission, vision, and objectives at the corporate level. The foreign subsidiaries may formulate its detailed business ethics and social responsibility objectives, goals, and programs in the context of the local and social business situation.

As it continues to expand internationally, it is worthwhile for the MNC to proactively transcend its initial home country's perspectives to those of other countries. The assimilation of additional and diverse perspectives of culture is a prerequisite for the MNCs' HQs to effectively help its foreign subsidiary units to pursue local, cultural, and societal analysis for developing the goals and programs for the host country, and still be within the broad scope and spirit of the global social responsibility values of the global organization. This approach would lead to a better understanding between the MNC HQs and the foreign subsidiary unit executives. This approach would also facilitate the formulation of effective social responsibility strategies for the foreign units of host country. The core values are fundamental and probably universal to all its operations worldwide. They become the guiding principles for each of its foreign subsidiaries to apply in their host country's context, as they develop the specific social responsibility programs.

There are good reasons for an MNC to be ethical in its international business conduct. An unethical business conduct would badly impair the reputation of the MNC and its key people at the HQ, the foreign subsidiary, and its home country. Unethical practices can cause significant damage and can be costly, in terms of damage to public relations. Ethical business practice by an MNC is not only a morally good practice. It is also good for business in the long run. Ethical practice fosters good will in the environment that an MNC has enacted and will be enacted in the future. An MNC's stakeholders at the HQ level and at each foreign subsidiary level can be adversely affected by an MNC's unethical business practices.

Recommendations for Specific Actions

The following are the specific recommendations for an MNC to pursue ethical and socially responsible practices:

(1) Developing ethical and social responsibility values, objectives, and goals that are morally sound. This approach would prevent fraud, bribery, misrepresentation, and deception, and would prevent unnecessary damage control expenses of legal and public relations, customer and supplier disappointments, and stakeholder rejections of MNC policies in the future. Top management at the HQ and foreign subsidiary levels should aggressively pursue repeated counseling and reinforcements to their subordinates with specific dos and don'ts as applicable to the MNC and its industry. A code of ethics should be composed and explained to all employees, and they should be required to endorse these codes;

(2) Executives at all levels should work closely with their subordinates and teams to closely scrutinize any potential aberrations of ethical and socially responsible conduct. Frequent discussions which regard mistakes by other forms may bring to surface these issues and sensitize all employees about the temptations and lapses of unethical business conduct;

(3) Creating an ethical and socially responsible culture in the organization; pursuing strategies that would lead to the sustainability of socially and ecologically responsible practices. These may have highly short-term costs, but may have overall long-term benefits in both monetary and non-monetary terms, e.g., those practices that would lead to an improvement in image as an ecologically sound firm, high integrity, and image of impeccable ethics in all business and employee dealings;

(4)Higher levels of management executives should personally scrutinize any newer practices for any potential ethical and social responsibility lapses, oversights, and fallouts. Such systematic screening process would warn any personnel at a lower level of avoiding any temptation. It would caution people in the MNC. In time, they would then tend to be very careful in composing newer methods and practices. They would not yield to temptation, personal greed, or an over-eagerness for showing superior performance at the cost of good and ethical business and administrative practices;

(5)When dealing with their lower-level personnel, higher-level executives should take every opportunity to pursue expressed ethical and socially responsible methods and to explain the underlying rationale and justification very articulately and explicitly to the people in the team;

(6)Repeatedly displaying and communicating the MNCs' very strong commitment and steadfast adherence to the basic principles and values of business ethics and social responsibility that the MNC espouses. The top management should not penalize subordinates who may lower their performance when they follow ethical practices, when contrasted with their competitors, as in the case of losing sales to a competitor who follows unscrupulous sales practices;

(7)Recruiting directors, top executives, managers, and executives who have impeccable ethical and socially responsibility standards, as demonstrated by their past track records;

(8)Formulating corporate objectives, goals, and strategies that are consistent with the highest standards of business ethics and social responsibility;

(9)Setting MNC and foreign subsidiaries' performance expectations or targets so that they are realistic and feasible, given the axiomatic necessity of adherence to the MNC's ethical and social responsibility standards;

(10) Making all people familiar with governmental rules and regulations in the industry and regions in which the MNC and its foreign subsidiaries operate;

(11) Transferring the best practices from one part of the MNC to all the other parts and adapting them for the new application as needed;

(12) Collaborating with local environments and governmental authorities to improve understanding of the expectations of the local authorities;

(13) Collaborating with local communities on local projects to improve the environment and living conditions for the less advantaged people;

(14) Developing and improving practices within the MNC regarding industry-related standards, various ISO standards, the UN Global Compact, and the US Foreign Corrupt Practices Act;

(15) Encouraging and publicly rewarding employees volunteering their time and expertise for community service.

Conclusions

Unethical business practices are bad in themselves, and further, this would result in a large number of costs and difficulties for an MNC. Some of these costs and difficulties are: governmental restrictions, fines, penalties, lawsuits, legal fees, public relations expenditures, lowered MNC's stock price, lost sales because of negative customer and market perceptions, lowered debt rating that causes greater difficulty in getting good terms for loans, employee's lowered morale and higher turnover, employee's lowered commitment to the MNC which results in lowered employee output, and negative MNC's image and perception caused by greater difficulty in attracting and recruiting higher quality and ethical people.

Ethical conduct and socially responsible MNC's performance are good business practices in the long run. They foster good relations with its stakeholders and the general public. They improve the MNC image and reputation, which have no price but untold benefits to the MNC in the continuous long run.

Creating a strong culture within all levels of the MNC for an unyielding ethical and socially responsible business practices would obviate the need for a close, frequent, and strong supervision of subordinates for checking potential lapses of ethical and socially responsible practices. A strong culture must be subjected to periodic review and scrutiny for future improvements, which are in tune with social changes in a manner that is consistent with the MNC's core values and fundamental principles of business ethics and social responsibility.

Rewarding subordinates publicly and generously for their exceptional ethical and socially responsible practices would set very good examples for all employees. It will further strengthen the ethical and socially responsible culture. The MNC must communicate with all stakeholders on issues that would have great impacts on the ethical and socially responsibility dimensions.

Close coordination and communication with the MNC's stakeholders are important practices for continuously realigning the MNCs' stakeholders' strategic environments at both the HQ level and the foreign

subsidiaries level. The partnership of the MNC with its stakeholders is an important one. It would keep the MNC attune to the changes in the respective environments of the stakeholders.

III. Applicability of ILO Standards and Conventions: Sri Lankan Position

A. International Conventions ratified and not-ratified by Sri Lanka

1. Ratified

40 Conventions

- Fundamental Conventions: 8 of 8
- Governance Conventions (Priority): 2 of 4
- Technical Conventions: 30 of 177
- Out of 40 Conventions ratified by Sri Lanka, of which 31 are in force, 9 Conventions have been denounced; none have been ratified in the past 12 months.

Fundamental

Conventions

C029 - Forced Labour Convention, 1930 (No. 29) C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) C098 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98)

C100 - Equal Remuneration Convention, 1951 (No. 100)

C105 - Abolition of Forced Labour Convention, 1957 (No. 105)

C111 - Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

C138 - Minimum Age Convention, 1973 (No. 138) *Minimum age specified:*

C182 - Worst Forms of Child Labour Convention, 1999 (No. 182) Governance (Priority)

C081 - Labour Inspection Convention, 1947 (No. 81)

C144 - Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144)

Technical

C004 - Night Work (Women) Convention, 1919 (No. 4)

C005 - Minimum Age (Industry) Convention, 1919 (No. 5)

C006 - Night Work of Young Persons (Industry) Convention, 1919 (No. 6)

C007 - Minimum Age (Sea) Convention, 1920 (No. 7)

C008 - Unemployment Indemnity (Shipwreck) Convention, 1920 (No. 8)

C010 - Minimum Age (Agriculture) Convention, 1921 (No. 10)

C011 - Right of Association (Agriculture) Convention, 1921 (No. 11)

C015 - Minimum Age (Trimmers and Stokers) Convention, 1921 (No. 15)

C016 - Medical Examination of Young Persons (Sea) Convention, 1921 (No. 16)

C018 - Workmen's Compensation (Occupational Diseases) Convention, 1925 (No. 18)

C026 - Minimum Wage-Fixing Machinery Convention, 1928 (No. 26)

C041 - Night Work (Women) Convention (Revised), 1934 (No. 41)

C045 - Underground Work (Women) Convention, 1935 (No. 45)

C058 - Minimum Age (Sea) Convention (Revised), 1936 (No. 58)

C063 - Convention concerning Statistics of Wages and Hours of Work, 1938 (No. 63)

C080 - Final Articles Revision Convention, 1946 (No. 80)

C089 - Night Work (Women) Convention (Revised), 1948 (No. 89)

C090 - Night Work of Young Persons (Industry) Convention (Revised), 1948 (No. 90)

C095 - Protection of Wages Convention, 1949 (No. 95)

C096 - Fee-Charging Employment Agencies Convention (Revised), 1949 (No. 96)*Has accepted the provisions of Part III*

C099 - Minimum Wage Fixing Machinery (Agriculture) Convention, 1951 (No. 99)

C106 - Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106)

C103 - Maternity Protection Convention (Revised), 1952 (No. 103)

C110 - Plantations Convention, 1958 (No. 110)*Has excluded Parts II, III, V, VI, X and XII pursuant to Article 3, paragraph 1(b)*

C108 - Seafarers' Identity Documents Convention, 1958 (No. 108)

C115 - Radiation Protection Convention, 1960 (No. 115)

C131 - Minimum Wage Fixing Convention, 1970 (No. 131)

C135 - Workers' Representatives Convention, 1971 (No. 135)

C116 - Final Articles Revision Convention, 1961 (No. 116)

C160 - Labour Statistics Convention, 1985 (No. 160)*Acceptance of Articles 7, 8, 10, 12, 13 and 15 of Part II has been specified pursuant to Article 16, paragraph 2, of the Convention.*

2. Not Ratified

60 Conventions not ratified by Sri Lanka

A. Governance (Priority)

C122 - Employment Policy Convention, 1964 (No. 122)

C129 - Labour Inspection (Agriculture) Convention, 1969 (No. 129)

B. Technical

C014 - Weekly Rest (Industry) Convention, 1921 (No. 14)

C077 - Medical Examination of Young Persons (Industry) Convention, 1946 (No. 77)

C078 - Medical Examination of Young Persons (Non-Industrial Occupations) Convention, 1946 (No. 78)

C094 - Labour Clauses (Public Contracts) Convention, 1949 (No. 94)

C097 - Migration for Employment Convention (Revised), 1949 (No. 97)

C102 - Social Security (Minimum Standards) Convention, 1952 (No. 102)

C118 - Equality of Treatment (Social Security) Convention, 1962 (No. 118)

C120 - Hygiene (Commerce and Offices) Convention, 1964 (No. 120)

C121 - Employment Injury Benefits Convention, 1964 [Schedule I amended in 1980] (No. 121)

C124 - Medical Examination of Young Persons (Underground Work) Convention, 1965 (No. 124)

C128 - Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (No. 128)

C130 - Medical Care and Sickness Benefits Convention, 1969 (No. 130)

C139 - Occupational Cancer Convention, 1974 (No. 139)

C140 - Paid Educational Leave Convention, 1974 (No. 140)

C141 - Rural Workers' Organisations Convention, 1975 (No. 141)

C142 - Human Resources Development Convention, 1975 (No. 142)

C143 - Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)

C145 - Continuity of Employment (Seafarers) Convention, 1976 (No. 145)

C146 - Seafarers' Annual Leave with Pay Convention, 1976 (No. 146)

C147 - Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147)

C148 - Working Environment (Air Pollution, Noise and Vibration) Convention, 1977 (No. 148)

C149 - Nursing Personnel Convention, 1977 (No. 149)

C150 - Labour Administration Convention, 1978 (No. 150)

C151 - Labour Relations (Public Service) Convention, 1978 (No. 151)

C152 - Occupational Safety and Health (Dock Work) Convention, 1979 (No. 152)

C154 - Collective Bargaining Convention, 1981 (No. 154)

C155 - Occupational Safety and Health Convention, 1981 (No. 155)

C156 - Workers with Family Responsibilities Convention, 1981 (No. 156)

C157 - Maintenance of Social Security Rights Convention, 1982 (No. 157)

C159 - Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159)

C161 - Occupational Health Services Convention, 1985 (No. 161)

C162 - Asbestos Convention, 1986 (No. 162)

C163 - Seafarers' Welfare Convention, 1987 (No. 163)

C164 - Health Protection and Medical Care (Seafarers) Convention, 1987 (No. 164)

C165 - Social Security (Seafarers) Convention (Revised), 1987 (No. 165)

C166 - Repatriation of Seafarers Convention (Revised), 1987 (No. 166)

C167 - Safety and Health in Construction Convention, 1988 (No. 167)

C168 - Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168)

C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)

C170 - Chemicals Convention, 1990 (No. 170)

C171 - Night Work Convention, 1990 (No. 171)

C172 - Working Conditions (Hotels and Restaurants) Convention, 1991 (No. 172)

C173 - Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173)

C174 - Prevention of Major Industrial Accidents Convention, 1993 (No. 174)

C175 - Part-Time Work Convention, 1994 (No. 175)

C176 - Safety and Health in Mines Convention, 1995 (No. 176)

C177 - Home Work Convention, 1996 (No. 177)

C178 - Labour Inspection (Seafarers) Convention, 1996 (No. 178)

C179 - Recruitment and Placement of Seafarers Convention, 1996 (No. 179)

C180 - Seafarers' Hours of Work and the Manning of Ships Convention, 1996 (No. 180)

C181 - Private Employment Agencies Convention, 1997 (No. 181)

C183 - Maternity Protection Convention, 2000 (No. 183)

C184 - Safety and Health in Agriculture Convention, 2001 (No. 184)

C185 - Seafarers' Identity Documents Convention (Revised), 2003 (No. 185)

C187 - Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187)

C188 - Work in Fishing Convention, 2007 (No. 188)

C189 - Domestic Workers Convention, 2011 (No. 189)

MLC - Maritime Labour Convention, 2006 (MLC, 2006)

B. ILO Conventions: Sri Lankan condition

1. ***Observation (CEACR) on*** Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) **-** *Sri Lanka* ***(Ratification: 1995)***

The Committee also notes the Government's response to the comments submitted by the International Trade Union Confederation (ITUC) in a communication dated 4 August 2011. The Committee further notes the comments submitted by the Lanka Jathika Estate Workers' Union (LJEWU) dated 6 June 2012, and by the ITUC dated 31 July 2012, which relate to a number of matters already raised by the Committee, as well as violations of the Convention, in particular serious allegations relating to acts of intimidation against trade union activists and leaders, arrests and detention of workers following a strike, as well as police violence during workers' demonstrations, including in one case recourse to firing that led to the death of a worker and hundreds injured. ***Recalling that a truly free and independent trade union movement can only develop in a climate free from violence, pressure and threats of any kind against the leaders and members of workers' organizations, the Committee requests the Government to provide its observations on the abovementioned allegations, and to take the necessary measures to ensure that the use of excessive violence in trying to control demonstrations is prohibited, that arrests are made only where serious violence or other criminal acts have been committed, and that the police are called in a strike situation only where there is a genuine and imminent threat to public order.***

The Committee further notes that the Government indicates in its report that a special meeting of the National Labour Advisory Council took place on 1 February 2011 to discuss the implementation of the National Workers' Charter of 1995 (the national labour policy of Sri Lanka) and reflect on how laws and practice should be developed, in particular in relation to freedom of association issues. The Government adds in its report that this meeting aimed at reaching consensus among the social partners to effectively address the issues related to the implementation of the Convention, as well as the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Workers' Representatives Convention, 1971 (No. 135). ***Taking note of the summary of the proceedings of this meeting which the Government attaches to its report and of the indication that a tripartite subcommittee was formed for further discussions, the Committee expresses the hope that this process will bring positive results, including progress towards the amendment of the labour legislation, and that the comments made by the Committee for a number of years will be fully taken into account in this regard. It requests the Government to provide information on the progress made in its next report.***

Article 2 of the Convention. Minimum age. In its previous observation, noting that the minimum age for admission to employment was 14 years and that the minimum age for trade union membership was 16 years (section 31 of the Trade Unions Ordinance), the Committee recalled that the minimum age for trade union membership should be the same as the minimum age for admission to employment. The Committee notes that

the Government reiterates that it is seeking to increase the minimum age for employment to 16 years. ***The Committee requests the Government to indicate in its next report any developments in this regard.***

Articles 2 and 5. Public servants. Previously, the Committee had underlined the need to amend section 21 of the Trade Unions Ordinance in order to ensure that organizations of government staff officers may join confederations of their own choosing, including those which also group together organizations of workers from the private sector, and that first-level organizations of public employees may cover more than one ministry or department in the public service. The Committee notes that the Government indicates in its report that action will be initiated to negotiate with the ministry concerned to reach a consensus on this issue. ***The Committee reiterates its hope that amendments to section 21 of the Trade Unions Ordinance will be adopted in the near future, in order to ensure that trade unions in the public sector may join confederations of their own choosing, and that first-level organizations of public employees may cover more than one ministry or department in the public service, and requests the Government to indicate the progress made in this respect in its next report.***

Article 3. Dispute settlement machinery in the public sector. In its previous observation, the Committee noted that the Industrial Disputes Act – which provides for conciliation, arbitration, industrial court and labour tribunal procedures – did not apply to the public service (section 49 of the Industrial Disputes Act), that a mechanism for dispute prevention and settlement in the public sector was being developed with technical assistance from the ILO, and that a document concerning the dispute settlement mechanism had been adopted. ***Noting the absence of any new information in this regard in the Government's latest report, the Committee expresses the hope that progress will be made in the near future towards the establishment of a mechanism for dispute prevention and settlement in the public sector, which would fully respect the principles recalled in the Committee's previous observations. It requests the Government to provide information in this regard in its next report.***

Compulsory arbitration. In its previous observation, the Committee noted that, under section 4(1) of the Industrial Disputes Act, the Minister may, if he or she is of the opinion that an industrial dispute is a minor dispute, refer it, by an order in writing, for settlement by arbitration, to an arbitrator appointed by the Minister or to a labour tribunal, notwithstanding that the parties to such dispute or their representatives do not consent to such reference, and, under section 4(2), the Minister may, by an order in writing, refer any industrial dispute to an industrial court for settlement. The Committee notes that the Government once again reiterates in its report that sections 4(1) and 4(2) were intended to provide safeguards against strikes that are likely to seriously affect the national economy, and that in practice, however, arbitration was seldom imposed without the consent of the trade union. ***The Committee is bound to reiterate its request to the Government to amend sections 4(1) and 4(2) of the Industrial Disputes Act, so as to ensure that recourse to compulsory arbitration to bring an end to a collective labour dispute and a strike is only possible: (i) when the two parties to the dispute so agree; or (ii) when the strike in question may be restricted, or even prohibited, that***

is: (a) in the case of disputes concerning public servants exercising authority in the name of the State; (b) in conflicts in essential services in the strict sense of the term; or (c) in situations of acute national or local crisis, but only for a limited period of time and to the extent necessary to meet the requirements of the situation. The Committee requests the Government to indicate any developments in this regard in its next report.

Article 4. Dissolution of organizations. In its previous observation, the Committee had requested the Government to take the necessary measures to ensure that in all cases where an administrative decision of dissolution of a trade union is appealed to the courts (in accordance with sections 16 and 17 of the Trade Unions Ordinance), the administrative decision will not take effect until the final decision is handed down. The Committee notes that the Government reiterates its previous comments on the procedure for the withdrawal or cancellation of the registration of a trade union, including the appeal procedures against the decisions of the registrar, but does not confirm that the decision of the registrar will not take effect until the final decision of the appeal procedure is handed down. ***The Committee is therefore bound to reiterate its request to the Government to take the necessary measures to ensure that administrative decisions of dissolution are suspended pending their appeal in court, and to indicate any progress in this respect in its next report.***

The Committee is raising other points in a request addressed directly to the Government.

Observation Committee on Right to Strike

Article 3 of the Convention. Right of workers' organizations to organize their activities and formulate their programmes.

The Committee notes that section 32(2) of the Industrial Disputes Act provides that strikes in connection with industrial disputes in any essential industry are possible when written notice of intention to commence the strike is given at least 21 days before the date of the commencement of the strike. The Committee further notes that section 43(1) of the Industrial Disputes Act, as amended by the Industrial Disputes (Amendment) Act, No. 39, of 2011, provides that every person who commits any offence under this Act shall be liable on conviction, after summary trial before a magistrate, to a fine not exceeding 5,000 rupees (INR), or to imprisonment of either description for a term not exceeding 12 months, or to both such fine and imprisonment. ***Recalling that no penal sanctions should be imposed against a worker for having carried out a peaceful strike, and that measures of imprisonment or fines could be envisaged only where, during a strike, violence against persons or property, or other serious infringements of penal law have been committed, and can be imposed exclusively pursuant to legislation punishing such acts, such as the Penal Code, the Committee requests the Government to amend section 43(1) of the Industrial Disputes Act so as to ensure that these principles are respected.***

Finally, the Committee notes that section 48 of the Industrial Disputes Act provides that "essential industry" means any industry which is declared by order made by the Minister and published in the *Gazette*, to be an

industry essential to the life of the community. ***The Committee requests the Government to provide information on any such order made by the Minister.***

2. Observation (CEACR) - adopted 2012, published 102nd ILC session (2013)

Right to Organise and Collective Bargaining Convention, 1949 (No. 98) **-** *Sri Lanka* **(Ratification: 1972)**[11]

The Committee notes the Government's response to the comments submitted by the International Trade Union Confederation (ITUC) in a communication dated 4 August 2011. The Committee further notes the comments submitted by the Lanka Jathika Estate Workers' Union (LJEWU) dated 6 June 2012, and by the ITUC dated 31 July 2012, which relate to matters already raised by the Committee, as well as allegations of infringements of the Convention, in particular numerous allegations of acts of anti-union discrimination. ***The Committee requests the Government to provide its observations on these comments.***

The Committee also notes the comments made by the Employers' Federation of Ceylon (EFC) and the International Organisation of Employers (IOE) in a communication dated 18 August 2011, stating in particular that the Industrial Dispute Act provides for mandatory collective bargaining, which they consider is contrary to the essence of the Convention, and that this piece of legislation is discriminatory in that it only sets out unfair labour practices on the part of the employers and not on the part of the workers or their organizations. ***The Committee requests the Government to provide its observations on these comments.***

The Committee notes that the Government indicates in its report that a special meeting of the National Labour Advisory Council took place on 1 February 2011 to discuss the implementation of the National Workers' Charter of 1995 (the national labour policy of Sri Lanka) and reflect on how laws and practice should be developed, in particular in relation to freedom of association and collective bargaining issues. The Government adds in its report that this meeting aimed at reaching consensus among the social partners to effectively address the issues related to the implementation of the Convention, as well as the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Workers' Representatives Convention, 1971 (No. 135). ***Taking note of the summary of the proceedings of this meeting which the Government attaches to its report and of the indication that a tripartite subcommittee was formed for further discussions, the Committee expresses the hope that this tripartite process will bring positive results, including progress towards the amendment of the labour legislation, and that the comments made by the Committee for a number of years will be fully taken into account in this regard. It requests the Government to provide information on the progress made.***

Article 1 of the Convention. Protection against acts of anti-union discrimination. In its previous comments, the Committee had requested the Government to take the necessary measures to ensure that legislation

[11] Available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO:13100:P13100_COMMENT_ID:3082154:NO, visited on: 20/11/2015

prohibiting acts of anti-union discrimination is coupled with effective and expeditious procedures and sufficiently dissuasive sanctions to ensure their application.

- -*Sufficiently dissuasive sanctions.* The Committee notes with ***interest*** that the Government indicates in its report that Industrial Disputes (Amendment) Act No. 39 of 2011 has increased the amount of the fine provided for in cases of anti-union discrimination from 20,000 (approximately US$367) to 100,000 rupees (approximately US$1,835).

- -*Effective and expeditious procedures.* Noting that in practice only the Department of Labour can bring cases concerning anti-union discrimination before the Magistrate's Court and that there are no mandatory time limits within which complaints should be made to the Court, the Committee had previously requested the Government to indicate whether trade unions had the capacity to bring their grievances directly before the courts, and to take measures in consultation with the social partners to guarantee that short time periods for the examination of the anti-union discrimination cases by the authorities would be established. The Committee notes that the Government indicates in its report that: (i) the opportunity of granting trade unions the right to bring anti-union discrimination claims directly before the courts has been discussed on a tripartite basis on a number of occasions and that no consensus was reached on this matter; (ii) a circular dated 29 April 2011 was addressed by the Commissioner General of Labour to all officers of the Department of Labour, providing guidelines on the procedure to be respected when receiving a complaint of unfair labour practice, including deadlines, and, in particular, that complaints should be enquired within 14 days upon receipt; and (iii) delays in dealing with the complaints were due to time consumed in the collection of the necessary evidence for a case to be filed with the court. ***Stressing once again that the existence of legal provisions prohibiting acts of anti-union discrimination is not enough if they are not accompanied by effective and rapid procedures to ensure their application in practice, and observing that, according to the ITUC's comments, numerous acts of anti-union discrimination occur in practice, the Committee requests the Government to take the necessary measures to ensure the effectiveness and expeditiousness of the procedures detailed in the new guidelines, and to provide information on the number of cases of anti-union discrimination examined by the courts and the results thereof. The Committee further requests the Government to take the necessary measures to ensure that workers who are victim of anti-union discrimination can lodge a complaint before the judicial courts. The Committee also invites the Government to continue to discuss, on a tripartite basis, the possibility of granting trade unions the right to bring anti-union discrimination cases directly before the courts.***

Article 4. Measures to promote collective bargaining. In its previous observation, the Committee requested the Government to indicate the measures taken by the Social Dialogue and Workplace Cooperation Unit (SDWC), as well as the measures taken under the auspices of the National Policy for Decent Work, to promote collective bargaining. The Committee notes with ***regret*** that the Government does not provide information on this matter in its report. ***The Committee is therefore bound to reiterate its request that the***

Government provide information on progress achieved to promote collective bargaining, including on the result of the measures taken by the SDWC and those taken in furtherance of the National Policy for Decent Work.

Export processing zones (EPZs). In its previous observation, as regards the need to promote collective bargaining within the EPZ sector, the Committee noted the information provided by the Government according to which 40 per cent of EPZ enterprises **have employees' councils** that have bargaining rights, and that some of them were in the process of concluding collective agreements. The Committee also noted that, according to the ITUC, employees' councils were bodies funded by the employer without workers' contributions – thus giving them an advantage over trade unions which require membership dues – and that employees' councils were promoted by the Board of Investment as a substitute for trade unions in EPZs. The Committee notes that the Government indicates in its report that Trade Unions' Facilitation Centres have been established in three EPZs, with a view to facilitating private meetings between workers and their representatives. The Government further indicates that the Board of Investment is vigilant that the formation or functioning of employees' councils does not undermine the formation or functioning of trade unions. The Government adds that complaints in this regard can be submitted to the Commissioner General of Labour, to the National Labour Advisory Council and to the Board of Investment. ***Given the apparent difficulties with regard to the exercise of workers' rights to organize and collective bargaining in EPZs, the Committee requests the Government to provide information in its next report on specific measures taken to address these difficulties. The Committee also requests the Government to ensure that employees' councils do not undermine the position of trade unions, in particular in relation to their right to collective bargaining, and to indicate any developments in this regard in its next report.***

Representativeness requirements for collective bargaining. In its previous observation, the Committee had noted that, under section 32A(g) of the Industrial Disputes Act, no employer shall refuse to bargain with a trade union which has in its membership not less than 40 per cent of the workmen on whose behalf the trade union seeks to bargain. It subsequently requested the Government to ensure that if no trade union covers more than 40 per cent of the workers, collective bargaining rights should be granted to all the unions in this unit, at least on behalf of their own members. The Committee notes that, in their comments, the IOE and the EFC express the view that it is important that the bargaining agent on behalf of the workers has sufficient representative strength to bargain with the employer and indicate that all major trade unions of the country have no problem in keeping the 40 per cent threshold. The Committee notes, however, that the LJEWU states that due to the multiplicity of trade unions in the country it is extremely rare that the 40 per cent threshold is met. The Committee also notes that the Government indicates that there is no restriction for small trade unions to negotiate or intervene in matters relating to their members, and that there is no consensus amongst the trade unions on this issue. ***The Committee therefore requests the Government to continue to discuss, on a tripartite basis, the need to ensure in the legislation that, if no trade union covers more than 40 per cent of***

the workers, collective bargaining rights should be granted to all the unions in this unit, at least on behalf of their own members, and to indicate the progress made in this regard in its next report.

Article 6. The right to collective bargaining in the public service. In its previous observation, the Committee noted that, as of 31 December 2008, there were 1,933 registered trade unions out of which 1,130 were public officers' unions representing 1.2 million public employees. The Committee also noted that the procedures regarding the right to collective bargaining of public sector workers do not provide for genuine collective bargaining, but rather establish a consultative mechanism – with perhaps some elements of arbitration – under which the demands of public service trade unions are considered, while the final decision on salary determination rests with the Cabinet of Ministers. The Committee notes with ***regret*** that the Government does not provide information on this matter in its report. ***The Committee is therefore bound to reiterate its request that the Government take the necessary measures to recognize and promote civil servants' right to collective bargaining, as long as they are not engaged in the administration of the State, and to indicate any developments in this regard in its next report.***

Finally, as regards the establishment of a mechanism for dispute prevention and settlement in the public sector, the Committee refers to its comments made in its observation under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

3. Direct Request (CEACR) - adopted 2011, published 101st ILC session (2012)

Right of Association (Agriculture) Convention, 1921 (No. 11) **-** *Sri Lanka* **(Ratification: 1952)**[12]

In its previous comment, the Committee had asked the Government to take the necessary steps to ensure for self-employed farmers the same association rights, including the right to represent members and the right to strike, that industrial workers are accorded under the Trade Unions Ordinance of 1935. It had noted that, while farmers may form farmers' organizations in line with the provisions of the Agrarian Services (Amendment) Act, No. 4 of 1991, section 56(A)(4) of this Act, which identifies the purposes of farmers' organizations, does not include the right to represent members in disputes and the right to engage in strikes. The Committee notes that the Government indicates in its report that discussions with senior officials of the Department of Labour and the Ministry of Labour and Labour Relations are taking place to discuss the issue of the right of association of self-employed persons in agriculture. ***The Committee hopes that the Government will take the necessary measures to amend its legislation to bring into conformity with the Convention and requests it to provide information on developments in this regard.***

[12] Retrieved from: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO:13100:P13100_COMMENT_ID:2697902:NO, visited on: 20/11/2015 at: 12:54 PM

4. Direct Request (CEACR) - adopted 2014, published 104th ILC session (2015)

Workers' Representatives Convention, 1971 (No. 135) - *Sri Lanka* **(Ratification: 1976)**[13]

Article 2 of the Convention. Facilities. In its previous comments, the Committee had noted allegations that workers' representatives faced difficulties in accessing undertakings located in export processing zones (EPZs).The Committee notes that the Government indicates in its report that facilitation centers have been established in three EPZs (Biyagama, Katunayake and Koggala) in which any trade union representative may discuss in private, and without the interference of employers, the formation of new trade unions or matters pertaining to existing unions. The Committee further notes the information provided by the Government that, of the 34 enterprises in EPZs that have recognized trade unions, 18 have granted check-off facilities and six have signed collective agreements.

Article 5. Requirement not to undermine position of trade unions. In its previous comments, the Committee noted the allegation that employers in EPZs had used for many years the creation of "employees' councils" promoted by the Board of Investment of Sri Lanka to hamper the creation of free and independent trade unions and to prevent them from exercising their right to collective bargaining and in particular that the councils can replace trade unions in collective bargaining if the latter do not represent 40 per cent of the workforce and the former do. The Committee notes that the Government has not addressed specifically this matter in its report. ***Recalling that the protection of Article 5 of the Convention applies to the representatives of all trade unions in the enterprise, the Committee again requests the Government to ensure that, where both trade unions and elected representatives exist in an undertaking either within or outside the EPZs, the existence of elected representatives is not used to undermine the position of the trade unions concerned in collective bargaining.***

5. Observation (CEACR) - adopted 2013, published 103rd ILC session (2014)

Abolition of Forced Labour Convention, 1957 (No. 105) - *Sri Lanka* **(Ratification: 2003)**[14]

Article 1(a) of the Convention. Penal sanctions involving compulsory labour as a punishment for expressing political views or views ideologically opposed to the established political, social or economic system. The Committee previously noted that section 120 of the Penal Code provides that whoever by words, signs or visible representations excites or attempts to excite feelings of disaffection to the President or the Government, or hatred towards or contempt of the administration of justice, or excites or attempts to excite people, or attempts to raise discontent or to promote feelings of ill will and hostility between different classes of people, shall be punished with imprisonment for up to two years. It also noted that, by virtue of section 65

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[13] Available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO:13100:P13100_COMMENT_ID:3186121:NO, visited on 20/11/2015 at: 4:07

[14] Available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO:13100:P13100_COMMENT_ID:3143261:NO, visited on: 20/11/2015 at: 12: 58 PM

of the Prison Ordinance, imprisonment involved the obligation to perform compulsory labour. It requested information on the application of this provision of the Penal Code.

The Committee notes with ***concern*** the Government's statement that it has not yet received information on the application of section 120 of the Penal Code. However, the Government indicates that it is implemented by government officers and government institutions and, in case a fraudulent case is brought, such officers or institutions can be penalized and ordered to compensate the affected party. Any case brought against a person under section 120 must be filed by making a charge sheet according to section 136(1)(a)(b) of the Penal Code. Additionally, the affected party has the right to file a case with the Supreme Court, pursuant to the Constitution. The Government indicates that it is therefore not possible to use section 120 of the Penal Code to penalize the expression of political opinions. ***The Committee once again requests the Government to provide information on the application of section 120 of the Penal Code in practice, including information on any arrests, prosecutions, convictions and penalties imposed, as well as copies of court decisions illustrating the scope of its application, in order to enable the Committee to assess the provision's conformity with the Convention.***

The Committee is raising other points in a request addressed directly to the Government.

6. Observation (CEACR) - adopted 2013, published 103rd ILC session (2014)

Minimum Age Convention, 1973 (No. 138) **-** *Sri Lanka* **(Ratification: 2000)**[15]

The Committee notes the Government's report and the comments made by the National Trade Union Federation (NTUF) dated 24 August 2013.

Article 2(2) of the Convention. Raising the minimum age for admission to employment or work. The Committee previously noted the Government's information that the Ministry of Labour Relations and Foreign Employment was considering the possibility of extending the age for admission to employment to 16 years and that steps were being taken to consult the relevant organizations/parties concerned. The Committee requested the Government to indicate whether any amendments raising the minimum age for employment to 16 years had been made.

The Committee notes the Government's statement that amendments in this regard have been submitted to the Attorney-General for approval, which will thereupon be submitted to the Parliament for adoption. ***The Committee expresses its firm hope that the amendments with regard to raising the minimum age for admission to employment to 16 years will be adopted in the near future. In this regard, the Committee would like to draw the Government's attention to the provisions of Article 2(2) of the Convention, which***

15 Available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO:13100:P13100_COMMENT_ID:3142575:NO, visited on: 20/11/2015 at: 1:01 PM

provides that any Member having ratified this Convention may subsequently notify the Director-General of the International Labour Office, by a new declaration, that it has raised the minimum age that it had previously specified. The Committee would be grateful if the Government would consider the possibility of sending a declaration of this nature to the Office, in case any amendments to the national legislation raising the minimum age for admission to employment or work to 16 years have been made.

Article 2(3). Compulsory education. The Committee previously noted the Government's information that the Ministry of Education had taken steps to submit a Bill to the Parliament in respect of extending compulsory schooling up to 16 years of age.

The Committee notes the Government's information that the Cabinet of Ministers have approved the memorandum submitted by the Ministry of Education on raising the upper age limit of compulsory education from 14 years to 16 years. The Government further indicates that the amendments in this regard have been submitted to the Attorney-General for approval. ***The Committee expresses the firm hope that the Government will take the necessary measures to ensure that the amendments with regard to extending compulsory education up to 16 years will be adopted in the near future. It requests the Government to provide information on any progress made in this regard, as well as to supply a copy, once it has been adopted.***

Part V of the report form. Application of the Convention in practice. The Committee notes that, according to the findings of the Child Activity Survey of 2008–09 conducted by the Department of Census and Statistics, 2.5 per cent of the total child population aged between 5 and 17 years are involved in child labour, of which 1.5 per cent are engaged in hazardous work. About 80.8 per cent of the working children are engaged in unpaid family work; 66.3 per cent are engaged in elementary occupations such as street and mobile vendors, domestic helpers, mining, construction, manufacturing, transport and related work; while 61 per cent are engaged in the agricultural sector. The survey report further indicates that the average work time by children aged 5–17 years is 13.3 hours per week.

The Committee notes the Government's statement that the Department of Labour (DoL) is making every effort to enforce the law against child labour and that no incidence of child labour has been observed in the formal economy. In 2012, the DoL received 186 complaints on child labour in the informal economy of which four cases have been filed with the magistrate courts, while in the other cases legal action was impossible due to lack of evidence. The Committee further notes the Government's information that one of its districts, "Rathnapura", is envisaged to become a Child Labour Free Zone by 2015, and that the Government is trying to expand this concept into other districts as well. According to the Government's report, the main aspect of this concept is that it has the support of all government programmes related to education, vocational training, poverty alleviation and other social welfare schemes, as well as support of the private sector and the non-governmental organizations, in eliminating child labour. The Committee notes, however, the comments made by the NTUF that the number of cases of employment of children are much more than indicated by the

Government as most of the children are employed as domestic workers where outsiders have no access. ***The Committee encourages the Government to take the necessary measures within the framework of its attempt to expand the Child Labour Free Zone concept to all of its districts by 2016, to ensure the application of the Convention to all branches of economic activity, including the informal economy. In this regard, the Committee requests the Government to take effective measures to strengthen the capacity and expand the reach of the labour inspectorate to better monitor children working in the informal economy, including domestic workers. The Committee also requests the Government to continue providing information on the manner in which the Convention is applied in practice, including information from the labour inspectorate on the number and nature of contraventions reported, violations detected and penalties applied.***

7. Observation (CEACR) - adopted 2013, published 103rd ILC session (2014)

Worst Forms of Child Labour Convention, 1999 (No. 182) - *Sri Lanka* **(Ratification: 2001)**[16]

The Committee notes the Government's report and the comments made by the National Trade Union Federation (NTUF) dated 24 August 2013.

Article 3 of the Convention. Worst forms of child labour. Clause (b). Use, procuring or offering of a child for prostitution. The Committee previously noted that sections 360A, 360B and 288A of the Penal Code, as amended, prohibited a wide range of activities associated with prostitution, including the prohibition of the use, procuring or offering of minors under 18 years of age for prostitution. It also noted the Government's information that prosecutions on the commercial sexual exploitation of children are carried out by the Department of Police and the National Child Protection Authority (NCPA). The Committee further noted that the Committee on the Rights of the Child (CRC), in its concluding observations of 19 October 2010 (CRC/C/LKA/CO/3-4, paragraph 69), expressed concern at the high incidence of exploitation of approximately 40,000 children in prostitution, that no comprehensive data were available on child sexual exploitation, and that no central body was established to monitor the investigation and prosecution of child sexual exploitation cases.

The Committee notes the Government's information that several initiatives and measures have been taken against the sexual exploitation of children, such as: the development of a national plan of action to combat trafficking in children for sexual and labour exploitation; the establishment of a children's council throughout the island; and the establishment of a special committee to look into the issue of reducing the duration of judicial proceedings relating to child sexual exploitation. The Committee also notes the information provided by the Government in its fifth periodic report of 31 January 2013 to the Human Rights Committee (CCPR/C/LKA/5, paragraph 294), that it has established a women and children police desk at district level

16 Retrieved from: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO:13100:P13100_COMMENT_ID:3142614:NO, visited on: 20/11/2015 at: 3:25 PM

consisting of specially trained police officers to deal with the incidence of sexual exploitation of children. The Committee further notes from the Government's report that, as per the data collected from the police unit and the NCPA, in 2012, 53 cases of commercial sexual exploitation of children were reported while, in 2013, 30 cases were reported. ***The Committee urges the Government to continue its efforts to combat the commercial sexual exploitation of children and to ensure that thorough investigations and robust prosecutions of persons who commit this offence are carried out and sufficiently effective and dissuasive penalties are imposed in practice. It requests the Government to continue providing information with regard to the number of prosecutions, convictions and penalties imposed on offenders in cases related to the commercial sexual exploitation of children.***

Clause (d) and Article 4(1). Hazardous work. The Committee previously requested the Government to provide information on the application in practice of section 20A of the Employment of Women, Young Persons, and Children Act of 2006, which prohibits the employment of children under the age of 18 years in any hazardous occupation.

The Committee notes the Government's statement that around 65,000 labour inspections are carried out annually and no incidents of hazardous work by children have been detected in the formal economy. The Committee notes, however, that, according to the findings of the Child Activity Survey 2009, out of the total child population of 107,259 reported to be in child labour, 63,916 children (1.5 per cent) between the ages of 5–17 years are engaged in hazardous work. The incidence of hazardous forms of child labour is highest in the manufacturing industries followed by the service and agricultural industries. ***Noting that a large number of children under the age of 18 years are involved in hazardous work in Sri Lanka, the Committee urges the Government to take immediate and effective measures to ensure their protection from hazardous work, including in the informal economy. It also requests the Government to provide information on the measures taken in this regard and on the results achieved.***

Article 6. Programmes of action to eliminate the worst forms of child labour. Commercial sexual exploitation of children. The Committee previously noted that the CRC, in its concluding observations of 19 October 2010 (CRC/C/LKA/CO/3-4, paragraph 71), expressed concern that Sri Lanka remained a common destination for child-sex tourism, with a high number of boys being sexually exploited by tourists. The CRC also expressed concern that the police lacked the necessary technical expertise to combat child-sex tourism; that the Cyber-Watch programme to monitor the Internet for child pornography and crimes related to child-sex tourism was discontinued; and that the Cyber Crimes Unit closed due to lack of funding.

The Committee notes that, according to the document entitled "Sri Lanka's Roadmap 2016 on the Worst Forms of Child Labour from Commitment to Action", one of the strategies of the 2016 Roadmap is to promote child-safe tourism. The document also indicates that Sri Lanka's Ten-Year Horizon Development Framework 2006–16, called *Mahinda Chintana,* which is vigorously tackling many of the root causes of child labour, aims to strengthen security against tourism-related crimes, including combating child-sex tourism

through strict police vigilance and awareness-raising programmes. However, the Committee notes from the same document that the beach boy phenomenon along with the issue of paedophilia has been known for a long time along the south western coastal belt of Sri Lanka. The Committee further notes the comments made by the NTUF that the commercial sexual exploitation of children takes place mainly in seaside tourist resorts and the very secretive nature of these offences curtails complaints or facts from coming to light. The Committee expresses its ***concern*** at the situation of children involved in child-sex tourism. ***The Committee, therefore, once again urges the Government to strengthen its efforts to combat child-sex tourism and to ensure that perpetrators are brought to justice. The Committee requests the Government to provide information on the implementation of the strategies of the 2016 Roadmap in promoting child-safe tourism as well as the measures taken within the framework of the Mahinda Chintana in combating child-sex tourism.***

The Committee is raising other points in a request addressed directly to the Government.

8. Direct Request (CEACR) - adopted 2013, published 103rd ILC session (2014)

Worst Forms of Child Labour Convention, 1999 (No. 182) - *Sri Lanka* **(Ratification: 2001)**[17]

Article 7(2) of the Convention. Effective and time-bound measures. Clause (b). Direct assistance for the removal of children from the worst forms of child labour and for their rehabilitation and social integration. Sale and trafficking of children. Following its previous comments, the Committee notes the Government's information contained in its report under the Forced Labour Convention, 1930 (No. 29), that the Ministry of Child Development and Women's Affairs under the direction of the task force has established a government-run shelter and safe houses such as "Women in Need" and "Salvation Army" for victims of human trafficking, which provide medical and psychological assistance to such victims. With regard to child victims of trafficking, the Committee notes the Government's information that rescued victims of child trafficking who are in need of care and protection are referred to certified schools. Furthermore, the Department of Probation and Child Care Services provides safe shelter and psychological assistance to victims of the worst forms of child labour. There are four safe houses, four certified schools and two national training and counselling centres in the country which provide medical, legal and psychological services to child victims of trafficking. The Committee requests the Government to provide information on the number of child victims of trafficking who have benefited from the services provided by the safe houses, certified schools and national training and counselling centres.

Part V of the report form. Application of the Convention in practice. The Committee notes from the Government's report under Convention No. 29 that the Women and Children Police Desk carried out investigations into four cases of child trafficking during the period of March 2012 to April 2013 and that the cases are still ongoing. The Committee also notes that, since 2009, the Criminal Investigations Department

[17] Available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::::P13100_COMMENT_ID:3142611, visited on: 20/11/2005 at: 3:21 PM

has investigated 61 cases of human trafficking, while the Attorney-General's Department has received 191 suspected cases of human trafficking of which 645 indictments have been filed in the court. In addition, the Committee notes from the Government's fifth periodic report of 31 January 2013 to the Human Rights Committee that Sri Lanka recorded its first human trafficking conviction in May 2011 which sentenced three persons, including one foreign national, to nine years of rigorous imprisonment along with a fine. The report further indicates that the Attorney-General's Department took steps to ensure that the foreign victims gave evidence before the High Court and ensured their repatriation to their home country with the assistance of the International Organization for Migration (CCPR/C/LKA/5, paragraph 297). ***The Committee requests the Government to continue providing information on the number of persons prosecuted, convicted and sentenced with regard to the cases involving the worst forms of child labour, in particular trafficking of children.***

9. Observation (CEACR) - adopted 2014, published 104th ILC session (2015)

Equal Remuneration Convention, 1951 (No. 100) **-** *Sri Lanka* **(Ratification: 1993)**[18]

Article 1 of the Convention. Work of equal value. Legislation. The Committee recalls that it expressed concern previously regarding the absence of legislation providing for equal remuneration for men and women for work of equal value and the limitations of the principle of equal wages arising out of wage ordinances and collective agreements to the "same" or "substantially the same" work. The Committee notes the Government's statement that there are no specific provisions to ensure that minimum wages are paid for men and women without discrimination under the Wages Boards Ordinance, but that it is ensured that there are no different minimum wages for men and women determined by the wages boards. The Government therefore considers that there is no need to specifically indicate that employees should be paid their wages without discrimination based on gender. The Committee recalls that the concept of "work of equal value" aims to address occupational sex segregation in the labour market where, in general, men and women do not perform the same or similar work and permits a broad scope of comparison between jobs including, but going beyond "equal", "the same" or "similar" work, as it encompasses work that is of an entirely different nature, which is nevertheless of equal value. ***The Committee again urges the Government to take steps to give full legislative expression to the principle of equal remuneration for men and women for work of equal value. The Committee asks the Government to provide specific information on the concrete steps taken in this regard.***

Additional emoluments. The Committee notes the Government's repeated statement that there is a legal requirement to pay wages in legal tender. However, the Government has not provided information on the practice of providing meals for men rural workers, but not for women. The Committee recalls that the principle of the Convention should apply to all elements that a worker may receive for his or her work, including allowances paid alongside, or in addition to, the basic wage, such as meals and housing facilities, regardless of the term used ("wages", "pay", "remuneration", "salary" etc.). ***The Committee therefore once***

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[18] Retrieved From: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO:13100:P13100_COMMENT_ID:3181002:NO, visited on: 20/11/2015 at: 3:50 PM

again asks the Government to take measures to ensure that all emoluments, whether in cash or in kind, are available and granted to men and women on an equal footing, and to provide information on any steps taken in this regard.

Article 2. Wages boards. The Committee notes the notification of new wages boards rates as of January 2013, made under the Wages Boards Ordinance, revising the minimum wages in a number of trades. It notes, however, that sex-specific terminology remains in use in the wages boards decisions. The Committee further notes from the Government's report under the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), that the simplification of the wages boards system is in progress and that ILO technical assistance is requested in this regard. ***The Committee asks the Government to provide information on the progress made in simplifying the wages boards system. In this context, the Committee again asks the Government to take the necessary steps to ensure that the rates of wages fixed by wages boards are based on objective criteria free from gender bias (such as qualifications, effort, responsibilities and conditions of work), so that work predominantly done by women is not undervalued compared to work predominantly done by men. The Government is also requested to take appropriate measures to ensure the use of gender neutral terminology in defining the various jobs and occupations in Wages Boards Ordinances to avoid stereotypes concerning whether certain jobs should be carried out by men or women.***

Article 3. Objective job evaluation. The Committee welcomes the inclusion in the National Action Plan for the Protection and Promotion of Human Rights 2011–16 of "equal pay for work of equal value" as an explicit objective to be achieved through the conduct of a study on introducing of a job evaluation system to serve as a basis for developing and establishing such an evaluation system. ***The Committee asks the Government to take steps to conduct the study planned in order to develop an objective job evaluation method based on the work to be performed and using objective criteria free from gender bias, such as qualifications and skills, effort, responsibilities and conditions of work. The Committee asks the Government to provide information on the progress made in this respect.***

The Committee is raising other matters in a request addressed directly to the Government.

10. Direct Request (CEACR) - adopted 2014, published 104th ILC session (2015)

Equal Remuneration Convention, 1951 (No. 100) - *Sri Lanka* **(Ratification: 1993)**[19]

Articles 1 and 2 of the Convention. Assessment of the gender pay gap. ***The Committee asks the Government to provide up-to-date statistical data on the distribution of men and women in the different occupational categories in the various industries and their average level of earnings, as well as any research or studies on the gender pay gap and its underlying causes, including in the informal economy.***

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[19] Retrieved from: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::::P13100_COMMENT_ID:3181006 visited on: 20/11/2015 at: 3:54 PM

Article 2. Equal remuneration in the plantation industry, including palm oil plantations. The Committee recalls the observations made in 2012 by Education International (EI) and the All Ceylon Union of Teachers (ACUT) that there is gender wage discrimination mainly in the plantation industry. The Government reports that there is no wages board for palm oil workers, while the Ministry of Plantation's progress report of 2013 indicates that oil palm cultivation in Sri Lanka will expand within the next ten years. ***Recalling that the fixing of minimum wages can make an important contribution to the application of the principle of equal remuneration, the Committee once again asks the Government to provide information on the steps taken and progress made in determining minimum wages for palm oil workers, ensuring that men and women receive equal remuneration when performing not only "equal" or "similar" work but also work of "equal value". The Committee once again asks the Government to provide information, disaggregated by sex, on the number of workers in the various occupations in the plantation industry and the measures taken to address any gender remuneration gap in this industry.***

Export processing zones (EPZs). Regarding the process of wage determination in EPZs, the Committee notes the Government's statement that wages determined by wages boards are applicable to workers in EPZs but companies pay higher wages than the minimum wages. The Government also indicates that it is factually wrong to state that women are concentrated in lower paid occupations. ***Noting that no data is provided in support of this assertion and recalling that statistical information is crucial in order to permit an adequate evaluation of the nature, and the extent, of any pay differential between men and women, the Committee asks the Government to provide information on the distribution of men and women and their corresponding level of wages in the various occupational categories (unskilled, semi-skilled, skilled, higher skilled and managerial occupations) in enterprises in EPZs. The Government is also asked to indicate how the principle of the Convention is taken into account in the process of wage determination, in particular, with a view to ensuring that the jobs predominantly performed by women are not being undervalued compared to those predominantly performed by men in EPZs.***

Wage Policy. The Committee notes from the Government's report that a National Pay Commission has recently been established to evaluate the existing wage policy and to introduce a new wage policy applicable to both the public and private sector. The Government also indicates that ILO technical assistance is requested in this regard. ***The Committee asks the Government to provide information on the progress made in evaluating the wage policy and designing a new wage policy applicable to the public and private sectors. The Committee asks the Government to take steps, in collaboration with employers' and workers' organizations, to ensure that the new wage policy implements the principle of equal remuneration for men and women for work of equal value, through the use of objective job evaluation methods.***

Awareness raising. ***The Committee asks the Government, in cooperation with the workers' and employers' organizations, to disseminate information widely and raise awareness among workers, employers, their organizations, as well as labour inspectors and other officials, of the principle of equal remuneration for***

men and women for work of equal value, in particular of the concepts of equal value and objective job evaluation.

11. Direct Request (CEACR) - adopted 2013, published 103rd ILC session (2014)

Minimum Wage Fixing Convention, 1970 (No. 131) **-** *Sri Lanka* **(Ratification: 1975)**[20]

Articles 3 and 4 of the Convention. Criteria for adjusting minimum wages – Full consultation with employers' and workers' organizations. The Committee notes the comments made by the Employers Federation of Ceylon (EFC) and the International Organisation of Employers (IOE) concerning the application of the Convention, which were received on 4 July 2013 and were transmitted to the Government on 9 September 2013. The two employers' organizations recognize that consultations are held every time that wage boards are convened to revise minimum wages in respect of different trades but express their disappointment about the operation of the minimum wage fixing mechanism in practice. More concretely, the EFC and the IOE indicate that the voting pattern in tripartite meetings where decisions on proposed minimum wage rates are taken is such that government representatives often align themselves with the workers supporting any increase, thus creating a challenging situation for employers. Moreover, the EFC and the IOE consider that it would be important to adopt a professional approach to wage fixation, which would imply conducting surveys and studies in relation to a particular industry and ascertaining the market rates of wages and the capacity of the industry to pay before fixing minimum wage levels. In addition, the Committee notes the comments made by the IOE on 17 July 2013 according to which economic factors, in particular productivity, are not taken into consideration when minimum wages are set. ***The Committee requests the Government to transmit any comments it may wish to make in response to the observations of the EFC and the IOE.***

12. Observation (CEACR) - adopted 2013, published 103rd ILC session (2014)

Plantations Convention, 1958 (No. 110) **-** *Sri Lanka* **(Ratification: 1995)**[21]

Part VII (Maternity protection), Articles 46–50 of the Convention. Further to its previous comment, the Committee notes that a study on maternity benefits is under preparation with the technical assistance of the Office. In this connection, the Committee notes that the comments made by the National Trade Union Federation (NTUF) in which reference is made to the discussion concerning the application by Sri Lanka of the Maternity Protection Convention (Revised), 1952 (No. 103), that took place at the 100th Session (2011) of the International Labour Conference, and the Conference Committee on the Application of Standards' conclusions requesting the Government to take "concrete action to advance effectively the solution of these

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[20] Retrieved From: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO:13100:P13100_COMMENT_ID:3138985:NO, visited on: 20/11/2015 at: 3:57 PM

[21] Available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO:13100:P13100_COMMENT_ID:3150653:NO, visited on: 20/11/2015 at:4:02 PM

long-standing issues." According to the NTUF, the Government's decision to refer the matter to the steering committee on labour reforms is a mode of procrastination, while plantation workers enjoy substantially lower number of maternity leave days compared to public sector workers. ***The Committee requests the Government to submit any comments it may wish to make in response to the observations of the NTUF.***

The Committee is raising other points in a request addressed directly to the Government.

IV. Constitutional and Statutory Protection to Workmen in Sri Lanka

A. Comparison of the Labour Rights enshrined in the Constitution of Sri Lanka and India

The following table makes a comparison of the provisions relating to employment and labour matters in the Indian Constitution and Sri Lankan Constitution.

Provision w.r.t Labour and Employment Matter	**Relevant Provision In Sri Lankan Constitution**	**Relevant Provision In Indian Constitution**
Freedom of association	Article 14 guarantees every citizen (among other rights) the freedom of speech and expression including publication, the freedom of peaceful assembly, the freedom of association, the freedom to form and join a trade union; the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise.	Article 19- Similar to Sri Lankan constitution, the Indian Constitution guarantees the citizens the right to assemble peaceably and without arms and the right to form associations or unions, to practise any profession, or to carry on any occupation, trade or business.
Restriction to the above rights	The above rights are subject to restrictions which are contained in Article 15 such as national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. The freedom of peaceful assembly is subject to restrictions by law in interest of racial and religious harmony. And the freedom of	In India also these rights are not absolute but are subject to restrictions which may be in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

Equality of opportunity in employment or appointment	association is subject to restrictions by law in the interests, of racial and religious harmony or national economy. Article 27 (6) in Part VI, i.e Directive Principles of State Policy states that the State shall ensure equality of opportunity to citizens, so that no citizen shall suffer any disability on the ground of race, religion, language, caste, sex, political opinion or occupation.	Article 16 of the Indian Constitution provides for equality of opportunity in employment or appointment to any office under the state. It prohibits discrimination on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.
Fundamental duty	Article 28 sub clause (c) states that it is the fundamental duty of every person in Sri Lanka to work conscientiously in his chosen occupation.	No such provision in Indian Constitution.
Reservation for backward classes	No such provision in the constitution of Sri Lanka.	The Indian Constitution has the provision for reservation
		for scheduled caste, schedule tribe and other backward classes. This is contained in article 16(4). The state is also empowered to make provision any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes.

Prohibition of Human Trafficking and Forced labour	Though there is no express mention in the constitution, such acts are made offences in the penal code.	**Article 23-** Indian constitution prohibits the human trafficking and begging are forced labour are made an offence. Similar laws prohibiting human trafficking and begging are made in furtherance of this article.
Prohibition of Child Labour	There is no specific mention of child labour. However the directive principles of state policy mentions that the State shall promote with special care the interests of children and youth, and to protect them from exploitation and discrimination.[22] The Employment of Women, Young Persons and Children Act 1956 is enacted.	**Article 24.** No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment. The Child Labour (Prohibition And Regulation) Act, 1986 is enacted.
Right to strike	Article 14 guarantees the freedom to form and join a trade union. However, the Trade Unions Ordinance defines as to what strike action involves and therefore, in the context of the Sri Lankan labour law, strike action can be regarded as a legitimate trade union activity, except in situations where it is restricted by law. However there is no express provision in the constitution giving the right to strike.	Similarly, the Indian constitution guarantees the right to form associations or unions, however there is no express provision of the right to strike.

[22] Article 27 (13) directive principles of state policy

<table>
<tr><td>Directive Principles of State Policy</td><td colspan="2">Like in Sri Lanka, in India also the directive principles of state policy are not enforceable in the court of law. They are only guiding principles for the state. Similarly, the Constitution of Sri Lanka also says that the Principles of State Policy and fundamental duties not justiciable and the directive principles of state policy do not confer or impose legal rights or obligations, and are not enforceable in any court or tribunal.
The relevant entries and articles in respect to labour mentioned in
Directive principles of both the countries are as follows:-</td></tr>
<tr><td></td><td>Sri Lankan Constitution
Article-27
(d) the rapid development of the whole country by means of public and private economic activity and by laws prescribing such planning and controls as may be expedient for directing and coordinating such public and private economic activity towards social objectives and the public weal ;
(e) the equitable distribution among all citizens of the material resources of the community and the social product, so as best to subserve the common good ;
(6) The State shall ensure equality of opportunity to citizens, so that no citizen shall suffer any disability on the ground of race, religion, language, caste, sex, political opinion or occupation. (7) The State shall eliminate economic and social privilege and disparity, and the exploitation of man by man or by the State. (8) The State shall</td><td>Indian Constitution
Article 39: The State shall, in particular, direct its policy towards securing— (a) that the citizens, men and women equally, have the right to an adequate means of livelihood; (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment; (d) that there is equal pay for equal work for both men and women; (e) that the health and strength of workers, men and women, and the 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;
<u>Article 41</u>: Mentions that the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and</td></tr>
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	ensure that the operation of the economic system does not result in the concentration of wealth and the means of production to the common detriment. **(9)** The State shall ensure social security and welfare.	disablement, and in other cases of undeserved want. **Article 42.** Mentions that the State shall make provision for securing just and humane conditions of work and for maternity relief. **Article 43.** mentions that The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, 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 endeavour to promote cottage industries on an individual or co-operative basis in rural areas.
Redressal in case of infringement of fundamental rights	Fundamental rights can be enforced by way of writs in the supreme court in case any fundamental rights enshrined in Chapter III or chapter IV is infringed, provided that the alleged action is administrative or executive action. (as per article 17 of the constitution)	In case of any fundamental rights infringed, the party can approach the High Court under 226 or Supreme Court under 32.

3 lists	Employment finds place in the concurrent list III[23]	**Union lists relevant entries** Entry52- Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest Entry 61- Industrial disputes concerning Union employees. **Concurrent list relevant entries** Entry 22. Trade unions; industrial and labour disputes. Entry 23. Social security and social insurance; employment and unemployment. Entry 24. Welfare of labour
		including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits.
Participation of the workers in Management	No such specific mention in the Sri Lankan constitution.	**Article 43A.** Mentions that the State shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organisations engaged in any industry. Similar provisions are made in the industrial disputes act in order to give effect to this provision.

This research paper is a study of the constitutional rights with respect to labour and industrial matters and the rights given to them by various judicial judgements in Sri Lanka.

[23] Entry 21 of list III

It also enumerates the various principles developed over the years by the labour tribunals and Courts of Sri Lanka for the welfare of labour such as the Control Test, Integration Test and the Economic Reality Test.

B. STUDY OF THE CONSTITUTIONAL PRINCIPLES AND LANDMARK CONSTITUTIONAL CASES OF SRI LANKA w.r.t LABOUR LAW[24]

The Democratic, Socialist and Republic Sri Lanka gurantee various fundamental rights and liberties to its citizen. Like Indian constitution, Part III of the constitution (Article 10 to 17) confers basic rights to its citizens. In order to understand the rights given to the workers in Sri Lanka it is important to understand the constitutional framework in which these rights were conferred upon them. First Segment mentions the various Articles of the Constitution of Sri Lanka which are relevant to understand the rights conferred on working class.

1. ARTICLE 14

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;

(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.

Basic set of liberties are guaranteed in the first part of Article 14 and in the next segment restrictions on these liberties are elaborated under Article 15. Restrictions on Article 14 are brief discussed as under.

RESTRICTIONS TO ARTICLE 14

However these freedoms enshrined in Article 14 are not absolute, but are subject to certain restrictions which are laid down in Article 15 as follows:-

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[24] Shivaraj S. Huchhanavar, Research Fellow NJA and Aufa Karnalkar, V BSL LLB ILS Law College For internship tenure Nov. 2nd to 21st November 2015

Freedom of speech and expression including publication is subject to such restrictions prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence.

Freedom of peaceful assembly is subject to restrictions as may be prescribed by law in the interests of racial and religious harmony. [25]

Freedom of association; is subject to restrictions prescribed by law in the interests, of racial and religious harmony or national economy. [26]

Freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise are subject to restrictions prescribed by law in the interests, of national economy or in relation to

(a) the professional, technical, academic, financial and other qualifications necessary for practicing any profession or carrying on any occupation, trade, business or enterprise' and the licensing and disciplinary control of the person entitled to such fundamental right, and

(b) the carrying on by the State, a State agency or a public corporation of any trade, business, industry, service or enterprise whether to the exclusion, complete or partial, of citizens or otherwise. [27]

Freedom of movement and of choosing his residence within Sri Lanka is subject to such restrictions prescribed by law in the interests of national economy. [28]

These rights enshrined in Article 14 are also subject to restrictions prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society.

Right to Equality: Special Provision for Women and Disabled

Article 12 (4) declares that, [N]othing 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 executives or legislatures 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.

INFRINGEMENT OF FUNDAMENTAL RIGHTS IN LABOUR MATTERS

[25] Article 15 (3)
[26] Article 15(4)
[27] Article 15 (5)
[28] Article 15(6)

Having understood the various fundamental rights, it is also incumbent to know the manner of enforcing these rights and redressal in case of infringement. Article 17 of the Constitution of Sri Lanka is pertinent to note in this context.

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

EXECUTIVE AND ADMINISTRATIVE ACTION - INTERPRETATION BY SRI LANKAN COURTS

The words "executive and administrative" action was subject to a lot of controversy and has come up for interpretation before the Supreme Court of Sri Lanka in a number of cases. These words "executive" and "administrative" are not defined in the Constitution of Sri Lanka.

Sukhdev Singh & Others v. Bhagatram Sardar Singh Raghuvanshi **AIR (1975) SC 1331 : 1975 SCR (3) 619 at page 644-**

"A State is an abstract entity. It can only act through the instrumentality or agency of natural or juridical persons. Therefore, there is nothing strange in the notion of the State acting through a corporation and making it an agency or instrumentality of the State."

Rienzie Perera and Another v University Grants Commission[29]**, [1978-80] 1 Sri L R 128** "The wrongful act of an individual, unsupported by State authority, is simply a private wrong. Only if it is sanctioned by the State or done under State authority does it constitute a matter for complaint under Article 126. Fundamental rights operate only between individuals and the State.

In the context of fundamental rights, the State" includes every repository of State power" The expression executive and administrative action means "exertion of State power in all its forms."

Trade Exchange (Ceylon) Ltd. v. Asian Hotels Corporation Ltd. [1981] 1 Sri LR 67

In this case the Supreme Court of Sri Lanka affirmed the Decision of the Court of Appeal and held that the action of a public commercial company is not amenable to a writ of certiorari. The court held that notwithstanding the fact that the respondent company was a public commercial company incorporated under the Companies ordinance, and shares were controlled by the Government and most of the capital was contributed by the government, the court refused to accept the respondent public company as an agent of the government.

The question in this case was whether the action of a public commercial company, incorporated under the Companies Ordinance, was amenable to the writ of certiorari and other writs?

Or in other words, whether the action of a public commercial company could be challenged under 126 of the Constitution of Sri Lanka as falling within Executive or Administrative action of the state.

Accordingly the Supreme Court held that the action taken by a public company is not amenable to a writ of certiorari.

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[29] [1978-80] 1 Sri L R 128 at page 138

However the decisions in *Rajaratne* and *Leo Samson* brought a radical change and widened the scope of executive and administrative action. Various Indian judgements were also referred in these cases. The courts developed the "control test"

THE CONTROL TEST

Though a plain reading of the Article will imply that only executive or administrative actions taken by the state can be challenged under Article 126 of the Constitution, the Sri Lankan courts have not adopted a very literal interpretation of these phrases and instead widened the ambit of this phrase.

A catena of cases decided by the Supreme Court of Sri Lanka over the years have evolved the principle of CONTROL TEST which is a guiding light for the Judges to decide in similar cases. The control test is applied to determine the degree of control that the Govt. enjoys over the entity in question in order to come to a conclusion whether the action of the entity would amount to executive or administrative action and therefore if the said action can be challenged under Article

126 of the constitution. The various cases in this context can be studied as follows:- ***S. Rajaratne v Air Lanka Ltd.***

In this case the petitioner alleged that there were different criteria and different standards applied in recruitment of the same post, which resulted in unjust discrimination and therefore violation of the fundamental rights enshrined in Article 12.

In order to ascertain whether the case could fit into the ambit of Article 126, the Court had to first ascertain whether Air Lanka was an agent of the government and whether its actions would amount to executive or administrative actions. The control test was applied in this case. While applying the control test, the court took into consideration the Articles of Association of the company, manner of appointment of directors, share capital held by the government etc. to ascertain the degree of control that Air Lanka enjoyed over the affairs of the company.

> *"All the above circumstances enumerated by me show that Air Lanka is no ordinary company. It has been brought into existence by the government, financed almost wholly by the government and managed and controlled by the government through its own nominee Directors. It has been so created for the purpose of carrying out a function of great public importance which was once carried out by the government through the agency of a statutory corporation. In reality Air Lanka is a company formed by the government, owned by the government and controlled by the government. The juristic veil of corporate personality donned by the company' for certain purposes cannot, for the purposes of the application and enforcement of fundamental rights enshrined in Part III of the Constitution; be permitted to conceal the reality behind it which is the government. The brooding presence of the government behind the operations of the company is quite manifest. The cumulative effect of all the above factors and features would, in my view, render Air Lanka an*

agent or organ of the government. Its action- can therefore properly be designated as executive or administrative action within the meaning of Articles 17 and 126 of the Constitution. The petitioner has thus established that he is entitled to relief under Article 126(4)."

The court also clarified that while applying the control test, it should be borne in mind that it is not necessary that the Company in question should be brought into existence by a Special Statute. A mere analysis of the provisions of the incorporating statute or other relevant legislation may not always suffice, and may sometimes be misleading. In fact, in certain circumstances, a person or body may exercise executive or administrative power even in the absence of any enabling legislation.

The decision in *S. Rajaratne v Air Lanka Ltd* was reiterated in the year 2001 in the case *Jayakody v Sri Lanka Insurance and Robinson Hotel Co. Ltd. and Others*, [2001] 1 Sri LR 365,

EXECUTIVE AND ADMINISTRATIVE ACTION OF STATE, ITS AGENTS AND INSTRUMENTALITIES.

The question arises that though Article 126 includes only executive and administrative actions, will the phrase executive and administrative action include the even the executive or administrative action of the State or its agents or instrumentalities?

Three leading cases in this context by the SC are:-

***Wijetunga v. Insurance Corporation of Sri Lanka* (1982) 1 Sri L R 1**

This case explained the concept of State and Agency and Instrumentality of the government. Relevant excerpts from the judgement are:-

"action by the organs of the government alone constitutes the executive or administrative action that is a sine qua non or basic to proceedings under Article 126……. While there can be no doubt that the expression would include official acts of all government departments and its officers, a problem could be envisaged when the acts of entities other than that of the government are being questioned."

"When a corporation is wholly controlled not only in its policy making but also in the execution of its functions it would be an instrumentality or agency of the State. On the other hand, where the Directors of the Corporation, though appointed by the government with a direction to carry out governmental policies, are otherwise free from the fetters of governmental control in the discharge of their functions, the corporation cannot be treated as instrumentality or agency of the State. It is not possible to formulate an all inclusive or exhaustive test to determine whether a particular corporation is acting as an instrumentality or agency of the government for its action to be labelled executive or administrative action. Mere finding of some control would not be determinative of the question. The existence of ***deep and pervasive State control*** *may afford an indication that a corporation is a State agency.*

Leo Samson v. Sri Lankan Airlines and Others [2001] 1 Sri LR 94

"The expression 'executive or administrative' action has not been defined. However, the trend of our decisions has been to construe it as being equivalent to actions of the government or of an organ or instrumentality of the government."

The contention of the first respondent was that after the signing of the shareholders agreement by Govt. and Emirates, wherein emirates was made an investor and was given the power to appoint directors (including managing director), the impugned decisions remain that of the Investor and the Government has no control over the Board of Directors. Hence the petitioner cannot approach the SC under 126 because the impugned actions complained of do not constitute executive or administrative action.

On a close observation of the provisions of the Memorandum and Articles of Association and the Shareholders Agreement of Air Lanka, the court found that the management, power, control and authority over the business of the Company was vested in the Investor (Emirates) and with certain management decisions being vested exclusively with it (Emirates)."

The court therefore concluded that the Govt. had lost deep and pervasive control over the Company, the impugned actions were no longer executive or administrative action and therefore the contention of the respondent was accordingly accepted.

Jayakody v. Sri Lanka Insurance and Robinson Hotel Co. Ltd and Others [1987] 2 Sri LR

The other question which arose in this case was whether appointment, disciplinary control etc. of employees of state and state agencies constituted 'executive or administrative action'? "Executive or administrative action" (within the meaning of Chapter III of the Constitution) would include even the executive or administrative action of the State or its agents or instrumentalities.

Hence a study of the above cases shows that only those actions which constitute as an executive or administrative action within the meaning of Article 17 of the constitution can be challenged under Article 126. What constitutes administrative or executive action depends upon a number of factors which will establish the deep and pervasive control by the Government.

EXECUTIVE AND ADMINISTRATIVE ACTION IN ARTICLE 17 OF SRI LANKA AND CONCEPT OF STATE IN ARTICLE 12 OF INDIAN CONSTITUTION: A COMPARITIVE ANANLYSIS

Similar to the concept of executive and administrative action, the concept of state and other authorities in Article 12 of the Indian Constitution has been radically developed and widened by the Sri Lankan Courts.

The judgements of Indian Courts in this context have been referred in number of case by Sri Lanka.

12. In this Part, unless the context otherwise requires, "the State'' includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local ***or other authorities*** *within the territory of India or under the control of the Government of India.*

Name of the Indian case	Sri Lankan case in which Indian case was referred
Ramana Dayaram Shetty v. International Airport Authority and *Ajay Hasta v. Khalid Mujib*	*Rajaratne v. Air Lanka Ltd.*[30]
RATIO In order to ascertain whether a particular corporation comes within the definition of Article 12 (authority), It is immaterial whether the corporation is created by or under a statute. The test is whether it is an instrumentality or agency of the Government and not as to how it is created. Whatever be its genitival origin, it would be an "authority" within the meaning of Article 12 if it is an instrumentality or agency of the Government and that would have to be decided on a proper assessment of the facts in the light of the relevant factors. The concept of instrumentality or agency of the Government is not limited to a corporation created by a statute.[31]	
Som Prakash v. Union of India	*Leo Samson v. Sri Lankan Airlines And Others*[32]
RATIO The preponderant considerations for pronouncing an entity as State agency or instrumentality are (i) financial resources of the State being the chief funding source, (ii) functional character being governmental in essence, (iii) plenary control residing in Government, (iv) prior history of the same activity having been carried on by the Government and made over to a new body, and (v) some element of authority or command. Whether the legal person is a corporation 'created by a statute, as distinguished from under a statute, is not an important criteria although it may be an indicium."	

INTEGRATION TEST AND ECONOMIC REALITY TEST

Many times the courts have found the control test to be inadequate. Hence the economic reality test and the integration test were found to be appropriate in some cases. These tests have been adopted from English case laws. The various Sri Lankan cases in which this test was applied is are follows:-

Perera v. Marikar Bawa [33]

The applicant worked as a head tailor with a tailoring company on a commission basis. The work was done by him personally or under his guidance or supervision. He was not required to sign any register. He was not entitled to any bonus as in case of other employees. He did not make any contribution to the EPF.

The court came to the conclusion that is not appropriate to apply the control test in this case. Accordingly the court applied the integration test and held that the work of the applicant is an integral part and parcel of the company since he possessed certain specialized skills.

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[30] Available at: http://www.southasianrights.org/wp-content/uploads/2011/07/Rajaratne-v.-Air-Lanka-Ltd.-and-Others-1987SLR2V128.htm visited on: 4/12/2015 at: 12:05 PM

[31] Justice Bhagwati in *Ramana Dayaram Shetty v. International Airport Authority*

[32] Available at: http://www.lawnet.lk/docs/case_law/slr/HTML/2001SLR1V94.htm visited on: 4/12/2015 at: 12: 09 PM

[33] Available at: http://www.lawnet.lk/docs/case_law/slr/HTML/1989SLR1V347.htm visited on: 4/12/2015

The court relied on the words of Denning L.J[34] that the test is whether hand the employee is employed as part of the business and his work is an integral part of the business or whether his work is not integrated on to the business but is only accessory to it. The court concluded that though the applicant was not at par with the other employees, but he was part and parcel of the organization and was hence a workman as per the integration test.

Rev. Father Alexis Benedict of Youth Fisheries Training Project v. Denzil Perera and Others[35],

A youth development project was established to train youth in deep sea fishing. The development project availed the services of the applicants who were trained fishermen, these applicants were paid an equal share of 50% for the catch at the end of each month. The other 50% was to the project to meet the expenses for maintenance, repairs, renewals, etc. though

There were no letter of appointment issued to the applicants, An Employees' Provident Fund Scheme and an Insurance Scheme were introduced by the project for the benefit of these applicants. Accommodation was also provided to the applicants. The court applied the control test, integration test and economic reality test and stated that the project exercised control over many aspects of the venture and bore the financial risk of the venture. The court decided that they were integral part of the project and were employees of the appellant as a matter of economic reality.

In ***Sri Lanka Insurance Corporation v. Commissioner of Labour[36]***, the Corporation included the Respondent in the panel of Motor Car Assessors in 1964. He was required to undertake inspections, assessments, investigations and other work of similar nature connected with insurance claims, in any part of the country and thereafter submit a report with least possible delay. The report had to reach the Motor Claims Department within three days of the examination of the vehicle. He had to be available at short notice to receive his work assignments. The letter of appointment did not show that he had right to delegate to someone else the work assigned to him. He was paid on piece rate basis a fixed remuneration for each report submitted, and traveling and subsistence payments as well. He was also expected to safeguard the interests of the

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[34] Denning L.J. in *Stevenson Jordon and Narrison Ltd. v. Macdonald and Evans* held that some work done by an accountant was within a contract of service and some work done by him was outside.
"The test usually applied is whether the employer has the right to control the manner of doing the work. Thus in *Collins v. Herts County Council* Mr. Justice Hilbery said 'The distinction between a contract for services and a contract of services can be summarised in this way: In the one case the master can order or require what is to be done, while in the other case he can not only order or require what is to be done but how it shall be done'. But in Cassidy v. Ministry of Health Lord Justice Somerwell pointed out that the test is not universally correct. There are many contracts of service where the master cannot control the manner in which the work is to be done, as in the case of a captain of a ship. Lord Justice Somerwell went on to say: "one perhaps cannot get much beyond this" Was the contract a contract of service within the meaning which an ordinary person would give to the words?". I respectfully agree. As (Sir Raymond Evershed M. R.) has said, it is almost impossible to give a precise definition of the distinction. It is often easy to recognise a contract of service when you see it, but difficult to say wherein the difference lies. A ship's master', a chauffeur and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship's pilot a taximan and a newspaper contributor are employed under a contract for services". Available at: http://www.lawnet.lk/docs/case_law/slr/HTML/1989SLR1V347.htm visited on: 4/12/2015

[35] Who is a Workman? A critical evaluation of the tests to differentiate a workman from an independent contractor in the light of judicial decisions by: A. Sarveswaran Retrieved from: http://archive.cmb.ac.lk/research/bitstream/70130/1632/1/HRM_%26_MOS_131_142.pdf visited on: 4/12/2015 at: 11:50

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Corporation. The court said that the Respondent had a long standing and stable relationship with the Corporation until his retirement in 2002, and he was under a duty to act according to the instructions given by the Corporation and the conditions in the relevant document. The court applied the control test and held that the Respondent was not performing services on his own account and he was selected to perform services to the Corporation and as such he was a workman under a contract of service.

C. Comparative Analysis of the Industrial Disputes Act of India and the Industrial Disputes Act of Sri Lanka[37]The following table shows a comparative distinction between the Industrial Disputes Act of India and Sri Lanka. It also highlights the areas in which either of the Statute are silent and therefore provides scope for improvements.

AREA	INDIA	SRI LANKA
DEFINATION INDUSTRIAL DISPUTE	Any dispute or difference between:- employers and employers employers and workmen employers and workmen which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person;[38]	Any dispute or difference between (a) employer(s) and workmen (b) workmen and workmen connected with the employment or non-employment, or the terms of employment, or with the conditions of labour, or the termination of the services, or the reinstatement in service, of any person, and for the purpose of this definition "workmen" includes a trade union consisting of workmen;[39]

[37] Prepared By: Ms. Aufa Karnalkar V BSL LL.B (ILS Law College) during Internship at NJA from Nov.2 to 21, 2015
[38] Sec 2(k) of IDA India
[39] Sec 48 of IDA Sri Lanka

DISPUTE SETTLEMENT MECHANISM	Industrial Disputes Act of Indian provides for 6 authorities. Conciliation Officer, Board of Conciliation, Court of Inquiry, Labour Courts, Tribunals and National Tribunal.	Conciliation, Arbitration, Labour court, and Industrial court. Any written agreement between employer and employee is also considered.
JURISDICTION	The jurisdiction of the authorities are enumerated in the Act itself. The Labour Court decides disputes enumerated in the Second Schedule. The Tribunal decides disputes enumerated in the Second and Third Schedule. Questions of National Importance are decided by the National Tribunal.	When the commissioner is satisfied of the existence or apprehension of an industrial dispute, the commissioner will cause to settle the dispute in either of the following ways :- (a) settlement of dispute in pursuance of any agreement between the organization and employees (b) settle the dispute by Conciliation (c) refer the case to an authorized officer for conciliation (d) refer the dispute to Arbitration (with consent of parties) (e) refer the dispute to Labour Court (f) The Minister may, by an order in writing, refer any industrial dispute to an industrial court for (g) settlement[40]
PROCEDURE	The authorities and the Arbitrator have the power to frame their own procedure[41]. Certain powers of the	The Minister is empowered to frame regulations for the Procedure to be followed by industrial court,

[40] Sec 3 of IDA Sri Lanka
[41] Sec 11 IDA India

	Civil Court are also vested in these authorities[42]. In addition the Central and State Government are also empowered to frame rules regarding the Power and procedure of these Authorities.[43]	arbitrator and labour tribunal. However industrial court is empowered to make procedure to be followed in conducting inquiry.[44] Procedure of labour tribunal are made by the Minister of justice in concurrence with the Minister of Labour.
WORKS COMMITTEE AND GRIEVANCE SETTLEMENT COMMITTEE	The Industrial Disputes Act India compulsorily requires a works committee in every industry employing 100 or more workers to ensure good relation between employer and employee [45] and Grievance Settlement Committee in every industrial establishment with 50 or more workmen for settlement of Industrial disputes connected with an individual workman employed in the establishment.[46]	Such an arrangement is absent in the statute of Sri Lanka but similar provisions are made in the Works Committee Act.
INSPECTION OF RECORDS	Such provision though not contained in the Industrial Disputes Act, but similar provisions are made in the Factories Act.	A duty is cast on the employer to make available for inspection by the Commissioner or any Labour Officer or any other prescribed officer any registers or records required to be maintained by him under the Wages Boards Ordinance, the Maternity Benefits Ordinance, the Shop and Office Employees Act, or the Employees' Holidays Act, and such other

[42] Sec 11 (3) IDA India
[43] Sec 38 (2)(a) IDA India
[44] Sec 24(2) of IDA Sri Lanka
[45] Sec 3 IDA India
[46] Sec 9C IDA India

		registers or records as may be prescribed.[47]
COLLECTIVE BARGAINING	Though expressly the term "collective bargaining" does not find place in the statute, but Sec 18 (1) of the IDA, provides that memorandum of settlements entered into between workmen represented by trade unions and employers would be binding upon the parties.	Part III of the Act defines Collective agreement, and also provides that the Commissioner shall publish the Collective Agreement in the Gazette.
STRIKE [48]	Definition of strike is the same in both Countries. The definition of strike in Sri Lanka is contained in the Trade Unions Ordinance.[49]	
PROHIBITION OF STRIKES AND LOCKOUT[50]	Strikes and lockouts are prohibited in Industrial Establishments during Conciliation proceedings and 7 days after the conclusion of conciliation proceedings Proceedings in labour court, Tribunal, National Tribunal and 2 months after the conclusion of these proceedings Arbitration proceedings and 2 months after the conclusion thereof Any period in which a settlement or award is in operation	No such provision in Sri Lanka

[47] Sec 44C of IDA Sri Lanka
[48] Chapter V of IDA India
[49] Sec 2Q IDA India and Part I of Trade Unions Ordinance.
[50] Sec 23 of IDA India

LAYOFF	Compensation is calculated at 50 % of the Basic wages and Dearness Allowance for 45 days only.	No mention of lay off in the IDA of Sri Lanka. However termination of employment of workmen is governed by the Termination Of Employment Of Workmen (Special Provisions) Act.
COMPENSATION IN CASE OF LAYOFF[51]	Compensation is not paid if he refuses to accept any alternative employment in the same establishment from which he has been laid-off, or in any other establishment belonging to the same employer situate in the same town or village or situate within a radius of five miles from the establishment (a) if he does not present himself for work at the establishment at the appointed time during normal working hours at least once a day; if such lay off is due to strike or slowing-down of production on the part of workmen in another part of the establishment.	Termination Is governed by the formula provided for calculating the compensation as contained in the Schedule.
RETRENCHMENT	(a) voluntary retirement of the workman; or (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman	Retrenchment" means the termination by an employer of the services of a workman or workmen on the ground that such workman or workmen is or are in excess of the number of workmen required by

[51] Sec 25C of IDA India

	concerned contains a stipulation in that behalf; or termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or (c) termination of the service of a workman on the ground of continued ill-health.	such employer to carry on his industry.[52]
However in India as well as Sri Lanka, the benefits of retrenchment is given only to the workman who has been employed in any industry for a period more than one year.		
Both the countries have made provisions for giving preference to retrenched workers in case of re-employment by the employer.[53]		
CONDITIONS PRECEDENT TO RETRENCHMENT OF WORKMEN AND SERVICE OF NOTICE[54]	Workman who has been in continuous service for not less than one year under an employer shall be retrenched by that employer on the following conditions:- (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice (b) the workman has been paid, at the time of retrenchment, compensation equivalent to fifteen days' average pay for every	Where an employer intends to effect retrenchment in respect of any workman employed in an industry carried on by that employer, he shall, unless such retrenchment is in consequence of an agreement between the employer or the representative of the employer and the workman or the representative of the workman, or a settlement or award under this Act (a) give to that workman at least one month's notice in writing of such intention, and, if that workman is a member of a trade union, to that trade union, and (b) send a copy of such notice to the Commissioner.[55]

[52] Sec 48 of IDA Sri Lanka
[53] Sec 25H of IDA India and Sec 59 of IDA Sri Lanka
[54] Sec 25F of IDA India
[55] Sec 31G of IDA Sri Lanka

	completed year of continuous service or any part thereof in excess of six months; and (c) notice in the prescribed manner is served on the appropriate Government or authority	No employer shall effect retrenchment in respect of any workman to whom he has given notice of his intention to do so until after the expiry of two months after the date of such notice.[56]
PRINCIPLE OF FIRST COME LAST GO[57]	In the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category	No such provision in Sri Lanka
FURNISHING OF SECURITY IN CASH	No such provision is contained in the IDA in India	The employer is required to furnish security in cash in case such employer (a) appeals to the High Court against an order of a labour tribunal or (b) makes an application in revision or (c) makes an application for the issue of writ of *certiorari, prohibition, procedendo* or *mandamus* against the President of a labour tribunal, in respect of an order made by such President. The amount of security to be deposited is also contained in the Act.[23]
NOTICE OF CHANGE IN CERTAIN MATTERS[58]	In case the Employer proposes to effect any change in the conditions of service applicable to any workman in respect of any matter specified in the Fourth Schedule,	No such provision in Sri Lanka

[56] Sec 31H of IDA Sri Lanka
[57] Sec 25G of IDA India 23
Sec 31C (4) of IDA Sri Lanka
[58] Sec 9A of IDA India

	shall give the worker a notice of the nature of such change	
COMPENSATION FOR TRANSFER OF UNDERTAKING[59]	Where on account of transfer of ownership or management of an undertaking from present employer to a new employer, every workman who has been in continuous service for not less than one year in that undertaking immediately before such transfer and whose service is interrupted and terms and conditions of the service become less favorable, the workman is entitled to notice and compensation as if the workman had been retrenched.	No such provision in Sri Lanka
COMPENSATION TO WORKMEN IN CASE OF CLOSING DOWN OF UNDERTAKING[60]	Where an undertaking is closed down for any reason whatsoever, every workman who has been in continuous service for not less than one year in that undertaking immediately before such closure shall, be entitled to notice and compensation, as if the workman had been retrenched.	No such provision in Sri Lanka
CONFIDENTIALITY OF MATTERS	In case the trade union, person, firm or company, in question has makes a request in writing to the conciliation officer, Board, Court, Labour Court, Tribunal,	No such provision in Sri Lanka

[59] Sec 25FF of IDA India
[60] Sec 25FFF of IDA India

	National Tribunal or Arbitrator, as the case may be, that the information provided in the course of investigation (which is not available otherwise than through the evidence given before such authority) shall be treated as confidential; then such information shall not be included in any report or award under this Act.[61]	

[61] Sec 21 of IDA India

D. The Employment Relationship (scope) in Sri Lanka

By: **RKS Suresh Chandra**[62]

I. Introduction

The employment relationship in Sri Lanka is based on the Employer-Employee relationship, which over the years has gained protection under the law. The common Law concept of the contract based on a Master and servant relationship under the Roman Dutch Law, which was later influenced by the English Law concepts. The influence of English Law was seen mostly in the area of the rights and liabilities of the Master and servant relationship in regard to third parties.

The relationship comes into being when a person lets out his services to another who hires them for a fee. Under the Roman Dutch Law the relationship between the Employer and the Employee as treated as a pure contract between equals as free agents. However, such a description does not divulge the realities of the situation in relation to social and economic factors as the relationship in most instances in not one between equals as the economic disparity between the parties would often show that the contract is not one between equals. The contract of employment under the Roman Dutch Law imposed rights and duties on both parties for the breach of which remedies falling short of specific performance were available.

But with the advent of social welfare legislation, the contract of employment has undergone a transformation with the emphasis on the protection of the Employee's rights specially in relation to wages, conditions of employment, health and safety and termination. The modifications in the Common Law have been brought about by legislation, the rise of the Trade Unions and collective bargaining and has resulted in rendering the relationship to one more of status rather than that of a strict contract. This position in Sri Lanka is clearly seen in the area categorised as "dependant workers" but in the area of self-employment the position under the Common Law remains the same with no additional protection being afforded to them by law.

According to a survey on the labour force in Sri Lanka carried out in the year 2000 the economically active population was estimated at 6.7 million of which 6.17 million were employed and 0.53 million were unemployed. Nearly half of the working age population is economically active. Of all working age males, 66.6 percent are economically active while nearly one third of the working age females are economically active. The total activity rate increased up to the age group 35-39 years and declined thereafter. The highest participation rate can be seen in the age group 40-44 years for males and in the group 35-39 years for females.

Of the employed persons 67.2 percent are males and 32.8 percent are females. Occupations under the major industrial group "Agricultural, Livestock and Fisheries" have dominated all other industrial groups in the rural sector. More than half the employed persons are reported under the major industrial groups "Personal and community Services " and "Trade and Hotels" in the urban sector. Of the employed persons, nearly 57 percent work as "employees" and another 28.6 percent work as "own account workers".

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[62] Retrieved from: http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/genericdocument/wcms_205382.pdf visited on: 7/12/2015 at: 11:27

Out of a total of 100 percent, 13.8 percent are in the public sector, 43.9 are in the private sector, 27 percent are own account workers and 13.2 are unpaid family workers according to the aforesaid statistics.

The majority of the population in Sri Lanka fall into the category of dependant workers, in relation to the Government sector and the Private sector. Those in the Government Sector do not come under the purview of Labour legislation and it is only the private sector and the semi government sector who come under their purview. In the private sector although labour legislation is expected to be followed in a uniform manner, the manner in which they are followed in practice is not really satisfactory. The employers can be categorised into a Formal Established Category and a non-formal and not properly established category or small time employers. The Established Categories generally follow the Labour Legislation with much responsibility but they are very often observed in the breach by the latter category. This perhaps is due to the fact that Sri Lanka is still a developing country and the machinery for the proper implementation of the labour legislation is not quite in place.

In the area of dependant workers, there are attempts by employers to disguise such relationships by employing common law concepts such as "contract work", "contract employment", "labour contracts", "hiring of labour" etc. However, such concepts have been proved to be unsuccessful when challenged in Courts. The latest trend seen in this connection is the concept of "outsourcing" whereby matters which are cumbersome to be handled by an organisation are handed over to a third party on the basis of a contractual agreement.

There is no legislation covering self-employment in Sri Lanka though occasionally attempts have been made to introduce welfare schemes regarding them.

II Dependant Work and Independent Work

The protection granted by legislation applies to employees who are strictly so called. Therefore the distinction between Independent Contractors and Workmen has been maintained in this area. This is so specially because apart from the Shop and Office Employee's Act , there is no other Statute which imposes an obligation on the employer to issue a letter of employment to employees. In the said Shop and Office Employee's Act S.17 provides that "Every employer by whom any person is employed in or about the business of any shop or office shall furnish such person on the date of his employment with such particulars as may be prescribed relating to the conditions of his employment". So, in the absence of a letter of appointment and sometimes in the absence of documentation to establish such a relationship, the distinction between Independent Contractors and Workmen becomes all the more important.

The Statutes dealing with Labour legislation such as the Industrial Disputes Act, The Shop and Office Employees' Act, The Wages Boards Ordinance, The Workmen's Compensation Ordinance, The Employees' Provident Fund Act, The Employees Trust Fund act, The Factories Ordinance, etc have definitions of Employers and Workmen which facilitate the drawing of the above distinction between Independent Contractors and Workmen.

The Shop and Office Employees' act No.19 of 1954 which is an Act providing for the regulation of employment, hours of work and remuneration of persons in shops and offices and for matters connected

therewith or incidental thereto defines an "Employer" (a) in relation to any shop, means the owner of the business of that shop, and includes any person having the charge or the general management and control of that shop, and (b) in relation to any office, means the person carrying on, or for the time being responsible for the management of, the business for the purposes of which the office is maintained.

The Employment of Women, Young Persons, and Children Act No.47 of 1956 defines an "Employer" as any person who on his own behalf employs or on whose behalf any other person employs any woman, young person or child and includes any person who on behalf of any other person employs any woman, your person or child.

The Industrial Disputes Act No.4 of 1950 has the following definitions:

"Employer" means any person who employs or on whose behalf any other person employs any workman and includes a body of employers (whether such body is a firm, company, corporation or trade union) and any person who on behalf of any other person employs any workman.

"Workman" means any person who has entered into or works under a contract with an employer in any capacity, whether the contract is expressed or implied, oral or in writing, and whether it is a contract of service or of apprenticeship, or a contract personally to execute any work or labour, and includes any person ordinarily employed under any such contract whether such person is or is not in employment at any particular time, and includes any person whose services have been terminated.

The Workmen's Compensation Ordinance No.19 of 1934 has the following definitions:

"Workman" means any person who is employed on wages not exceeding five hundred rupees per mensem in any such capacity as is for the time being specified in Schedule II, whether the remuneration is calculated by time or by work done or otherwise, and whether the contract of employment or service was made before or after the commencement of this Ordinance and whether such contract is expressed or implied, oral or in writing.

"Employer" includes the Republic of Sri Lanka and anybody of persons whether corporate or unincorporate and any managing agent of an employer and the heirs, executors or administrators of a deceased employer, and, when the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract or service or apprenticeship, means such other person while the workman is working for him.

The Wages Boards Ordinance No.27 of 1941 has the following definitions:

"Employer" means any person who on his own behalf employs, or on whose behalf any other person employs, any worker in any trade, and includes any person who on behalf of any other person employs any worker in any trade.

"Worker" means any person employed to perform any work in any trade.

The Trade Unions Ordinance No.14 of 1935 has the following definition:

"Workman" means any person who has entered into or works under a contract with an employer in any capacity, whether the contract is express or implied, oral or in writing, and whether it is a contract of service

or of apprenticeship, or a contract personally to execute any work or labour and includes any person ordinarily employed under any such contract, whether such person is or is not in employment at any particular time.

The Maternity Benefits Ordinance No.32 of 1939 has the following definitions:

"Employer" means any person who on his own behalf employs or on whose behalf any other person employs any woman worker; and includes any person who on behalf of any other person employs any woman worker.

"Woman worker" means a woman (other than a woman employed in or about the business of a shop or an office or a woman whose employment is of a casual nature) employed on wages in any trade, whether such wages are calculated by time or by work done or otherwise and whether the contract of employment or service was made before or after the commencement of this Ordinance, and whether such contract is expressed or implied, oral or in writing.

The Employees' Provident Fund Act No.15 of 1958 has the following definitions:

"Employer" means any person who on his own behalf employs, or any person on whose behalf any other person employs, or any person who on behalf of any other person employs, any person in a covered employment.

"Employee" includes any apprentice or learner who is paid a remuneration.

The Employees' Trust Fund Act No. 46 of 1980 has the following definitions:

"Employer" means any person who employs or on whose behalf of any other person employs, any workman and includes a body of employers (whether such body is a firm, company, corporation or trade union) and any person, who on behalf of any other person, employs any workman, and includes the legal heir, successor in law, executors or administrator and liquidator of a company and in the case of an unincorporated body, the President or the secretary of such body, and in the case of a partnership, the managing partner or manager.

"Employee" includes any apprentice or learner who is paid a remuneration.

The Termination of Employment of Workmen Act No.45 of 1971 has the following definitions:

"Employer" means any person who employs, or on whose behalf any other person employs, any workman and includes a body of employers (whether such body is a firm, company, corporation, trade union or other body unincorporate), and any person who on behalf of any other person employs and workman.

"Workman" has the meaning as in the Industrial Disputes Act.

The Payment of Gratuities Act No.12 of 1983 has the following definitions:

"Employer" means any person who employs or on whose behalf any other person employs any workman and includes a body of employers or any person who on behalf of any other person employs any workman any person or body of employers who or which has ceased to be an employer.

"Workman" means any person who has entered into or works under a contract with an employer in any capacity. Whether the contract is expressed or implied, oral or in writing and whether it is a contract of serviced or of apprenticeship or a contract personally to execute any work or labour and includes any person ordinarily employed under any such contract whether such person is or is not in employment at any particular time, and includes any workman whose services have been terminated.

The above definitions are fairly comprehensive and encompass a fairly wide area where the contract of employment can arise. Situations have arisen where the above definitions have been the subject of analysis by Courts but such situations are few as set out below.

Apart from the definitions in these statutes, the Sri Lankan Courts have even where there have been letters regarding the contract of employment which do not clearly draw out the distinction, looked into the realities of the situation and decided in favour of the employee. The Courts have in this connection used the traditional tests, viz**., The Control Test, The Integration Test and the Economic Reality Test.** Vide Carson ***Cumberbach &*** *Co. Ltd. v. Nandasena* 77 N.L.R.73; *Associated Newspapers of Ceylon Ltd. Vs De Silva* 1978-79 2S.L.R.173; *Ceylon Mercantile Union v Ceylon Fertilizer Corporation* 1985 1 S.L.R. 40; *Perera v Marikkar Bawa Ltd*. 1989 1 S.L.R. 173.

The definition of Employer and Workman have been the subject of analysis in some cases the most noteworthy of which is the decision in *Carson Cumberbatch & Co. Ltd. v Nandasena*. This case dealt with the position of a Managing Agent of the Employer and the Court came to the conclusion that there was no contract of employment between the workman and the Agent. Justice Tennekoon in the course of his Judgment dealt with the definition of the term "Employer" in the Industrial Disputes Act. He stated that the definition can be split up into three limbs:

1) any person who employs any workman,
2) any person on whose behalf any other person employs any workman,
3) any person who on behalf of any other person employs any workman.

Justice Tennekoon went on to state that "We are of opinion that the person referred to as a person employing a workman in each of the three limbs of the definition is intended to refer to a person who is under contractual obligation to the workman. Thus the first limb of the definition will catch up a person who himself engages a workman and also one who engages a workman through an agent who is known to the latter to be acting as agent; the second limb will apply to a principal on whose behalf an agent, without disclosing the existence or identity of his principal engages the services of a workman; in such case the workman on discovering the existence and identity of the principal can hold him to the contract; the 3rd limb would include the type of agent who is referred to under the second limb, because in such a case the agent is at common law regarded as having contracted personally."

Apart from this Judgment there has been no other instance where the definition of "Employer" has been dealt with in great detail. A comparison was made with the definition of Employer in the Workmen's compensation Ordinance, The Shop and Office Employees'Act, the Maternity Benefits Ordinance.

In *De Silva v. Associated Newspapers of Ceylon Ltd*. the question arose as to whether a news correspondent who was appointed under a series of written contracts which were renewed from time to time came within the definition of the term "workman" in the Industrial Disputes Act when his contract was not renewed and when he sought relief from the Labour Tribunal. The Court of Appeal in the course of its Judgment stated thus: "The inadequacies of the "control test" have led Judges to formulate other tests in the context of modern

industrial complexities. One of them known as the "integration test" was formulated by Lord Denning thus: "under a contract of service a man is employed as a part of the business; whereas under a contract for services, his work although done for the business, is not integrated into it, but is only accessory to it". *Stevenson, Jordan and Harrison Ltd. v McDonald and Evans* or as stated by the same learned Judge in another case "The test of being a servant does not nowadays depend on submission to orders. It depends on whether a person is part and parcel of the organisation. …..In *U.S. v Silk* the Supreme Court of the United states has decided that in determining whether certain person were "employees" within the meaning of a statute the test to be applied is not "power of control" whether exercised or not, over the manner of performing services to the undertaking", but whether the men were employees "as a matter of economic reality". Based on this decision the English courts have recently evolved a test which is really a refinement of the integration test, and it was status thus by Cooke, J in *Market Investigations Ltd. v Minister of Social Security* "the fundamental test to be applied is this: Is the person who has engaged himself to perform these services performing them as a person in business on his own account? If the answer to the question is 'yes' then the contract is a "contract for services". If the answer is "no" then the contract is a "contract of services".

The Court reached the conclusion that the correspondents of the Newspaper Company were certainly not doing business on their own account. They were employed as part and parcel of the company's business of newspaper publishers. They were an integral part of the company's business, and not merely accessory to it. They were therefore employed under contracts of service by the company and were "workmen" within the meaning of the Industrial Disputes Act.

In *Perera v Marikar Bawa* the question arose as to whether a person engaged as the Head Cutter of the Tailoring establishment of the Respondent Company was a workman within the definition of the term in the Industrial disputes Act. Perera was provided with a cubicle but employed his own workmen and used his own tools. The Company passed on tailoring orders to him and on execution he was paid a commission from the collections for each month. The company collected the payment from the customer and kept the accounts. The appellant did not sign the attendance register and was not entitled to a bonus like other employees.

Justice Viknarajah having considered the Control Test, the integration test and the economic reality test went on to state that it would appear that the greater the skill required for an employee's work, the less significant is control in determining whether the employee is under a contract of service. Control is just one of many factors whose influence varies according to circumstances. The test which emerges from the authorities seem to me, as Denning L.J. said, whether on the hand the employee is employed as part of the business and his work is an integral part of the business or whether his work is not integrated on to the business but is only accessory to it or as Cooke J expressed it, the work is done by him in business on his own account. The appellant did not carry on his business of head cutter as a business belonging to him. It was a business done by the appellant for the respondent. He was not on par with the other staff of the respondent because the mode of payment was different but he still remained part and parcel of the organisation. The Court held that the appellant was an employee within the meaning of the Industrial Disputes Act.

The above cases have expanded the concept of "workman" widely to encompass what would normally have been though not to be a contract of employment. The widening of the net of the term workman brings with it with several other consequences. The payment of provident fund, trust fund, gratuity, regulation of work in respect of time and payments, termination would have an effect if a person is brought under the definition of the term "workman". It would be a fruitful academic exercise to expand the concept of workman in order to bring in new areas under its umbrella, but at the same time several far reaching consequences would also arise specially from the point of view of the employer. In a world of extreme competition it would be timely to consider whether such expansion should be done or not.

The situations which have been brought under the umbrella of the term "workman" would probably have never been envisaged by the parties to constitute situations of contracts of employment. They would have been quite satisfied with the terms agreed upon at the commencement of the arrangement. But only when disputes arise specially when the contract is not renewed or there is a cessation of the contract that the question of the application of the relevant laws come into play. It would appear that the party seeking to establish a contract of employment is certainly trying to take advantage of the situation and to put the employer into jeopardy. Therefore it may be necessary to consider the basis of the creation of the relationship and its genuineness before embarking on the attempt to establish a contract of employment so that the party seeking to establish that he is a workman can get the advantage of the application of the various aspects of labour legislation. In order to do this it would be necessary to consider the intention of the parties at the commencement of the relationship, which could be gathered from the attendant circumstances. However, the case law which has considered these situations have been centered on the actual working of the relationship and not as regards the intention of the parties.

The definitions in the above Statutes which are favourable to employees has sometimes resulted in Employers adopting ways and mean of avoiding the statutory duties caste on them for example employing labour through a Labour Contractor. However, case law in Sri Lanka is indicative of the fact that such methods have been failures as the tendency is to bring the employee under the definition of the term "workman". Vide *Fertilizer Corporation v. The Ceylon Mercantile Union.*

In this case The Fertilizer Corporation employed labour through a third party with whom there was a contractual agreement to supply labour. However, it was shown that the Corporation had exercised control over the employees supplied by the third party and that the contract entered into between the corporation and the third party was a subterfuge to overcome the application of the labour laws. It was held that the Corporation was the employer of the employees.

A similar situation arose in relation to the Termination of Employment (Special Provisions) Act in the case of *Free Lanka trading Co. Ltd. v De Mel* 1979 N.L.R. Vol. 2 188. Seven persons were engaged by the Company as "Technical Sales representatives" on a written agreement. Clauses 3(e) and 5(f) of the agreement read as follows:

3(e) "The Independent Agents agrees to determine for himself the hours and days he will work in the company's behalf and will only submit those reports to the company that he deems necessary in the conduct of his business as an Independent Agent."

5(f) "The Independent Agent is aware of the definition of 'worker' as appearing in the annual Holidays Act, Shops and Office act, Wages boards Ordinance, Workmen's compensation Ordinance and the definition of 'employee' as appearing in the Industrial Disputes act, and agrees and acknowledges that he is not within such definitions and that he has received legal advice to that effect and to the import and meaning of all the provisions of this Agreement."

However, it appeared that in fact, the position was that the work done by these Sales Representatives and their relations with the management were regulated not by the terms of this agreement but carried out in a very different manner very much at variance with the said terms. The conduct of the business by these Sales Representatives and the mode of the discharge of their duties appeared to have been very much under the control of the management and so much so that they had, inter alia, to finish Daily Call Sheets, a work calendar every Saturday for the following week, weekly reports on sales etc. and came under the direct supervisions and disciplinary control of the general sales Manager.

It was held (l) that the said agreement appeared to have been entered into so as to erect a façade under cover of which the management could seek to avoid performance of obligations cast by law upon employers towards the employees. Though it is proved that the representatives were paid a commission or a salary and commission, the mode in which remuneration was paid was not decisive on the question whether a person was an employee or an independent contractor.

(2) That the clauses of the said agreement which purported to set out the agreement of the parties on the legal effect were not relevant as the contract was not intended to be and/or was not acted upon.

(3) That the Sales representatives came within the category of workmen within the meaning of the Act.

Apart from the conventional types of employment such as where an organisation engages persons to work for them in their institution, there are certain types of situations in Sri Lanka which may be necessary to consider.

In the transport sector, relating to the plying of lorries, taxis and three wheelers (tri-shaws) there is an arrangement between the Owner of the Cab or three wheeler with the person engaged to drive such vehicle for profit sharing. Out of the earnings for the day, the amount for expenses are set apart and out of the net balance a portion is paid to the driver, usually one third and the balance is taken by the owner of the vehicle. In some instances there is a fixed amount that has to be paid by the driver to the owner at the end of the day irrespective of the amount that has been earned for the day. There is a tendency to consider such situations as creating employer employee relationships which may bring into effect the application of the labour laws. If that happens, fairly a large number of owners of vehicles will desist in supporting the transport system of the country.

In the industrial sector, in the use of lathe machines, there is a practice where owners of lathe machines have arrangements with operators of such machines where the owner collects a fixed amount at the end of the day from the operator. If this situation is brought under the economic reality test, since the machinery belongs to

the owner and very often it is in a building owned by him, the owner would be considered as having an employer-employee relationship with the operators of the lathe machines.

In village areas, there is a practice relating to the manufacture of beedis (a small cigar where tobacco is rolled up in a special kind of leaf) which is popular among manual labourers, where the entrepreneur engages mostly women to produce the cigars by providing them with the leaf and the tobacco which are taken to their homes. The women hand over the manufactured beedis to the owner and collect a fee for their labour. If the advanced tests used by Courts are applied to this situation, it may be argued that this situation also brings about an employer-employee relationship.

There is a similar practice regarding the manufacture of joss sticks (incense sticks) where again the raw material is given out to people who take it to their homes and produce the finished product.

The concept of "outsourcing" is a new innovation adopted by some manufacturers and organisations to reduce the hazzle of controlling labour and having space to house labour etc. This is seen in some organisations in relation to the providing of security, where rather than having their own employees to provide security in the organisation, the entire security aspect is handed over to a Security Company who would engage their personnel to carry out the security work of the organisation.

Similar arrangements are seen sometimes in the transport sector of some organisations. Rather than having their own transport managers and drivers to drive vehicles, vehicles are hired out from outsiders to provide the necessary transport of the organisation, thus doing away with employing drivers.

It has also been observed in certain Garment Manufacturing Companies, that certain items are given out to third parties, such as for example doing a small embroidery pattern on a ladies garment and such third parties take it to their own homes and attend to same and get paid on a piece rate basis.

Similarly it has been observed certain manufacturers in confectionaries, give out their products to third parties for purposes of wrapping or bottling who do the same outside the manufacturers factory and get paid on a piece rate basis.

The question of whether such "outsourcing" would attract the application of the labour laws is yet to be seen.

In recent times, certain problems have been encountered by some institutions in relation to the engaging of skilled personnel in relation to their businesses which have been traditionally considered as not bringing about an employer-employee relationship.

This has occurred in the area of the payment of Employees Provident Funds. The labour Department has in recent times taken the view that such relationships do not debar the application of the Employees Provident Fund Act and has called upon Institutions to pay such funds for persons who had been engaged by them for period of 30 to 40 years and in relation to whom the payment of such provident funds had never been considered. Such situations are seen in relation to Insurance business, where persons who are engaged as "Assessors" who are not considered as employees but who are called upon to assess damages to vehicles when insurance claims are made and who are paid on the basis of assessments done by them. Such persons had not been considered to come under the purview of the E.P.F. Act for the 30 to 40 years that they have been

engaged as Assessors but suddenly the Institution is being called upon to pay them their Provident Funds. This has created a very serious situation in Sri Lanka and would certainly lead to litigation.

If the issuing of a letter of appointment is made mandatory by legislation, it may be possible to overcome the difficulties encountered in relation to the determination of the question of whether an employee is a workman or an independent contractor to some extent. But caution must be drawn to the fact that an employer may try to issue a letter of appointment, which would on the face of it show that there is no contract of employment. However, in such situations as shown above the Courts would determine whether there exists a contract of employment or not.

The question of whether a person engaged by another is a workman or not is determined specially when there has been a termination of such engagement and the Employer takes up the position that the claimant is not a workman when the workman challenges such termination. Termination is challenged in Sri Lanka in two situations.

If the termination is categorised as a non-disciplinary termination, i./e. where termination has taken place due to reasons which are not categorised as disciplinary reasons, then the forum for such challenge is the Commissioner of Labour in terms of the Termination of Employment (special Provisions) Act No.45 of 1971 where the question of whether the Applicant is a workman or not would be gone into.

On the other hand if the termination is a disciplinary termination then the forum is the Labour Tribunal established under the Industrial Disputes Act No.43 of 1950 which will go into the questions of whether the Applicant is a workman or not. However, the jurisdiction of the Labour Tribunal is not limited to cases of disciplinary termination and has a wider jurisdiction to deal with non-disciplinary terminations as well.

There are certain other instances where the question of whether a person is a workman or not arise specially in relation to the payment of Provident Funds under the Employees' Provident Fund, the payment of Trust Funds under the Employees Trust Fund and the payment of gratuity under the Payment of Gratuity Act. In these instances it is the Commissioner of Labour who is clothed with jurisdiction to determine the question of whether a person is a workman who is entitled to such benefits under the relevant laws.

Apart from these instances where the Labour Tribunal or the Commissioner of Labour would look into the question of the contract of employment, under the legal system of Sri Lanka a person is entitled to go before the ordinary Civil Courts, (District Court) regarding questions relating to employment. However, these ordinary Civil Court remedies are not resorted to as they are time consuming and expensive for the workman.

The manner in which it can be determined as to whether there is a true Employer Workman relationship is to see whether there has been a letter of appointment setting out the terms and conditions of employment, and whether there is compliance with statutory payments by the Employer to the workers, such as provident fund benefits, trust fund benefits, gratuity, minimum wages where stipulated, etc.

If the issuing of a letter of appointment is made mandatory by legislation, it may be possible to overcome the difficulties encountered in relation to the determination of the question of whether an employee is a workman or an independent contractor to some extent. But caution must be drawn to the fact that an employer may try to issue a letter of appointment, which would on the face of it show that there is no contract of employment.

However, in such instances as shown above the Court would determine whether there exists a contract of employment or not.

But as stated above, the issuing of a letter of appointment is set out only in the Shop and Office employment Act which applies to employment in shops and offices and therefore is not mandatory in respect of other categories of employment. In 1994 there was an attempt by the Ministry of Labour to introduce a Labour Charter where one of the proposals was to make the issuing of a letter of appointment mandatory. However, the Charter was not approved.

As to the supervision of the payments of statutory payments by Employers to workers, the Commissioner of Labour is empowered by the relevant statutes to carry out inspections, hold inquiries, to make orders for such payments and to prosecute employers who do not comply with such orders. Though there are effective legislative measures in this sphere, the practical applicability of them due to lack of proper machinery seems to be a major problem in Sri Lanka.

Dependant Work

1. The relationship of employer and employee may be characterised as a 'voluntary relationship into which the parties may enter on terms laid down by themselves, within limitations imposed only by the general law of contract'. It imposes obligations on both parties.

The contract of employment may be identified from the following criteria:

(a) Selection

(b) Giving of orders

(c) control

(d) Right of dismissal

(e) Payment of remuneration.

The definition of the terms "workman", "employer" in the statutes regarding labour legislation are the best sources available in determining the relationship of employer and workman. These definitions have been given above. In addition, case law too as shown above has assisted in establishing this relationship. The term that is used in most of the Statutes to describe the employee in the contractual relationship is the term "workman".

2. The issuing of a letter of appointment, the payment of a salary or wage as opposed to a fee, the exercise of disciplinary control, the contribution to Provident Funds, Trust Funds, payment of gratuity, granting of maternity benefits, seeking the approval of the Commissioner of Labour for purposes of redundancy and closures, are all indicative of the existence of the contract of employment and the relationship of employer and workman. Where these matters are complied with there is an assumption that there exists a proper Employer-workman relationship. The Commissioner of Labour (now known as the Commissioner General of Labour) is the Head of the Labour Department and he has been conferred wide powers regarding the implementation of the provisions of the Labour Statutes.

Therefore where there is no letter of appointment and where there is noncompliance of the statutory requirements in respect of labour legislation, questions arise as to the very nature of the employment as to

whether there exists a true employer-worker relationship. It is in such circumstances when complaints are made to the relevant authorities as stated above that determinations would be made regarding the actual relationship.

3. The provisions in the various Labour Statutes entitle the workman to seek the assistance of the Commissioner of Labour in the event of breaches of the provisions of the labour statutes, for example non-payment of wages, granting of leave, overtime payments, gratuity etc. The Commissioner is empowered to inquire into such complaints and make orders and to enforce them. Such inquiries are conducted by his Officers.

The Commissioner of Labour through his Officers are expected to carry out inspections regularly to see whether Employers carry out the basic conditions of employment specially in relation to the provisions in the Shop and Office Employees' Act, The Provident Fund Act, The Employees Trust Fund Act, The Factories Ordinance, Wages Boards Ordinance, Maternity Benefits Ordinance, even in the absence of complaints regarding breaches. However, this is an area, which is not very satisfactory as many an errant employer is not brought to book or even if action is taken implementation of such action is very slow.

A further drawback in this area is the inability of a worker to take steps to implement orders made by the Commissioner of Labour on his behalf, as such steps have to be taken only by the Commissioner of Labour. Due to the lack of proper personnel and machinery, there are considerable delays in this process. There have been instances where workers have resorted to obtaining Writs of Mandamus against the Commissioner of Labour to compel the commissioner to take steps to enforce orders.

The implementation of the provisions of the various Statutes in carried out by the Commissioner of Labour as only he is empowered to do so. Such actions are taken through the Magistrate's Courts and the procedure that is involved is very slow, as matters relating to labour are taken up sometimes only once a week among other matters. If there are separate Labour Courts dealing exclusively with labour related matters, there would be proper implementation of the various statutory requirements.

4. (a) Conditions of Employment and Remuneration

Conditions of employment are sometimes laid down in certain Statutes e.g. Shop and Office Employees Act, Factories Ordinance. But the proper implementation of these provisions is not very satisfactory, as the supervisions that is expected to be carried out by the Labour Department is not satisfactory.

As regards remuneration, the concept of minimum wages is seen only in the provisions of the Wages Boards Ordinance. But it is only those categories of employees for whom Wages Boards are set up who come under the provisions of this law.

(b) **Occupational Safety & Health Conditions**

Mandatory provisions relating to these are found in the Shop & Office Employees Act, The Factories Ordinance, the Maternity Benefits Ordinance. Here again implementation of these provisions is not very satisfactory due to lack of supervisions by the Authorities.

The Workmen's Compensation Ordinance provides for the payment of compensation for injuries suffered by workmen, including the causing of death in the event of injuries or death resulting out of or arising out of

course of employment. A schedule of payments to be made depending on the nature of the injury is set out in the said Ordinance. Many established employers have taken out Insurance covers in respect of such contingencies. A Commissioner is in charge of the implementation of the provisions of this Ordinance and he is empowered to hold inquiries and determine the quantum of compensation payable. The Ordinance also provides for sickness due to occupational disease and provides for the payment of compensation in such instances too.

(c) **Social Security**

There are no legislative measures in this area.

(d) **Freedom of Association**

It is a fundamental right guaranteed by the Constitution of Sri Lanka. Article 14(1) (c) provides that every citizen is entitled to the freedom of association.

The Trade Unions Ordinance provides for the formation of and registration of Trade Unions. However, the Trade Unions Ordinance does not have any provisions imposing any obligations on an employer to recognise Trade Unions. But the amendment to the Industrial Disputes Act in 1999 has made it mandatory for an Employer to recognise Trade Unions for purposes of collective bargaining. This has been in keeping with the ratification of the ILO Convention regarding same by Sri Lanka. This Act has aroused much dissatisfaction among Employers and the Commissioner of Labour has been rather slow in implementing the provisions of this amending Act.

(e) **Collective Bargaining**

There have been many instances of collective bargaining, which resulted in the formulation of Collective Agreement between Employers and Trade Unions. The provisions of the Industrial Disputes Act provide for the formulation and registration of Collective Agreements. Until the amendment to the Industrial Disputes Act in 1999 there was no compulsion on an Employer regarding collective bargaining. The amendment was again in keeping with the ratification of the ILO convention regarding collective bargaining. However, the provisions in the amending Act do not seem to be quite satisfactory and has caused dissatisfaction among the Trade Unions.

(f) **Access to Justice**

All the Labour Statutes provide for access to the relevant authorities in the event of breaches of the statutory provisions by employers. The Commissioner of Labour is empowered in relation to the various Statutes to grant relief to workmen when complaints are made to him regarding non compliance with statutory requirements. Such complaints may relate to non-payment of wages, non granting of leave, non-granting of bonus payments, non conformity with the Provident Fund and Trust Fund Acts, non payment of gratuity, etc.

The Industrial Disputes Act has provision for conciliatory measures to be taken by the commissioner of Labour when complaints are made to him by employees. Such conciliations can relate to a wide range of industrial disputes inclusive of termination of employment. If by a process of conciliation, a settlement is arrived at, the Commissioner of Labour is empowered to record such settlements which are thereafter binding on the parties.

The Commissioner of Labour has also been conferred the power to refer industrial disputes for settlement by Arbitration. The Industrial disputes Act has provision for voluntary arbitration as well as compulsory arbitration. Voluntary Arbitration is referred to by the Commissioner where both parties agree to a reference to arbitration, while compulsory Arbitration is referred to at the instance of the Minister of Labour. The reference to compulsory arbitration can be in relation to matters pertaining to minor industrial disputes as well as major disputes inclusive of termination of employment.

There is also provision under the Industrial Disputes Act for employees to seek relief from Labour Tribunals in relation to Termination of Employment, and in relation to non-disciplinary termination of employment to seek relief from the Commissioner of Labour under the provisions of the Termination of Employment (Special Provisions) Act.

Labour Tribunals have been conferred a special jurisdiction to grant just and equitable relief including the granting of reinstatement of workmen where termination of the employment is determined as being unjustified. However, such orders can be subjected to an appeal firstly to the High Courts and thereafter even to the Supreme Court.

5. Possible Solutions

The strengthening of the machinery to implement statutory provisions which impose obligations on Employers would ensure the overcoming of most of the problems encountered. Further, public awareness of the provisions of the Statutes too would enable employees to be conscious of their rights which in turn would prompt them to alert the authorities concerned to take action.

A drawback encountered in this area is the delay in the enforcement procedures that are available. There has to be proper legal mechanisms to ensure speedier enforcement of the relevant provisions of law.

As stated above, the enforcement machinery is not quite satisfactory in Sri Lanka as such enforcement has to be done through the Magistrate's Courts. The Labour Tribunals though they have the jurisdiction to determine matters relating to termination of employment and grant relief to workmen in the event of wrongful or unjustifiable termination of employment, have no jurisdiction to enforce such orders. At present Labour Tribunal Presidents are also designated as Additional Magistrates. This move should enable Labour Tribunal Presidents to enforce their orders, but certain amendments may have to be made to the Industrial Disputes Act to enable them to do so. If this is made possible there would certainly be less delay in implementing orders made by Labour Tribunals.

Independent work

The Labour legislation in Sri Lanka does not apply to Independent Workers as they are considered to be their own masters. There is no protection afforded to them under the law except where the contract between them and their employers provide some protection, which would come strictly under the law of contract, and recourse would have to be made to ordinary civil courts. . There are no legal instruments regulating them. Therefore questions regarding conditions of employment, remuneration, occupational safety and conditions, social security, freedom of association, collective bargaining, access to justice, etc do not arise.

III Work of an ambiguous or disguised nature

Situations arise where it is necessary to determine whether an employee is a workman (dependant worker) or an independent contractor. These situations have been dealt with above in relation to Dependent work and Independant work.

As stated above, the main difficulties in determining whether a worker is dependent or independent would be in relation to the nature of the work entrusted, the skill required, the manner in which the work is carried out, the nature of the payment made and the granting of other benefits. If statutory benefits such as payment of provident fund benefits, trust fund benefits, gratuity etc are granted to the employees, they would certainly be considered as dependent workers.

When work is entrusted to persons on the basis of written contracts, which are not usually considered as letters of appointment, questions arise whether such contractual documents are genuine or not and Courts have considered such documents and treated them as situations which tend to avoid the application of labour laws.

As case law has clearly established the position relating to the distinction between workmen and independent contractors, there is a reduction in the attempts to have ambiguous or disguised situations. The only area where there is a development in this regard would appear to be situations where "outsourcing' is resorted to by Institutions to cut down on costs. Outsourcing takes place when certain aspects of a business establishment are taken out of the ordinary routine and given over to a third party to provide for such aspects purely on a contractual basis. The third party may employ labour to carry out such work. In such a situation, the third party would become the employer.

But even situations of "outsourcing" would soon be considered by Courts as there appears to be an increase in the use of this concept. In such an eventuality, it would appear that the courts would treat them in a similar way, as had been the case in determining the distinctions between workers and independent contractors.

IV Case studies

In transport enterprises, drivers are usually employed as employees and are treated as dependant workers who get protection under the various statutes. Some of the drivers are employed on the payment of a salary as stipulated under the Wages Boards Ordinance. Some work on the basis of the sharing of the turnover, which in turn may turn out to be a dependant worker situation.

Sales persons in large stores fall into the same category of dependant workers.

Construction workers too fall into the same category of dependant workers. In this area sometimes a triangular relationship is seen, which is usually referred to as "subcontracting" but here again the employer can be easily identified using the definitions in the various statutes. Even in the instance of sub-contracting, if it appears to be a mere façade the main Employer may be considered as the employer of the workmen under the sub-contractor. Vide the decision in *Ceylon Mercantile Union v The Fertilizer corporation (infra).*

Apart from these, a problem situation has arisen in Sri Lanka regarding the increase in the use of the concept of "contract employment on the basis of a fixed term". Many employers have resorted to this concept in employing personnel in order to avoid regular or continuous employment. Usually fixed term contracts are

resorted to in situation where projects have fixed time periods, as there would be no need to continue the workers after the project is completed. Therefore it is usual to assume that fixed term contracts cannot be utilised where the nature of employment is regular. However, it is seen that many employers resort to this type of fixed term contracts in relation to regular employment of personnel such as labourers, drivers, clerks, etc. whose contracts are renewed every year.

Questions have arisen in relation to such fixed term contracts when after some time there is no renewal of the contract. In such situations, courts have considered the nature of the employment and considered such situations as those of regular employment, and the contractual documents which sets out the fixed term contract are rendered nugatory.

In dealing with dependant work and independent work, different types of situations were considered. For example, the cases of contract labourers, sales representatives, news correspondents, skilled employees in tailoring establishments, beedi wrappers, joss stick assemblers, lathe machine operators, tri-shaw drivers, lorry drivers, taxi drivers, etc. It was seen that in these situations such workers were considered as workmen and thus falling into the category of dependant workers. Once they are categorised under that head, they are entitled to the protection of the various labour statutes enumerated above.

The Workers Charter which was proposed in 1994 had a solution to the problems relating to fixed term contracts by confining such contracts only to specific categories but unfortunately the said Charter did not come into effect.

A further area that needs clarification is the area of "casual employment". Many employers resort to this concept in order to avoid permanent or regular employment. The Statutory provisions are not very satisfactory in this area and need looking into to bring about a satisfactory solution.

The word "casual" denotes such employment as is subject to, resulting from or occupying by chance and without regularity. A casual employee is one employed by chance on no contract to employ. He will be offered work as and when work is available. An employer cannot expect a casual employee to arrive work continuously. He can report for work as and when he so desires. He cannot as of right expect work from the employer. By its very nature such employment cannot confer upon a workman a right to reinstatement as there is no former position in which he can be placed again or a previous state to which he can be restored as in the case a permanent employee. *Vide Merril Fernando vs. Deimon Singho* 1988 2 S.L.L.R.242.

The description or designation on a document where the workman may have agreed to be designated as a casual employee is not conclusive. The actual relationship between the parties much be examined and if it is revealed that the employer had treated the employee as a person with a permanent character, then he will not be treated as a casual employee.

The Workers Charter, which was proposed in 1994, had a solution to the problem relating to casual employee but unfortunately the said charter did not come into effect.

IV Conclusion

The nature of the contract of employment has assumed fairly satisfactory proportions and the basis has been firmly established through the various statutes and case law. The distinctions between workers and independent workers have been clearly set out and all that is required is only refinement of such principles.

The distinction between dependant workers and independent workers is very clearly established in Sri Lanka. As far as work of an ambiguous or disguised nature are concerned, attempts at such have proved to be a failure when brought to book when considering the case law that is available on the subject.

Attempts at creating Triangular situations have also proved a failure in Sri Lanka when brought to book and the distinction between dependant and independent workers has been firmly rooted.

Independent workers do not get special protection under the law except the general law relating to contracts, and they do not get any protection under the labour laws nor are there any welfare measures provided to them under the Labour laws.

In Sri Lanka as there is a strong Trade Union movement, (there are more than 1000 registered Trade Unions) employees are fairly aware of the benefits afforded to them by the various labour statutes. Unawareness of such benefits lies only in the unorganised sector or the small time business community. The only way in which they can be made aware of such benefits is to carry out awareness programmes aimed at such persons specially in the rural areas.

In Sri Lanka the Statutory measures that are available are fairly satisfactory in protecting the workers. There are certain areas where there can be some improvement, specially the need for a mandatory letter of appointment, categorisation of fixed term contracts, settling the questions relating to casual employment, etc. However, the problems are not mainly regarding inadequacy of legal provisions, but in the implementation and enforcement of same. The weaknesses in the enforcement machinery has been stated above. The mechanisms and the machinery available are not adequate and not very satisfactory and this is an area, which has to be strengthened.

V. Rationalizing Labour Legislations in India and Sri Lanka

A. Through the looking glass[63]

By: Usha Ramanathan

ANY halfway decent story has its villain. More often it has a hero, but where the situation cannot produce a hero, there is always the martyr. The story that is currently being scripted has its villain, and its martyr. No marks for anticipating who is who. Anyway, that will become plain pretty soon.

In the beginning, there was the Industrial Revolution, colonization, the emergence of workers' collectives, the consecration of the corporate entity, the birth of civilization and so on. In a more recent beginning, there was the Indian Constitution promulgated on 26 January 1950. The Constitution's appointed task is to protect the weak against the strong. This, then, makes it incumbent on us to figure out where the dominant forces are located and who the relatively weak are. There is internal evidence of how the Constitution understands it. Article 23, for instance, prohibits 'traffic in human beings and *begar* and other similar forms of forced labour.' This is quickly followed up with Article 24 which aspires to protect children below the age of 14 from 'work in any factory or mine or engaged in any other hazardous employment.'

Leave the chapter on fundamental rights behind, and move to the principles that are to guide the state in how to act. Citizens, men and women equally are to 'have the right to adequate means of livelihood'; the economic system is not to 'result in the concentration of wealth and means of production to the common detriment'; the 'health and strength of workers, men and women, and the tender age of children are not to be abused and that citizens are not to be forced by economic necessity to enter a vocation unsuited to their age or strength.' The state is expected to act in ways that advance the 'right to work', provide 'humane conditions of work', maternity relief, a living wage – 'conditions of work ensuring a decent standard of life and full enjoyment of leisure.'[1]

Over the next decades, the meagre fare of the Workmen's Compensation Act 1923, the Trade Unions Act 1926, the Payment of Wages Act 1936, the Employment of Children Act 1938, the Factories Act 1948 was augmented with laws that were to ensure that workers in plantations and mines and those engaged in hazardous processes are not placed at risk, and that their living and working conditions do not drop into despairing depths. So there was the Employees State Insurance Act 1948, the Plantations Labour Act 1951, the Mines Act 1952, the Employees' Provident Fund and Miscellaneous Provisions Act 1952, the Payment of Bonus Act 1965, the Payment of Gratuity Act 1972. The extraordinary vulnerabilities of contract labour and interstate migrant workers were acknowledged in the passage of laws in the seventies.[2] Even a law that admitted to what by definition and effect is slavery – the Bonded Labour Act 1976 – was dared to be enacted.

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[63] Available at: http://www.india-seminar.com/2015/669/669_usha_ramanathan.htm visited on: 4/12/2015 at: 3:55 PM

In the eighties, angst, prompted in fair measure by international disapprobation, brought the exploitation of child labour back to the surface.[3]

The Bhopal gas disaster shattered the silence on the exposure of the worker, and the resident in the vicinity, to hazards hidden away within the perimeters of factories. Till 1987, the worker had no right to ask and learn about the nature and extent of safety and potential hazard in the workplace, and the employer had no obligation to tell. If a worker spotted a safety lapse, there was nowhere to go with the anxiety about risk. The directors of companies who dictated policy had no responsibility for risk, or when risk precipitated into disaster. Hazardous waste could travel through populated, even populous, regions and be deposited in backyards anonymously, with no one the wiser. All this, and a good bit more, changed in the amendment to the Factories Act in 1987.[4]

Then, as the world moved into the nineties, something changed; and that is a euphemism. It began to dawn on the state that the constituency for which it was responsible was the corporation and that it is corporations which are best placed to put countries on the global horizon. Multilateral financial agencies, of course, lent their services to moving on this agenda. So, because 'human rights' had skewered the ambitions of growth and wealth-generating development, a deliberate(d) shift was made from the human rights approach which had dominated the '80s to the 'rights-based approach', thus facilitating a move from substantive rights to procedural rights. There would be the right to be informed and to participation, but that this was likely to be a prelude to diluting the human right to life, and the rights attached to land or to livelihood, was muted.

Then, there was 'structural adjustment', where economies and systems were expected to remould themselves, to shed extra tonnage and become sleek and profitable. Workforces could be shrunk, and security of employment and its appurtenant protections reordered (another euphemism), denuded; and 'safety nets' were to save those who dropped off the employment map. Of course, the 'safety nets' remained mythical, but they were a useful fig leaf. And when that too failed to fool, there was governance. Governments needed systems by which they could govern their people, keep law and order and enable the exploitation of resources with the least disruption. Sounds familiar? How far back in history do we have to go to give this phenomenon a name?

It was an ambitious project to re-present the dominant and the powerful as weakened by the worker. Yet, the ease with which this was achieved deserves attentive study. As the nineties progressed, employers' associations were making a bid for the law to be loosened in ways that would give freedom and liberty to the corporation. The freedom to hire and fire. To casualize labour and reduce the presence of regularized labour. To scrap the law on contract labour which allowed the government to notify work that was of a kind where using contract labour was only meant as a facility for exploiting the vulnerability of that workforce. To shovel the ground away under the feet of the trade union. To take regulators off their back. To revoke the answerability of the directors of corporations – as 'occupiers' – in matters of health, safety and welfare in

factories. To shut down and walk away from establishments without having to report to the government and get its prior permission. These were the imperatives for enabling competitiveness, and profitability.

Sympathy flowed through the governmental system for a decade and more, but getting into the act needed a further leap. That, it seems, has now finally happened. First, there has been the casting away of the fig leaf. There is a frank and fearless averment that the 'reform' of labour laws is to help improve the 'investment climate' and 'investor confidence'. The 'compliance burden' will be flattened out. The 'hardships in ensuring formalities' under the law will be eased. The prime minister travels from country to country in the 'western' world doling out assurances that he will ensure 'ease of doing business'. It is all about 'creating a more enabling environment for transacting business', as one report reveals.[5]

'Let's start with trust', the PM reportedly said while lauding labour reforms. Labour reforms, he said, would make it easier for companies to do business in India and that would fulfil India's aspirations to become a manufacturing hub through a new programme called 'Make in India'. This, of course, is the PM's aspiration encapsulated in a slogan of his making; the project itself appears to have at its core the revamping of labour laws to suit business. The treatment of environmental, land acquisition and resource related laws will perhaps share that trait – of ease of doing business as the rationale offered for the changes – with labour reforms. There is no longer even a pretence that this is for the security and welfare of labour.

Genuflection to the potential investor is accompanied by an admonitory paternalism where the worker is told that he will keep, or lose, his job in line with what the employer decides today as preparation for a tomorrow with more opportunity for employment. This is entirely in consonance with the employers' persistent demand that they be allowed to deal with their workers freed from the shackles of law, and that is the only way they will feel secure in giving workers jobs – a contradiction in terms.

There is, too, the question of employability. In 1961, the Apprentices Act was enacted, intending to let the responsibility for training and skilling youth rest with the employers who had the know-how that the state lacked. That act does not reveal itself as having been effective. In 2014, the 1961 Act was amended to link apprenticeship with a system of reporting and collaborating with the government. It is not immediately clear why the government would expect this spell of the law to work when it had stayed in sunken gloom in the preceding decades. Possibly, the policy imperative of making the teeming youth into an economic advantage is expected to prod this law to life. May be.

A significant segment of labour law is regulatory. So, the Factories Act prescribes standards for health, safety and welfare of the workers; failure to conform to these standards constitutes an offence punishable with fine and imprisonment. The government is present in the form of the inspector to ensure that the worker is not put at risk, or denied his due. The Supreme Court has captioned regulatory offences as 'absolute offences',[6] to distinguish them from offences in the Penal Code.

The element of intention is essential to establish a penal offence. A lapse in maintaining a standard prescribed by the law and those implementing it makes for a regulatory offence. Also, while establishing the guilt of an individual accused is the essence of criminal law, regulatory offences place the onus on the person responsible for the lapse – the person who the Factories Act, for instance, calls the 'occupier'. This is in acknowledgment that, while the workers are proximate to the risk and so to the consequences of risk becoming disaster, they have no control over it. Nor, as the Bhopal gas disaster showed, do those living in the vicinity of establishments that may spread harm beyond its perimeters. Regulatory laws enable the government to enter the premises to spot, and mend, situations of risk.[7]

This is set to change, in part because it has been ineffective. It is now widely accepted that there are extravagant expectations of the labour bureaucracy which even the best intentioned cannot meet. Yet, that is not the reason for the changes that are being brought in; it is instead to end 'inspector raj'. Inspectors are increasingly to be kept away from factories. In Gujarat, for instance, the law is being recast to make place for a 'self-certification-cum-consolidated annual return scheme' which will extend to the Factories Act, the laws governing minimum wages, bonus and gratuity, and those concerning contract labour.[8] Establishments within the coverage of these laws are to be exempted from inspections; there will instead be 'regular audits'. And those establishments which comply with labour standards will be awarded 'appreciation certificates'; a prize for following the law.

There is a Draft Labour Code on Wages Bill 2015 which is set to replace four central laws – the Minimum Wages Act 1948, the Payment of Wages Act 1936, the Payment of Bonus Act 1965 and the Equal Remuneration Act 1976. To 'project a more friendly image to employers' as a 'person close to the development' reportedly said, the term 'inspector' is to be replaced by 'facilitator'. The facilitator is to 'supply information and advice to employers and workers concerning the most effective means of complying with provisions of the Code'.[9] Workers are thrown in gratuitously, for compliance under these laws has to be by the employer: for clarity – workers do not pay wages.

A labour inspector (facilitator) may continue to inspect and examine workers, and peruse documents and registers; but where he chances upon a defaulting employer, the procedure under the law is to pause, and the facilitator is to give the employer an opportunity to make amends. If the employer complies with the facilitator's directions, there shall be no prosecution.

One purpose of a law that provides for punishment is deterrence. Achieving deterrence needs either a penalty high enough to worry a potential offender that, if caught, however unlikely the prospect given the state of enforcement of the law, the penalty is more than he would care to bear. Or, that the probability of being caught, because of the rigorous enforcement of the law, serves to deter. The meek and gentle treatment of offenders is at least half a universe away from fostering respect for the law that is being mooted.

Then there is ‘compounding’ of offences. The 2014 Bill to amend the Factories Act of 1948 introduces the idea of compounding in a proposed section 92C. A list of compoundable offences are set out in a Fourth Schedule to be added at the end of the act. Non-provision of drinking water, or of facilities for sitting, or allowing double employment, or not maintaining registers (without which there is no record of what the factory has been doing and who it has in its employ and how they are being treated), not paying wages due to workers – there are 32 offences listed which impact on the health, welfare and wages of the workers. Once compounded ‘for such amount as prescribed’, ‘no further proceedings shall be taken against the offender in respect of such offence.’

The Rajasthan Amendment Bill went much further. When an offence is committed, no court is to take cognizance except on the complaint by an inspector (which is the way it was) and ‘with the previous sanction in writing by the state government.’[10] That is, an offence is not an offence till the state government says it may be so considered. There was, in addition, the possibility of compounding here, too, with the added sop that ‘where an offence is …compounded …after the initiation of the prosecution the composition shall amount to acquittal of the offender.’ The consequences that would catch up with a repeat offender was to be squelched by this declaration of innocence. The bill, in its journey to becoming an act, seems to have lost this last promise of acquittal.

As for the worker, in the past twenty years a hundred per cent of employment generated has been in the informal sector. The fault, of course, lies with the workforce in the formal sector – it is their posturing and unreason that has scared employers, making them shy away, even shun, the expansion of the formal working class. (I dare hope that the art of recognizing sarcasm has not vanished.) The answer lies in the informalizing of all labour: then no one can hold employers to ransom, and employers in turn will find the courage and the stimulus to employ more labour. For this to happen, the breaking down of the trade union is a necessary step. That will deplete the possibility of collective bargaining, of industrial action including strikes, and remove victimization from the lexicon; the last ably aided by a hire-and-fire policy.

Madhya Pradesh has been at work straining every nerve to displace Rajasthan as the frontrunner in these endeavours. In September 2014, the Madhya Pradesh cabinet gave its approval to twenty labour laws being amended.[11] The labour commissioner announced that ‘lay-offs, retrenchments and even closures will not require any permission.’ It will, he is reported as having said, be akin to a ‘hire-and-fire’ policy in establishments of a designated size. In small and medium enterprises with less than 50 employees, employers may terminate any employee without assigning any reason or conducting an enquiry.

This law shares with other proposed laws the idea of more labour to be extracted from the labouring classes. Take overtime. So that labour may not be made to do more than what is fair and reasonable, the Factories Act says that a worker may do 50 hours of overtime work in a quarter. This is now proposed to be increased to 100 hours.[12] The law currently says that the 50 hours may be increased to 75 hours a quarter if the government

makes the exemption; this is now to be raised to 115 hours. And, 'The state government or the chief inspector may, subject to prior approval of the state government, by order enhance the total number of hours of overtime in any quarter to 125 in the public interest.'[13]

The Madhya Pradesh amendment would have the overtime limit be extended only with the 'consent of the worker.'[14] It would, presumably, allow an employer to fire a worker were he to refuse, though this should not be allowed to detract from the acknowledgment of the worker's agency. Just may be.

The proposed amendments to the Factories Act are charming in their solicitous concern for women. The restriction on night work for women has, for long, been contentious. Legal prohibition has left women without the choice of working hours; employers have experienced annoyance at having workers who cannot be organized into shifts because of the restriction; and the rest of the workforce has found it unreasonable that they have to invest equality in a part of the workforce that is excluded from night work. In the beginning, this prohibition was explained by a lack of safety in the workplace and in travelling to and from work. And there was the premise that the woman's place is in the home, evenings and nights anyway. The exceptions to this rule existed even then, with women employed in fish canning and curing, for instance, being exempted from this prohibition;[15] the imperatives of industry had to take precedence.

For the past 25 years at least women have been demanding choice and autonomy at work, and industry has been asking for these restrictions to be lifted so that women too enter the labour marketplace giving employers a wider field of choice. The time, it seems, has arrived. But the language in which it is couched carries the confusion that patriarchy has when it tries to speak the language of equality with which it is both uncomfortable and unfamiliar. 'No woman shall be required or allowed to work in any factory except between the hours of 6 a.m. and 7 p.m.' reads Section 66 of the Factories Act 1948, with the proposed amendment: 'Provided that where the state government, or any person authorized by it in this behalf, is satisfied that adequate safeguards exist in a factory as regards occupational safety and health, provision of shelter, rest rooms, lunch rooms, night crèches and ladies toilets, equal opportunity for women workers, adequate protection of their dignity, honour and safety, protection from sexual harassment, and their transportation from the factory premises to the doorstep of their residence, it may, by notification in the official gazette, after due consultation with, and obtaining the consent of, the women workers, the employer, representative organization of the employer and representative organization of workers of the concerned factory… allow women to work between 7 p.m. and 6 a.m…' Equal opportunity, dignity, honour, consent; and how many people concerned about whether women be 'allowed' to work nights!

Leaving it to the states to reform labour laws is a little demonstration of deference to federalism, no question. It is also about creating a climate of competition among states about who among them will lower standards of protection of the worker sufficiently to convince business that it will be protected from the worker, the regulator and the law. The era of reforms derives its energy and drive from images of the worker as villain, as

vexatious,[16] as violent.[17] All that remains, it seems, is for the employer to now emerge from martyrdom and don the cape of the hero.

Footnotes:

1. Part IV of the Constitution of India.
2. Contract Labour (Regulation and Abolition) Act 1970; Interstate Workmen (Regulation of Employment and Conditions of Service) Act 1979.
3. Child Labour (Prohibition and Regulation) Act 1986.
4. Factories (Amendment) Act 1987.
5. Prashant K. Nanda, 'Modi Launches Labour Reforms to Make Doing Business in India Simpler', *Livemint*, 16 October 2014.
6. J.K. Industries Ltd. v. Chief Inspector of Factories (1996) 6 SCC 665.
7. Section 87-A of the Factories Act 1948: Power to prohibit employment on account of serious hazard.
8. 'Gujarat Labour Minister Vijay Rupani's Note on Amendments in Labour Laws', *Desh Gujarat*, 25 February 2015.
9. Surabhi, 'Labour Ministry's Reform Rewrite: Inspector Will Now be "Facilitator",' *The Indian Express*, 16 April 2015.
10. Clause 4 of the Rajasthan amendment to the Factories Amendment Bill 2014.
11. Shashikant Trivedi, 'MP Agrees to Amend 20 Labour Laws', *Business Standard*, 23 September 2014.
12. Clause 38 of the Factories (Amendment) Bill 2014, amending section 64 of the Factories Act 1948.
13. Clause 39 of the Factories (Amendment) Bill 2014, amending section 65 of the Factories Act 1948.
14. Supra note 11.
15. Section 66(2) of the Factories Act 1948.
16. The Small Factories (Regulation of Employment and Conditions of Services Bill 2014 promises to punish workers who maliciously or vexatiously make claims for delayed, or non-payment of wages, or of illegal deductions.
17. 149 Maruti workers have spent two and a half years in jail, since July 2012, without bail. It took a struggle through the hierarchy of courts for some of the workers to finally be given bail. And the state was willing to pay a lawyer Rs 11,25,000 (over a million rupees) per hearing in the District Court to keep them in jail – a huge statement to industry: see Notification of the Haryana Government, Administration of Justice Department, 24 July 2012.
In the meantime, prosecution witnesses allegedly named the accused sharing them among themselves alphabetically – PW 40 listed out accused whose names started from G to P, PW 41 named those starting from P, R and S, and, as the judge of the High Court of Punjab and Haryana recorded while considering the bail application of the accused, 'the said witness has also stated that he was not able to identify any of the accused named by him in his statement': Sunil and another v. State of Haryana, Crm-m 27164 of 2014 dated 23 December 2014 in the High Court of Punjab and Haryana. The outcome of this trial should be instructive.

B. REVIEW OF LABOUR LEGISLATION IN SRI LANKA[64]

At a time when Sri Lanka is enjoying the fragrance of peace and the government of Sri Lanka is promoting foreign direct investment, it is extremely important for us to review our labour legislation framework and determine as to whether it complements competitiveness and sustainability of enterprises.

The Sri Lankan labour law framework, which was heavily influenced by English law (for obvious reasons), has continued without any significant modifications in comparison with the changes that have taken place in the global business environment.

One of the main drawbacks that we could identify in relation to industrial relations has been the enthusiasm on the part of policy makers to introduce legislation whenever confronted with an industrial relations issue. As a result, we have inherited a highly regulated labour relations framework which is not consistent with the economic policies of a developing country. In the light of the above, we would like to make some specific comments/recommendations with regard to some of the more important pieces of legislation which requires urgent review/amendment. We also wish to comment on some of the proposals the Labour authorities have made in relation to superannuation for private sector employees. Our proposals and observations are set out below.

THE INDUSTRIAL DISPUTES ACT NO.43 OF 1950

The preamble to this Act states that it is for the prevention, investigation and settlement of industrial disputes. Although the preamble refers to the term "termination" of industrial disputes, the mechanism under the Act does not have anything concrete for the **prevention** of an industrial dispute. The settlement mechanism that is set out in the Act, such as conciliation, arbitration etc, are procedures which need to be followed after an industrial dispute has arisen. Therefore, the dispute settlement mechanism under the Act does not address the prevention of sudden stoppages of work by resorting to strike action which has, over the years, been a cause for much concern for employers operating in Sri Lanka.

Therefore, it is extremely important that we address this issue without any further delay ensuring that employers will at least have due notice before such action is carried out, either by a trade union or by workers. In this context, it is important that the right to strike should be regulated through a Code of Conduct which can be introduced as a mechanism for the prevention of an industrial dispute. Such a Code of Conduct could set out the steps that need to be taken by parties amongst themselves before the matter could be referred to conciliation.

Another important mechanism set up under the Industrial Disputes Act with regard to dispute resolution is the setting up of Labour Tribunals and the appointment of arbitrators. Both these mechanisms grant just and

[64] By Employers Federation of Sri Lanka available at: http://www.employers.lk/labour-law-reforms/15-labour-law-reforms- visited on: 6/12/2015 at: 11:32 AM

equitable relief to a worker. In doing so, the Labour Tribunals, especially in the case of dismissed employees, are also empowered to grant the relief of reinstatement or compensation.

The relief of reinstatement in service in the case of unjustified termination has been pointed out by us on many occasions as being unhealthy and counter productive to industrial relations.

What needs to be appreciated in this context is that the contract of employment is a contract for personal services and therefore, arbitrarily imposing an employee on an unwilling employer will not result in any productive outcome either to the employee or the employer.

Therefore, there needs to be a change in the law to require that a reinstatement order should always grant an option to the employer to make payment of compensation in lieu.

The rationale underlying the establishment of Labour Tribunals invested with equitable jurisdiction was primarily to cater to an ordinary employee who may not have the means to pursue his case in a court of law. In other words, Labour Tribunals were set up having regard to the lower category of workers and not necessarily the top management executives such as chief executives and managing directors.

Therefore, we need to review the type of worker who should be given access to a Labour Tribunal and limit it to ones who really require relief from such a Tribunal, as in the case of India.

THE SHOP AND OFFICE EMPLOYEES ACT NO.15 OF 1954

The outdated provisions in the Shop and Office Employees Act in relation to working hours and employment of women in the night have become serious concerns and issues to employers, specially setting up business in the BPO industries. We have already made our proposals with regard to an amendment to the law that would facilitate and regularize work of women during the night. Our proposal has been with regard to an amendment to section 10 of the Shop and Office Employees Act which would enable female employees in the business of "information technology enabled services" to work during the night in an office.

In addition to this amendment, we also propose that a similar amendment be brought in under section 10 by the insertion of an additional provision soon after (iv), as (v), which would state as follows:

> *Any female who has attained the age of 18 years may be employed in the businesses of a shop, which is in the nature of a supermarket store for the period or in part of the period between 6.00 p.m. and 11.00 p.m.*
>
> *"Supermarket Store" would mean a shop operated on a self-service basis selling food and other household goods*

The above reforms are imperative for us to compete in the international market and remain competitive. A total prohibition of enabling females to work after 8.00 p.m. other than in very limited establishments under the Shop and Office Employees Act is counter productive, especially where females constitute a substantial portion of the majority in the service sector. Sri Lanka is fertile ground for call centres which require working during the night for obvious reasons. **Despite repeated requests/submissions made to authorities, the suggested amendment still has not been brought about to the legislation**.

Holidays

Another important matter that we have drawn the attention of the authorities to is with regard to holidays. This needs to be addressed from two angles. Firstly, from the point of view of the excessive number of holidays. Secondly, from the point of view of the provisions in the different statutes applicable to the private sector. The following matters should be taken note of in this regard.

a) The period of 28 hours (inclusive of leave and holidays) a week to qualify for the 1-1/2 days paid weekly holidays is not sufficient by way of a qualifying period, as the objective of the weekly holidays provision is to grant a reasonable period of rest to an employee each week. There is no rationale in permitting an employee who does not work the full week (45 hours) the benefit of 1-1/2 days paid weekly holidays. The provision as it stands envisages 1-1/2 days paid holidays a week so long as an employee works 28 hours (inclusive of leave and other holidays). **It is suggested that the qualifying period for 1/1-2 days paid weekly holidays be 45 hours including leave and holidays. An amendment on these lines will assist in permitting better attendance at work and higher productivity**.

b) **It is not at all logical to insist on additional holidays by way of weekly holidays when the normal weekly holiday coincides with a statutory holiday**. The public sector and a majority of the Wages Boards do not stipulate such additional holidays. Many holidays are granted each year on account of public holidays coinciding with normal weekly holidays for employees covered by the S&O E act. When viewed in the context of the number of holidays in the country, this gives rise for even greater concern. Apart from the aspect of loss of working time due to these additional holidays, much disruption and confusion results as in many Companies, their offices need to be closed on such days whereas their factories remain open. The issue of working time lost and the resultant effect on productivity is exacerbated as these situations invariably lead to long weekends.

It is unfortunate that this issue was discussed before the Labour Law Reforms Sub Committee of the National Labour Advisory Council last year and a suggested compromise was that an amendment to section 5(2) of the S& O E Act be introduced in relation to weekly holidays by way of an additional proviso. The suggested proviso is as follows:

"Provided, however, that in the event a statutory holiday coincides with a weekly holiday or a weekly half holiday the employer shall either grant the additional holiday on any day prior to 31st December in that year or make payment of an additional day's or half day's wage as the case may be to the employee in lieu of such additional holiday/half holiday".

PROPOSAL TO SET UP A PRIVATE SECTOR PENSION SCHEME

At the National Labour Advisory Council meeting held on 21st May 2010 the Hon. Minister of Labour Relations and Productivity Promotion made a proposal for discussion in relation to setting up a private sector pension scheme. Both trade union and employer representatives present unanimously were of the view that there needs to be a comprehensive actuarial study done with regard to such a scheme taking into account a variety of factors, especially in relation to the sustenance of such a fund over a period of time. Our observations in relation to this proposal are as follows:

1. There is no doubt that the introduction of such a scheme, if it can be sustained, will be very beneficial to employees. However, it is important for us to look at some practical realities that surround the whole question of sustaining such a scheme. This has been the main problem in the case of many pension schemes, both in this country and abroad.

2. It is also important to bear in mind that already Sri Lanka has a very comprehensive superannuation scheme which can be compared with schemes even in some of the more developed countries. The bulk of the liability in respect of these schemes is borne by the employer. The employer contributes 15 per cent of the wage of an employee every month towards EPF and ETF. In addition, the employer also has the full liability of making payment of gratuity to all employees on cessation of employment, provided they have more than 5 years continuous service. Furthermore, the gratuity liability of an employer is reflected as a liability in the statement of accounts every year, as provision for same has to be made.

3. In this context, it is nothing but fair and reasonable not to further burden the employer with any additional contributions on behalf of employees, and we are happy that this aspect has been taken note of already in the proposals.

4. Many of the organizations in the private sector which currently grant pension benefits in terms of their own funds have been faced with the difficulty of sustaining the scheme in the recent past. There have been many instances of some Organizations making offers to employees to opt out of pension schemes in return for compensation packages. These offers are made purely in view of the difficulties such institutions have faced in sustaining such a scheme.

5. Another important factor that we need to take into account is that the current proposal does not envisage the payment of pension to everyone who contributes to the pension scheme. It states that, although every employee will be required to contribute 1 per cent from his EPF contribution to the scheme,

ultimately only the employees eligible for pension will receive the benefits. This could undoubtedly cause much dissatisfaction amongst employees as well as Unions.

6. We must also not forget that Sri Lanka is currently having an ageing population and it is estimated that in 2025 or thereafter almost 50 – 60 per cent of Sri Lanka's population would be over 60 years of age. This is a matter of crucial importance that we need to take into account in embarking on such a scheme.

7. On the other hand, it is submitted that we should, more importantly, look at what we have already and review as to whether the current superannuation schemes can maximize benefits to employees. If the intention is to genuinely grant maximum benefits to employees, there is an obligation and a responsibility on the part of the government to step in and at least grant some relief to the current superannuation schemes by way of tax exemptions, as was correctly pointed out by the Trade Union representatives at the last NLAC meeting. The undersigned also, at a previous meeting of the labour law sub committee at the time of discussing the unemployment benefits insurance fund, pointed out that it is not reasonable for taxes to be imposed on the income invested by the EPF and ETF. We understand that the amount of tax paid by EPF and ETF on its investments, if exempted, could adequately establish a fund for unemployment benefits. This was a joint proposal made by the employers and the trade unions at this meeting, which was not discussed thereafter.

8. In the circumstances, it is extremely important for us to ensure that maximum benefits accrue to the employees from the current superannuation schemes before embarking on another scheme. The administration costs of a pension scheme are also quite high, and this is another matter that we need to bear in mind.

9. The financial system, for a pension scheme is based on an assumption of factors which are highly dynamic and variable. Especially in an era where financial markets tend to fluctuate, it is highly unlikely that assumptions made now could remain valid over a long period of time.

10. It is also relevant to mention that most of our Insurance Companies and Banks offer retiral plans through various schemes which guarantee a monthly income after retirement. It may also be prudent for us to also look at the possibilities of such a mechanism through the administration of the current EPF. What needs to be done is to efficiently manage the current superannuation schemes and give more options to employees within the scheme.

In the light of the above, we feel that this is a matter that needs a very careful study, revealing sufficient data and information for us to discuss further on it. In the circumstances, we are of the view that there is no need to rush in, in relation to this matter, especially in view of the complex issues surrounding the subject.

PAYMENT OF GRATUITY ACT NO.12 OF 1983

The Regional Plantation Companies have, from time to time, highlighted that an urgent amendment to the Gratuity Act No.12 of 1983 needs to be brought in to address the issue with regard to employees who do not

report to work and still "tick in" years of service to employment which ultimately results in a massive gratuity provision in the annual accounts and a gratuity payment as well at the point of retirement. This was a matter that was highlighted during the negotiations that took place even before H.E. the President years ago. In fact, H.E. the President fully appreciated the problem and consequent to submissions made by the EFC, instructed the Ministry of Labour to look into this matter and bring about a speedy solution.

Up to now, there has not been any amendment to the Gratuity Act in terms of our proposal which has been to amend the definition of "year" in terms of section 20 of the Payment of Gratuity Act No.12 of 1983 to read as follows:

> "A year shall mean a completed period of 12 consecutive months during which a workman has worked not less than 180 days".

TERMINATION OF EMPLOYMENT OF WORKMEN (SPECIAL PROVISION) ACT NO.45 OF 1971 (AS AMENDED)

As we are all aware, this statute was enacted in 1971 during a period of a closed economy totally different to the current economic environment. The Act has wide coverage in the private sector and applies to "non disciplinary" termination of employment. Though originally intended to cover all employee retrenchments or lay offs due to enterprise restructuring or closure, "non disciplinary" situations have now been interpreted to include employee absence on account of ill health and even employee incompetence at work. Employers are required to seek approval of the Commissioner of Labour in relation to a non disciplinary termination, in cases where the employee has not given written consent to the termination of his services. The Commissioner of Labour has the power to either grant or refuse permission to terminate services under this Act in "non disciplinary" situations. Once again, this opens out a possibility of imposing an employee on an unwilling employer. The compensation formula which is currently gazetted by the Commissioner of Labour which runs up to a maximum of 48 months salary (capped at Rs 1.25 million) is reported to be the third highest retrenchment formula in the world! This clearly demonstrates the continuing mismatch of social/economic policies of our country. This shows the adoption of a poor country's economic policy along with a developing country's social policy.

Many employers, in situation of restructuring, closures, retrenchment or any other non-disciplinary terminations offer voluntary retirement compensation packages. Employers are often compelled to offer huge packages, especially in situations where restructuring has to be done quickly without having to go through a protracted inquiry before the Commissioner of Labour under the Termination Act. Such packages are often offered even to executives, including Chief Executives, as the provisions of the Act do not exclude them. There have been many instances of executives identified as being redundant or even inefficient, obtaining generous compensation packages. This has been due to our courts of law construing inefficiency and incompetence as "non disciplinary" situations. In other words, the system rewards the inefficient, and not the

efficient and productive worker. Therefore, an unproductive employee who is no longer relevant to an employer is able to obtain an attractive package, in addition to his statutory terminal benefits, as opposed to his productive counterpart who continues to work having only his terminal benefits at the end of his career. Is this security of employment? Or does it directly stifle employment creation. Many trade unions argue as to why anyone should object to extra generous VRS payments given to employees by employers as it clearly demonstrates the capacity of such employers to make such payments. Unfortunately, what is often ignored is the underlying reality, that none of those employers would ever consider offering direct employment opportunities in excess of the absolute minimum number they require. They also often resort to work arrangements other than direct employment to satisfy their requirements.

On the other hand, it is relevant to compare the severance pay packages of our neighbouring countries which compete with us in the global market. Bangladesh pays 30 days wages for each year of completed service provided the employee has worked for more than 12 months. India, pays 15 days wages for each year of service. Pakistan pays 20 days wages for each completed year of service, and Indonesia, whilst paying one month's wages for each year of service, limits severance pay to a maximum of 5 months.

It is also pertinent to mention that in the "Doing Business" report of the World Bank 2009, Sri Lanka is ranked as one of the top 5 highest paying countries in respect of retrenchment compensation.

The specific amendments supported by the EFC to the Act envisaged the following:

i. Where an employer has employed a worker for a period of not less than twelve months continuously, and notwithstanding anything to the contrary in the Termination of Employment of Workmen (Special Provisions) Act No.45 of 1971 as amended, he may terminate the employment of such worker for any reason, other than on disciplinary grounds, subject to his making the following payments:

    a) Gratuity payable under the Payment of Gratuity act No.12 of 1983; and

    b) One month's wages/salary or written notice of one month; and

    c) Two weeks wages/salary for each year of service; and

    d) Two weeks wages/salary for ach year of service left up to the age of 55 years

    The maximum payment on account of (c) and (d) together shall not exceed twenty months wages/salary.

ii. Where an employer wishes to terminate a worker's services and is unable for financial reasons to pay the aforesaid compensation as set out in (b), (c) and (d) of sub-section (i) above, he shall seek

permission from the Commissioner under the Termination of Employment (Special Provisions) Act if the same is applicable.

iii. Where the employer due to reasons of closure of the whole or part of his business has offered alternative employment elsewhere on terms not less favourable than the existing terms and conditions of employment, which offer has been rejected by the worker, the employer shall not be liable to pay any compensation to the worker concerned and may terminate the worker on giving one month's notice in writing or payment in lieu, subject to the right of the worker to seek relief before a Labour Tribunal for compensation. The Labour Tribunal shall take into account the offer of employment made and decide on the quantum of compensation if any to be awarded, which shall not exceed the amounts payable under (i) above.

iv. Where an application is made under the Termination of Employment (Special Provisions) Act No.45 of 1971 as amended, the Commissioner shall make inquiries based on affidavits tendered, and counter submissions in writing by parties, within one month of the written application. If no order is made within two months the Employer shall have the right to terminate the worker subject to the final determination of the Commissioner regarding the compensation payable.

v. **Lay-off Procedure**

Where an employer due to lack of raw materials, break down of machinery or factors beyond his control, is unable to provide employment for his workers or any part thereof, he shall, on proving such fact to the Commissioner, be granted permission to refrain from paying wages to the workers concerned.

The employer shall make a written application specifying the period of lay-off which shall be supported by an affidavit and the Commissioner shall give such matter priority and give his ruling within seven days of receipt of the application. The Commissioner shall refuse an application only if for reasons given by him in writing, he is convinced that the application for non-payment of wages is inequitable in the circumstances of the case. Where the period has to be extended the same procedure would be followed by an employer and the Commissioner.

It is also submitted that employees over 60 years of age, probationers, employees found incompetent and/or unable to discharge their duties due to ill health, be excluded from coverage under this Act. They will yet, under the Industrial Disputes Act, have recourse to the Labour Tribunal in a situation of dismissal.

WHAT IS THE WAY FORWARD?

Employers in Sri Lanka view the current labour regulatory framework as an impediment to business in a highly competitive global market. Undoubtedly, such a regulatory framework also "scares away" many potential investors from setting up business in Sri Lanka. Successful governments, whilst openly proclaiming its policy for a free market economy and also recognizing the need for labour market flexibility, have not yet been able to take the "plunge". Trade Unions have been extremely defensive and protective of existing legislation.

We need to change our mindset. It is of paramount importance for us to accept the need for a social partnership, and ask ourselves 'what are the changes necessary for sustainable development and economic stability?' There must be a genuine appreciation on the part of the government, unions and employers that changes need to be made to our regulatory framework to achieve economic development, which is a pre-requisite for stability and employment creation.

Charles Handy, in his book entitled "The Empty Raincoat" states: "If we are to cope with the turbulence of life today, we must start by finding a way to organize it in our minds. Until we do that we feel impotent, victims of events beyond our control or even our capacity to understand".

We need to take stock of the current situation and genuinely ask ourselves the questions

a) Is this the regulatory framework required to sustain employment and create more opportunities for employment?

b) Does this framework model secure employment?

Our current labour laws are essentially what existed prior to 1997 when our industry was heavily protected through stringent import substitution methods. The free market economy introduced after 1977 necessarily requires a national economy driven by massive private sector investment. It is paradoxical for such laws to remain in the statute books and for us to also expect investment and employment generation.

What is unfortunate is that the rigidities in law entice some employers to find devices to circumvent the laws. As John Rawls states (A Theory of Justice): "However attractive a conception of justice might be on their grounds, it is seriously defective if principles of moral psychology are such that it fails to engender in human beings the requisite desire to act upon it". Some of our labour laws, unfortunately, encourage evasion rather than compliance. The large informal sector which operates outside the rule of inspectors testifies to this fact.

What we need to realize is that labour laws is not only one element of an industrial relations system and not necessarily the most important one. It cannot be evaluated independent of the labour relations system. What we need, in place of the highly legislative and inflexible labour laws and relations systems is one which provides a basic legal framework of labour protection, with room for flexibility in regard to contractual arrangements, work force size, working time and functions. Balancing work protection with flexibility and

aiming for higher productivity should be a key objective. There needs to be a shift in labour relations from traditional concepts to a greater emphasis on developing and managing people, resulting in mutual gains.

A long time is past since the aftermath of the industrial revolution which resulted in the State intervening with legislation to "protect" the employee. Employment creation and job security can no longer be "protected" by an inflexible legal regulatory framework. Laws relating to terms and conditions of employment, collective bargaining and trade union rights cannot, per se "protect" employment. Protection depends to a large extent on whether the employer is in a position to carry on his business and continue to provide employment. The perception that employment can only be "protected" and "secured" by a regulatory framework must change. We need to look at the challenges and threats to employment creation and sustenance. Unless we address these issues positively, with a national focus, employment, in general will not have any "protection". We need to be proactive and move towards mechanisms that would give us **positive protection** as opposed to **'superficial' protection**.

The Ten Year Horizon Development Framework (Mahinda Chintana) in setting out the employment policy in its chapter entitled "Towards a flexible and a globally employable work force" spell out 4 policy directives which are clearly consistent with moving towards attaining this goal. The focus areas to these policy directives are employment generation, skills development and labour productivity, flexible labour laws and regulations, and strengthening employer-employee relations. Therefore, we have a clear defined policy in place in relation to employment. What needs to be done is to translate these policies into positive action through bringing about the necessary changes in the legal framework.

A clear example that we can refer to is with regard to the concept of productivity. Successive governments have openly acknowledged and accepted the need for higher productivity. Governments formulated national productivity policies, productivity task force and separate institutions to enhance productivity. All these initiatives are commendable. However, it is equally important that this message is translated into positive action and not merely limited to what is written down on policy statements and documents. We need to introduce the productivity culture through adequate legal reforms. We need to recognize performance based pay, productivity linked wages and agree on a wider meaning to the definition of "wage" which will acknowledge all opportunities available to an employee to enhance his earning capacity.

CONCLUSION

Our current labour laws, therefore, are essentially what existed prior to 1977 when our industry was heavily protected through stringent import substitution methods. The free market economy introduced after 1977 necessarily requires a national economy driven by massive private sector investment. It is, therefore, paradoxical for our laws to remain in the statute books and for us to expect investment and employment generation.

We fully endorse the policy directives set out in the labour policy enshrined in the Ten Year Horizon Development Framework (Mahinda Chintana) which clearly identifies flexible labour laws and productivity enhancement as key factors for development. We are happy that the portfolio of the current Labour Minister also contains an additional element, namely, productivity promotion, which further fortifies the intention of the government. Therefore, it is now important that these policy statements translate into our labour relations framework so that Sri Lanka could fully exploit the opportunities available to attract good investors to our country. We cannot be inhibited by a very regulated labour relations framework.

This submission is not exhaustive. What is discussed herein are the main significant issues and the legislation which needs immediate revision.

We are confident that you will give due regard to our submissions set out above and facilitate the required reforms, which can be initiated through a policy statement in the National Budget proposals for 2010/2011.

R L P Peiris

Director General
Employers' Federation Ceylon

C. Unions decry ILO initiated labour law amendments

By: Rohana Jayala

The Inter-Company Employees Union (ICEU) concedes that labour statutes need changes with the passage of time, but it should not be at the cost of the workers' interests.

President, ICEU, Wasantha Samarasinghe told Sunday Observer Business that the Union is aware that action is being taken to amend several labour statutes in a manner which is detrimental to the working class as a whole.

He said the Industrial Disputes Act, the Shop and Office Employees Act, the Termination of Services Act, the Trade Unions Ordinance, the Payment of Gratuities Act, the Worker Compensation Act and the Wages Board Ordinance are some of the labour statutes proposed to be amended.This has been initiated at the behest of the ILO and funded by the Swiss International Corporation Agency and the American Labour Department.

"It is incumbent on the government to discuss this vital issue with trade unions and place it before the National Labour Advisory Council and ensure that it meets the aspirations of the working people," Samarasinghe said.

"This hybrid government is determined to suppress the rights of the working class and dilute the important labour statutes at the whims and fancies of the employers," he said.

"The ILO appears to be indifferent to this issue which affects Sri Lanka's working class. We cannot expect the ILO to work in the interests of our people," Samarasinghe said.

Retired Supreme Court Judge Justice R.K. Suresh Chandra said there are two main theories on the role of the State in labour law, the protective theory and economic rationalization (libertarian) theory.

"While both theories aim at an equitable outcome between the employer and employee, protective theory calls for State intervention to negate inequalities in bargaining power through legislation, while economic rationalization seeks to foster private decision-making and market forces, with the State acting merely as a facilitator, without intervening directly. However, the State should act as a regulator and a facilitator," he said.

He said legislation has been enacted on the basis of Sri Lanka's being a social welfare State. Much of Sri Lanka's protective labour laws were passed in the first half of the last century, including the 1935 Trade Unions Ordinance (that defined Trade Unions, and provided their rights and regulations), the 1934 Workmen's Compensation Ordinance and the Wages Board Ordinance of 1941 (that created a minimum wage).

Many of these laws are outdated and irrelevant in a country now heavily affected by globalization and other current issues. "It may be necessary to consider whether these statutes need amendment to facilitate development," Justice Chandra said.

He said that the way forward for Sri Lanka is to make advances in productivity. For this to happen, there needs to be a change in attitude. Unions should recognize that they have responsibilities to the employer and the employees and employers must address the needs of labour, and give employees a sense of responsibility and opportunity to improve their skills.

"It is necessary to improve employee performance to increase productivity," he said, adding that "improved productivity could benefit society with better quality products at competitive prices". Director General, Employers Federation of Ceylon, Ravi Peiris said Sri Lanka's tightly-regulated labour system was due to historical reasons.

"We have had these laws enacted at a time when the labour movement was very strong, and if you look at most of these laws, they have been enacted between 1925 and 1960, when the governments of Sri Lanka relied on the trade unions and the working class to bring them to power," he said.

Peiris said what he saw as an attitude among policy makers, of attempting to 'protect the employee' and a misconception among workers that these laws actually protected their interests and secured their employment.

Peiris criticized this view, claiming that "true security of employment cannot be obtained only through laws," but through a basic relationship between employer and employee. Peiris said that many statutes predate the 1980s, when globalization increased and the economy was opened.

He lamented that forms of employment common in other parts of the world, including fixed term employment, flexible hours and working from home have not been able to fully break into Sri Lanka as employers are stifled with a set of regulations enacted in the 1940s and 1950s.

The overwhelming burden of old legislation has caused many business owners to operate outside the system, he said, creating an imbalance where those who follow the rules have to compete with those who do not. "We have placed emphasis on law, rather than establishing relations. Our attitude has been, whenever, there is a problem, enact a law," he said.

Peiris specifically cited the Industrial Disputes Act of 1950, which he claims created a conciliatory arbitration process with no mechanism to avoid a dispute. General Secretary, CMU, Sylvester Jayakody said the Industrial disputes Act and the Shop and Office Act were the main laws that governed the workers' rights and streamlined working conditions for decades.

There were many shortcomings in the law and employers could evade responsibilities in many ways due to lack of monitoring agencies on the part of the State. However, the laws were there and to a certain extent they benefited workers in many ways irrespective of whether they were members of trade unions or not.[65]

[65] Reported in, *Sunday Observer*, available at: http://webcache.googleusercontent.com/search?q=cache:wEeCL4PBDQUJ:www.sundayobserver.lk/2015/11/08/fin13.asp+&cd=2&hl=en&ct=clnk&gl=in visited on: 6/12/2015 at: 12:26 PM

VI. Industrial Disasters and response by India and Sri Lanka

A. The law 20 years after: Significant absences[66]

By Usha Ramanathan

Bhopal brought to attention the absences in the law on industrial disasters. There was no way to extract vital information from the industry, no provision for interim relief, and no clarity on how to deal with an offending corporation. Since 1984, statutory law has moved, grudgingly, some distance, but it is in the courts that the law has been largely played out. Are the wrongs inflicted on victims by the system finally gaining recognition?

India's unpreparedness for mass disaster was stark in the immediate aftermath of December 2/3, 1984, when MIC gas poured out of the Union Carbide plant into the neighbourhood, reaching well into the township that housed the working classes of Bhopal . At the time there was no evidence that anybody recognised the magnitude of the havoc and destruction that could be caused offsite by the substances and processes employed in making the pesticide within the plant. Despite earlier episodes of worker injury and death in Union Carbide, there was, in 1984, no mechanism in place to acknowledge workplace accidents as portents of disaster. In 1984, workers, who were the closest observers of safety conditions, risk and harm in a factory, were not entitled by law even to an informed engagement with the safety aspects of their workplace; nor was there any legislated scope for them to participate in safety management.

This exclusion from information regarding safety and potential risk was even more pronounced where it concerned people living in the vicinity of a plant; so too the local authority, which would inevitably find the onus of responsiveness to disaster foisted on them, as happened in Bhopal in December 1984. The managers of industry were shielded from the need to disclose the harmful nature of their raw material, products or processes, even as industrial secrecy stood rooted in the law.

As risk precipitated into disaster on the night of December 2/3, 1984, the absences in the law regarding industrial disasters became striking. The industry was unresponsive to repeated, emergent enquiries about the nature of the substance that was killing people in droves, and there was no means of extracting the information from them. There was no provision in the law for recognising a community of victims: it was the individual who was felled by the disaster, even where there were thousands of victims. There was no provision for interim relief while the survivors of a disaster battled a large and elusive corporation. The criminal law was opaque on how to deal with an offending corporation. A calculation of losses and damage sustained in a disaster could not be readily reckoned, as the demands of the traditional law of torts -- which is the law for determining compensation where it is not already set out in a statute -- for an individuated determination could not cope with mass disaster.

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[66] Available at: http://infochangeindia.org/agenda/industrial-pollution/the-law-20-years-after-significant-absences.html visited on: 4/12/2015 at: 3:36 PM

Safety

Matters of safety flew back onto the canvas of concern when oleum gas leaked into Delhi 's environment from the Shriram Foods and Fertilisers factory on December 4, 1985 . The gas spread across Delhi, resulting in the death of an advocate in the Tis Hazari courts, and causing temporary damage to many more. More than the extent of harm caused by the gas, it was the memory it evoked of the Bhopal gas disaster that spurred the Supreme Court, especially, into action. In a litigation launched in the public interest that was then pending in the court, where questions of safety in the plant had been raised, the court enunciated principles to enhance safety and provide a framework of deterrence. In 1987, a part of this was introduced by amendment into the Factories Act 1948. These included:

- the acknowledgement that the impact of accidents and disasters was increasingly likely to spill beyond the boundaries of factories, affecting "the general public in the vicinity" of the factory
- information regarding potential disasters should be communicated to the local authority and those in the vicinity of the factory; this should include information on what may be done to mitigate harm in the event of a disaster.
- a Site Appraisal Committee be established to decide on matters of safety and hazard every time a new factory is set up, or an old one expanded
- workers' right to participate in safety management, including the right
- to obtain information from the "occupier" relating to workers' health and safety at work;
- to get trained in matters relating to workers' health and safety at work;
- to represent to the inspector of factories or their representative when there is inadequate provision for protection of health and safety in the factory.

In an effort to tilt the balance in favour of safety, and away from the degree of pragmatism that industry had evidently practised in both the Bhopal and the oleum gas leak episode, the definition of "occupier" was amended. An "occupier", under the Factories Act 1948, is a person who "has ultimate control over the affairs of the factory". Prior to 1987, the factory management would designate a person as the occupier who would be the front person with whom the Inspector of Factories would deal when any law relating to factories was breached. The Bhopal gas disaster and the oleum gas leak showed the importance of not letting the buck stop at the lower rungs of the corporate hierarchy where the occupier would be a fall guy, while the real decision-makers got away.

So, in 1987, the definition of "occupier" was amended to read that "in the case of a company, any one of the directors shall be deemed to be the occupier". [S.2 Proviso (ii)]

Interestingly, violations of the Factories Act are indeed offences in the eyes of the law, but they are not offences as understood in the penal law of crime/ punishment. They are instead what the Supreme Court in 1996 called "absolute offences". Whereas in criminal law, the guilt of an individual would have to be established, with the knowledge and intention of the accused persons as a central theme while furnishing proof, absolute offences are different. These are recognised as inhabiting the region of the law which deals with regulations, where established norms are to be respected and, as in the Factories Act, where ignoring the norms could mean threat to the health, welfare and safety of a workforce. It is instead to be a measure of protection against callousness in operation as also of exploitation of a working class population.

Absolute offences are unlike offences in criminal law, where it is the guilt or innocence of an accused that is on trial and the inability to prove guilt beyond reasonable doubt is a prerequisite to pinning blame and prescribing punishment. For absolute offences, responsibility has to be fixed or pinned. Where the occupier is charged with an offence under the Factories Act, "he shall be entitled….to have any other person whom he charges as the actual offender" tried, and if "after the commission of the offence has been proved,..(he) proves to the satisfaction of the court

1. that he has used due diligence to enforce the execution of this Act,
2. that the other said person committed the offence in question without his knowledge, consent or connivance, and
3. that other person shall be convicted of the offence…." (S.101, Factories Act)

In an "absolute offence", then, someone is always responsible. This is not a development that followed on the heels of the Bhopal gas diasaster; it has been in the law for decades. What Bhopal has changed in the law is the level of command that will be called in to answer charges under the Act. The change in the definition of "occupier" now calls to account not merely someone designated by the company to take the rap, but someone at a stage in the hierarchy who can call the shots.

Criminal conduct

The law governing criminal conduct, of omission and commission, by corporations and corporate directors and managers, has not evolved significantly. There has, in fact, been a certain regression that set in with the decision of the Supreme Court in *Keshub Mahindra v State of Madhya Pradesh* (1996), where the court reduced the charges in connection with the Bhopal gas disaster from "culpable homicide" to "rash and negligent" conduct. The knowledge of the harm likely to be caused by their conduct as corporate managers, and their intention, was watered down even before it could be judicially established whether the decisions made by them, and the practices they adopted in operating and maintaining the plant, could be considered to constitute criminal conduct. Given the number of people dead, disabled and harmed by the disaster, and the allegations of design defect, malfunctioning, reduced allocation of resources in matters of safety, and disinformation that followed on the heels of the disaster, the assumptions that underlie this change in the law are not easy to explain. The reluctance of Parliament to engage with enacting a law on corporate criminality,

and the silence that the Law Commission adopted as its policy when revisiting the domain of criminal law in its 154 th Report on the Criminal Procedure Code, are further evidence of the unwillingness of the Indian State to run the risk of corporate displeasure.

These significant absences continue to inform the law.

Yet, even as the Union of India was arguing in court for UCC to be held responsible for design defects and non-use of the information that the UCC had on matters of safety of the plant, Parliament amended the Factories Act, 1948. In 1987, without any public debate, Parliament legislated to absolve the designer, manufacturer, importer or seller of plant and machinery after the user to whom the plant and machinery were handed over gave an undertaking that, "if properly used", no harm would ensue. Seen in the context of Bhopal , had this amendment been in place before the disaster, Union Carbide Corporation could not have been held liable for the disaster. Rather, Union Carbide India Ltd would be solely responsible.

This was a strange provision introduced into the law, providing a pre-judgment of culpability. And this, in a law that had nothing to do with contracts and liability, but with standards being maintained at the workplace.

Industrial secrecy

The law has, for some time now, been protective of the right against disclosure in matters connected with industry. In the Factories Act 1948 (S.91), an Inspector of Factories is authorised to take samples of any substances used, or intended to be used, in the factory, where there is reason to believe that it is being used in contravention of the Act, or if "in the opinion of the inspector (it is) likely to cause bodily injury to, or injury to the health of, workers in the factory". Once tested, and found to constitute evidence that an offence under the Factories Act has been committed, a prosecution may be launched. But disclosing the results of the analysis otherwise would be a wrong, punishable with imprisonment for a term extending up to six months or with fine upto Rs 10,000 or both. It is interesting that even as disclosure of information was prescribed in Chapter IV A of the Factories Act in 1987 as being a necessary aspect of safety and preparedness for hazards, the punishment for disclosure of the results from analysing samples was actually increased from three to six months imprisonment, and fine from Rs 500 to Rs 10,000.

There is a further provision that has survived the Bhopal gas disaster which places restrictions on the disclosure of information. "No inspector shall," S.118 reads, "while in service or after leaving the service, disclose otherwise than in connection or execution, or for the purposes of this Act, any information relating to any manufacturing or commercial business or any working process which may come to his knowledge in the course of his official duties," unless it is with the written consent of the owner of the business, or it is for the purposes of legal proceedings. An inspector breaching this injunction may be punished with up to six months imprisonment, or with fine up to Rs 1,000 or both. It is the right against disclosure that informs the mood in this provision. It is striking that there is no provision that has been considered to make punishable the non-disclosure of all the information that is in the possession of the owner which may help in mitigating the effects

of the disaster. The emphasis on industrial secrecy and the enforced silences rest uneasily with the dire need for disclosure and of information-sharing witnessed in the days, months and years following the Bhopal gas disaster.

Compensation

Among the multiple tragedies spawned by the Bhopal gas disaster was the issue of compensation. The District and High Courts directed that interim compensation be paid by UCC since they were prima facie liable. This was taken to the Supreme Court in appeal by UCC. The Supreme Court endorsed a settlement that was made in the name of the victims although the identities of the victims were nowhere near being conclusively established just yet. Despite the settlement, it was the problem of making interim provision to victims of industrial disasters that occupied the legislative mind. In 1991, the Public Liability Insurance Act (PLIA) was enacted to provide for interim compensation on a no-fault basis -- that is, the person suffering harm or injury would only have to demonstrate that they had been affected by the disaster, but not have to be burdened by needing to prove that it had been due to the fault or negligence of the enterprise. In 1992 this was amended because insurance companies were unwilling to insure hazardous companies for a sum without an overall ceiling. This, although the PLIA already prescribed limits on the amounts to be paid to each affected person where death, serious injury, loss of work, or damage to property occurs.

The PLIA was an attempt to use insurance as a risk-spreading exercise, which would enable the immediate payment of minimal amounts as an interim measure. This would cover not only Bhopal-like incidents but the multitude of mini-Bhopals that are a regular occurrence. There is little evidence, however, that this account under the PLIA is being drawn upon.

In 1995 the National Environment Tribunal Act was enacted to set up tribunals to deal exclusively with the determination and disbursement of compensation. Nine years have passed since Parliament voted the law in, but it remains in the statute books. It has not been brought into force yet, and the word doing the rounds is that there are moves afoot to merge the idea of the environment tribunal (which, incidentally, has little to do with the environment and directly addresses compensation issues arising out of what are termed ‘accidents’) with that of the Environment Appellate Authority (EAA). The latter was set up by a 1997 law to “hear appeals with respect to restriction of areas in which any industry’s operations or processes … shall not be carried out…” The merger is being mooted because of under-utilisation of both fora, which ought to seem strange in this era of many accidents involving hazardous substances.

In the 20 years that have passed since Bhopal, statutory law has moved, grudgingly, some distance; but it is in the courts that the law has been largely played out. The Supreme Court’s direction that the over Rs 1,503 crore that was being held by the State be given to its rightful receivers -- the victims -- is one of the few redeeming episodes in the litigation that emerged around Bhopal. The setting up of an independent medical commission to monitor the health effects of the affected population endorsed by the Supreme Court, has been

another. And the possibilities offered by the US Appeals Court that the soil and water contamination caused by UCC be cleaned by the polluter is a third. Maybe the tide is turning, and the wrongs inflicted on the victims by the system are gaining recognition. The victims have worked hard not to let public memory fade. Work on constructing a legal and judicial regime which can provide enhanced safety, rehabilitative care and deterrence is clearly overdue and needs an immediate beginning.

B. The problem[67]

By: Usha Ramanathan

THE capacity of the corporation to cause immense and irreparable harm and loss moved from conjecture to experience with the Bhopal gas disaster. Industrial risk, which had found tolerance as an inevitable, even if unfortunate, aspect of enterprise and industrial progress, precipitated into industrial hazard when MIC leaked out of the Union Carbide factory in Bhopal on the night of 2/3 December 1984. The Union Carbide Corporation was the majority shareholder in its Indian subsidiary, the Union Carbide India Ltd. UCC brought the plant to India, trained UCIL personnel, made decisions about investing in maintenance of the plant and machinery, monitored the functioning, and profitability, of the plant. UCC had been deliberating whether shifting the plant to Indonesia or Brazil would increase its viability when the disaster intervened, bringing the curtains down on this proposal.

Yet, when UCC was called to the dock to answer for the disaster, it refused to acknowledge its responsibility. In litigation that followed, the Indian government, as statutorily appointed representative of the community of victims, approached the US courts to adjudicate the civil claims for compensation and damages; the US courts declared that they were an inconvenient forum but directed the UCC to appear before the Indian courts; the matter of interim compensation was raised by victims' groups in the district court which asked UCC to pay Rs 350 crore as interim relief to the victims; the High Court adopted an altered reasoning and awarded Rs 250 crore; and while this matter of interim compensation was being argued in the Supreme Court, a settlement-order was passed by that court bringing all proceedings past, present and future to a close upon payment of $470 million by UCC and UCIL.

Doubts that assailed victims, victims' groups and court observers have persisted down the years. Why did the Supreme Court endorse a settlement made, avowedly in the interest of immediate relief to the victims when, in fact, the process of identifying the victims was yet to take off? Was it a settlement, or was it complicity between the state and the corporation? Was there a price attached?

The settlement was not merely a final determination of matters connected with the liability of the multinational corporation, it also signalled the departure of the MNC, and its CEO, from the jurisdiction of the Indian courts. UCC and Warren Anderson, who was the CEO at the time of the disaster, are today proclaimed absconders in the criminal trial which was restarted after the 'settling' of the criminal cases was set aside by the Supreme Court in a review order in 1991. When the UCC was asked to set up a hospital for the victims, it

[67] Available at: http://www.india-seminar.com/2004/544/544%20the%20problem.htm visited on: 4/12/2015 at: 3:40 PM

adopted a front, and a frontman, who operated as the Bhopal Hospital Trust (BHT), and monies that were attached as indemnity in the criminal proceedings were steadily siphoned away in the name of the Trust.

All questions relating to composition of the gas, its antidote, and any other information that may help in the treatment of the survivors remain unanswered by the corporation. The different standards adopted in the Bhopal plant and UCC's West Virginia plant remain unexplained. And the absconding corporation and the silent corporation have now been joined by the vanishing corporation – UCC has merged with Dow Chemical, and Dow would have it that it is not responsible for the disaster and its consequences. It has taken years of work, and litigation, to wring out an acknowledgment of Dow's responsibility for cleaning up the toxic waste that UCC had left behind which is even now contaminating the soil and water in and around the plant site – something that Dow continues to disclaim.

The endless ability of the corporation to slip beyond borders, change from one legal entity into another, play the litigation game, deploy money power and the threat of all MNCs backing off from a state that calls an MNC to account, is in plentiful evidence. Developing economies are especially vulnerable. It is this that made a judgment of liability important in Bhopal; a judgment we did not get.

International efforts since have been mild. The Global Compact launched by the UN Secretary General Kofi Annan is an instance. The Norms which are presently being developed under the aegis of the Office of the High Commissioner for Human Rights is an improvement, but need much work before it travels beyond being a voluntary, and therefore weak, code.

It is not only the corporation which stands indicted. The state too is arraigned, accused of giving the corporation an unregulated licence to cause harm, even to kill. In Bhopal, concerns about state complicity in corporate crime were sidelined when the Bhopal Claims Act was enacted in March 1985. With this act the state arrayed itself along with the victims, till the settlement was reached. The policy, and regulatory, role of the state has thus stayed beyond scrutiny and remains among the unresolved issues that are a legacy of the Bhopal litigation.

In December 1985, when oleum gas wafted into the atmosphere from the Shriram Foods and Fertilisers factory in Delhi, the Supreme Court seized upon it to expound principles of absolute liability, enterprise liability, deterrence, personal liability of directors and managers of safety, and workers' right to participate in safety management. The prescription of relocation of industries was mooted as a facet of safety. In 1987, this resulted in an amendment to the Factories Act 1948, and a chapter IV A was introduced to account for hazardous processes. Disaster preparedness and disaster management were enunciated in a context where it was acknowledged that disasters were likely to affect persons living in the vicinity of a factory, and that they, and the local authority, ought to be alerted to what they need to do in the event of a disaster. This is in the letter of the law; there is little evidence that it has been translated into practice.

In 1991, a law to make it compulsory to insure hazardous industry was brought in. The Public Liability Insurance Act 1991 was amended in 1992 after the insurance companies refused to insure hazardous industry for indefinite amounts. The PLIA 1991 was Parliament's effort to provide for interim compensation in the event of an accident arising out of the use of hazardous substances. Its use seems to have been minimal.

Despite a fair regularity of accidents over the years, and a premium of Rs 56,56 crore collected between 1992 and 2000, the relief claims paid amount to a mere Rs 46.45 lakh. There is a non-use of the provision made by this law which requires to be explained by the agencies of state. In 1995, a National Environment Tribunal Act was enacted to provide a forum for speedy redress in the nature of interim, and final, compensation to those who fall victim to hazardous accidents. The act still remains unenforced, and there has been no public explanation for this inaction.

The post-settlement phase has witnessed a range of proceedings that has resulted in further victimising the victim. Arbitrary categorisation, *suo motu* reduction of compensation amounts, determination by *lok adalats* that were set up to clear cases rather than do justice to the victims, the long wait, the miserly sums awarded – most of the injury claims were settled for Rs 25,000, without interest, and the payments made where death occurred averages at around Rs 67,000 – the absence of legal aid in Bhopal, the striking off from the list because of non-appearance, and so on.

The recognition as victim has been a precondition to treatment in the speciality hospitals, doubly victimising a person suffering unrecognised harm. The unwillingness of UCC to give information on the compound that escaped has meant that the treatment is based on inadequate, or no, information, often symptomatically. The closing down of the ICMR studies, and the paucity of research on the effects of the disaster, bear down on the victims as does a burden.

The 'settling' of criminal cases in 1989, their reopening in 1991, the reduction of charges against the Indian accused in 1996, the years that no extradition request was made for bringing Warren Anderson to trial, the refusal of the US government to agree to extradite, have rendered justice through criminal law difficult to achieve.

Amidst all this, the impoverishment and the reduction, even loss, of livelihood options stands in stark relief.

The victims, however, have refused to give up. National, and international, campaigns demanding the particular accountability of UCC and its new owner, Dow, have been gaining strength even as victims become survivors. Workshops and small businesses have been set up to provide livelihood. Alternative medical care has been established. And the judiciary and the executive have been consistently engaged to make them deliver to victims their due.

The persistence of the victims appears to have somewhat turned the tide. In May this year, following a Supreme Court order, the state government was required to provide clean water to the areas affected by the contamination in and around the factory site. In July, the contention over the settlement money that remained with the state was resolved with the Supreme Court recognising that it belonged to the victims, and ordering that it be disbursed among the victims in proportion to the amounts paid to them as compensation; and on 15 November the first cheque was handed over. In August this year, the Supreme Court ordered that an independent medical advisory body and monitoring committee be set up to oversee the medical relief and rehabilitation of the Bhopal victims.

The unfinished agenda presents a long, and severe, list. The experience of disaster, and hazard, calls into question the impunity which shields corporations. Chemical industry, and its free riding on the commons and

on the human body is under challenge; but the presumptions of development, and the imperatives introduced by privatization, liberalization and globalization in the '80s and the '90s, provide distortions which will have to be righted before reaching a resolution of this knotty issue. Twenty years after Bhopal, and it would seem the first tentative steps towards corporate accountability are yet being taken.

Govt. claiming less compensation than in 1985: Bhopal gas victims

Survivors of the Bhopal gas tragedy have claimed that the Union government is claiming less in compensation than what it did 30 years back. While in 1985 the Indian government asked for $3.3 billion as compensation, it is now $1.2 billion in 2015, they claimed.

"In 1985, the Indian government asked for $3.3 billion as compensation that will work out to about $7 billion dollars today. Union Carbide has paid only $470 million. The least the government should be asking for is $6.5 billion. But the curative petition only asks for 1.2 billion dollars," said Rashida Bee of the Bhopal Gas Peedit Mahila Stationery Karmchari Sangh.

Members of five organisations of survivors of the deadly gas leak who marched in a rally with torches on Wednesday on the eve of the 31st Anniversary of the tragedy have charged that the curative petition filed in the Supreme Court five years ago seeks "lesser" compensation from Union Carbide and its owner the Dow Chemical Company responsible for the incident.

'Just one hearing'

They also claimed that in the last five years there has been just one hearing on the curative petition and the government has not moved a single application for urgent hearing on the matter.

Balkrishna Namdeo, president of the Bhopal Gas Peedit Nirashrit Pensionbhogi Sangharsh Morcha, alleged that governments have produced "fraudulent data" on death and injury. "The government says only 5,295 persons have died due to the disaster whereas our own medical research shows that twice this number died in the first nine years itself," he said.

Nawab Khan, president of the Bhopal Gas Peedit Mahila Purush Sangharsh Morcha, said the figures published by the Madhya Pradesh government show that there were 4,31,495 chronic patients in hospitals meant for toxic gas-affected people in 2010. (Reported in *The Hindu*, available at: http://www.thehindu.com/todays-paper/tp-national/govt-claiming-less-compensation-than-in-1985-bhopal-gas-victims/article7942679.ece)

C. 'Many employers don't report occupational accidents, breaking Labour Laws' (*The Island,* Oct. 2, 2014)[68]

By Sanath Nanayakkare

About 1,800 work-related accidents are reported in Sri Lanka annually and about 80 of those are fatal accidents. However, these statistics do not reflect the true picture as reporting of occupational accidents is poor in Sri Lanka. In any work place "Zero" accidents can be achieved only through "behavior based safety", Dr. Wajira M. Palipane, Deputy Commissioner of Labour (Occupational Health), Specialist Occupational Physician and Head of the Division of Occupational Hygiene of the Department of Labour told Sanath Nanayakkare of The Island Financial Review during an interview recently.

Palipane, a highly qualified academic is a visiting lecturer in Occupational Safety and Health (OSH) in four universities and a professional institution in Sri Lanka. He is an occupational physician who is committed to protect health and safety of workers.

At a time where all business organizations are busy talking about their business outcomes and CSR projects, talking to Palipane revealed the lesser known risks and dangers workers face in their work environment.

He also told us about the forthcoming Employment Injury Insurance with sufficient capital, managed by the Labour Ministry, which will ensure benefits for families of workers who face work-related fatalities and non-fatalities.

Q: Do you have any statistics that show how many have died or become disabled from work-related accidents in Sri Lanka?

As per statistics of the Industrial Safety Division of the Department of Labour, for a year about 1,800 accidents are reported and out of this about 80 are fatal accidents. However, these statistics do not reflect the true picture as reporting of occupational accidents is poor in Sri Lanka. Unfortunately many employers do not accurately report all occupational accidents that take place in their respective work places to the Industrial Safety Division of the Department of Labour.

All employers are duty bound to report all occupational accidents that require three or more days of accident leave for the victim. The law pertaining to this in Sri Lanka is the Factories Ordinance. However many employers do not abide the law pertaining to reporting of occupational accidents.

Q: How do you define Occupational Safety and Health or OSH in plain terms?

It is all about promotions and maintenance of highest possible level of physical, mental, social and spiritual wellbeing of workers of all occupations and protection of them from hazards and risks that prevail in their working environment.

Q: Why do you think OSH isn't talked about in our society as much as Human Skills Development or Corporate Social Responsibilities?

[68] Available at: http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=111357

As far as large scale enterprises that cater the foreign markets are concerned OSH is a commonly talked subject and it is a top priority in the corporate agenda. However, small and medium scale enterprises and the informal sector unfortunately do not give due priority to OSH mainly due to financial constrains those enterprises encounter. This is why OSH is not a commonly talked about subject amongst the common people. However OSH should be a top priority in the corporate world irrespective of the scale of the enterprise.

Q: How important is OSH in moral, legal and financial aspects?

First and foremost OSH is a basic right of each and every worker. Employers are morally and legally bound to provide basic OSH needs of all of their workers. Financially, I consider OSH is a sound investment rather than a spending of money. All employers should perceive OSH as a sound investment as in the long run OSH will reap more financial benefits.

Q: Does Sri Lanka have a charter that sets forth principles for the protection of workers from sickness, disease and injury arising from employment?

Sri Lanka does not have a charter as such. However a National Policy on Occupational Safety and Health has been formulated and it will come in to being in the near future.

Q: Do you think some of these tragedies are preventable?

I personally think all occupational accidents, fatal and non fatal are preventable. As an Occupational Physician who is committed to protect health and safety of workers, I am of the opinion that no worker should die, get injured or take ill due to work related causes.

However, OSH is a tripartite responsibility. All three stake holders namely employers, workers and government should take collective efforts towards achieving highest possible level of safety and health of workers. Nobody can grant anybody safety and health. Safety and health should be achieved through collective efforts of all three stake holders. In any work place "Zero" accidents can be achieved only through "behavior based safety" where each and every worker considers safety of others is my responsibility. It is not an easy task. I strongly believe in training on OSH in achieving "behavior based safety".

Q: Prevention necessitates reporting. Do victims or their employers care to report accidents to the National Institute of Occupational Safety and Health; NIOSH?

True, for prevention of accidents it is mandatory to report accidents. Truly speaking prevention of accidents requires not only reporting of accidents but also all near misses, all unsafe acts and all unsafe conditions in work places. According to the theory of "accident pyramid" to prevent lost time accidents, it is mandatory to report all near misses, all unsafe acts and all unsafe conditions that are prerequisites of lost time accidents. As I have mentioned above all accidents that necessitate the victim to keep away from his or her employment for a period of three or more days due to the accident should be reported to the Industrial Safety Division of the Department of Labour and not to the NIOSH.

Q: Do you take International Labour Organization‘s (ILO’s) OSH tools into account in developing a national policy on OSH?

Yes of course we do. We do make use of the ILO’s tools, guidelines, codes of practice, conventions and standards in OSH in our daily OSH practices.

Q: What has the NIOSH done to promote a preventive safety and health culture at work places?

I am the Head of the Division of Occupational Hygiene of the Department of Labour and I do not belong to the NIOSH. As far as my division is concerned my officers and I have taken a number of measures to inculcate the safety culture amongst the industries.

As I have already mentioned above, I strongly believe in training, education and awareness building in achieving the safety culture in the industrial world in this country. I myself heavily involved in OSH training, OSH education and OSH awareness building.

I devote a substantial portion of my work life to educate and train employers and workers on OSH and so do my subordinates. I am a visiting lecturer in OSH in four universities and a professional institution in Sri Lanka. Through training education and awareness building you could convey the OSH messages to a vast audience and it is very effective in inculcating OSH culture amongst workers and employers. Apart from training, education and awareness building we do lots of OSH inspections, OSH audits, environmental monitoring and biological monitoring. All those activities have a heavy impact on prevention of occupational accidents and occupational diseases.

Q: Handling heavy machinery, chemicals, fire, epidemics etc. need protective gear and training. Is our workforce well-equipped in this aspect?

Let me elaborate on the hierarchy of prevention and control of occupational hazards.

Elimination-first you must attempt to eliminate the hazards if possible. This is the most effective way to control hazards. However in certain circumstances elimination of hazards is not possible such as electricity.

Substitution- the next most effective way to control hazards is substitute the hazard with less hazardous ones. Such as if highly toxic chemical is used in an industry, we could substitute it with a less hazardous alternative chemical.

Engineering control- We may make use of engineering technology to control the hazards. Such as noise insulation of a noisy generator. Guarding of dangerous parts of machinery.

Administrative control- Administrative measures such as safety policy, safety committee, safety officers, safe operating procedures, safety training, vocational training could be used to control hazards

Last but not least, Personal Protective Equipments can be used to control hazards.

However, for Personal Protective Equipment to protect the workers from hazards, the Personal Protective Equipments should have required standards. Just wearing a PPE does not provide protection from hazards. For example wearing a dust mask made of cloth does not provide protection from inhalable dust particles that have less than 5 microns of aero dynamic diameter.

To effectively protect from inhalable dust particles you should use the N-95 dust mask. This N-95 is the standard of the dust mask. Even during the SARS (Sever Acute respiratory Syndrome) epidemic, I was in Japan and I used to wear the N-95 dust mask which effectively provided protection from the SARS virus which is less than 5 microns. For many industries that have inhalable dust particles in the working environment, I recommend this N-95 dust masks. It is the responsibility of the employers to consult us before they do purchase PPE.

To get protection from volatile substances such as thinner, Toluene, Normal hexane you should wear respirators with appropriate cartridges. Dust masks cannot provide protection from volatile substances. I have seen in many way side vehicle repair garages painters do spray painting just by wrapping a piece of clothe around the breathing area. This does not provide any protection from thinner based (solvent based) paint.

We need to educate both the employers and workers with regard to use of PPE. I am of the opinion that the knowledge of employers and workers on appropriate PPE and standards of PPE is poor. We need to intervene in this regard.

Q: In case tragedy should happen, do we have legal provisions that ensure insurance schemes?

There is no compulsory employment injury insurance, but we do have a different mechanism in this regard. It is the Workmen's compensation act which is implemented by the Commissioner for Workmen's Compensation. Any worker who sustains injuries attributable to occupational accidents is entitled to claim compensation from the employers. However many workers are unaware of this. The Secretary to the Ministry of Labour and Labour Relations Upali Wejayaweera is very keen and passionate of establishing an Employment Injury Insurance system in Sri Lanka which is a need of the hour. This insurance system will be beneficial to both the employers and the workers and therefore it would be truly a win-win situation for both the employers and the workers. We seriously consider this employment injury insurance should be introduced to Sri Lanka which has been in practice for long years in the industrialized countries.

Q: Does NIOSH have institutional power to regulate workplace safety measures, carry out inspections or demand reports on safety issues?

The NIOSH does not have enforcement powers in OSH. The powers to enforce the Factories Ordinance in Sri Lanka is vested in the Commissioner General of Labour who has devolved those powers to the Chief Factories Inspecting Engineer who is the Head of the Division of Industrial Safety.

Q: The corporate sector last year spent Rs. 4 billion on individually-implemented CSR projects. Now there is a coordinating effort to pool these funds and make a unified CSR model to add more value to the social work being done by the private sector. Would it be possible to build a similar fund for OSH*?*

Yes of course. That is exactly the Labour Secretary Upali Wejayaweera envisages through Employment Injury Insurance. This insurance will have a capital and the Labour Ministry will be the custodian of that capital. We could provide not only compensation to injured workers but also we could establish occupational rehabilitation centres for injured workers, provide scholarships to children of injured workers. I strongly recommend all responsible employers who care for their workers safety and health to join hands with the labour ministry in establishing the proposed Employment Injury Insurance in Sri Lanka.

VII. Child Labour in Sri Lanka

1. PREVALENCE AND SECTORAL DISTRIBUTION OF CHILD LABOR[69]

In 2014, Sri Lanka made a moderate advancement in efforts to eliminate the worst forms of child labor. The Government expanded the Child Labor Free District by 2016 program to two new districts. The Government also implemented the fully automated Labor Inspection System Application (LISA) that supports onsite inspection processes in five of nine provinces. However, children in Sri Lanka are engaged in child labor, including in agriculture and in domestic work. The Government's enforcement efforts continued to be weak, particularly with regards to hazardous child labor.

Children	Age	Percent
Working (% and population)	5-14 yrs.	**9.2 (302,865)**
Attending School (%)	5-14 yrs.	97.8
Combining Work and School (%)	7-14 yrs.	10.4
Primary Completion Rate (%)		96.9

Children in Sri Lanka are engaged in child labor, including in agriculture and in domestic work. (1-4) Table 1 provides key indicators on children's work and education in Sri Lanka.

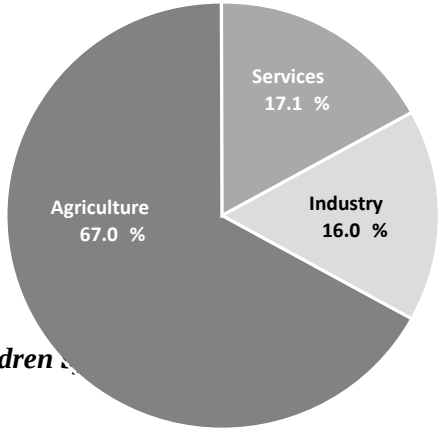

Table 1. Statistics on Children's Work and Education Working Children

Source for primary completion rate: Data from 2012, published by UNESCO Institute for Statistics, 2014.(5)
Source for all other data: Understanding Children's Work Project's analysis of statistics from Child Activity Survey, 2008–2009.(6)

Based on a review of available information, Table 2 provides an overview of children's work by sector and activity.

Table 2. Overview of Children's Work by Sector and Activity

Sector/Industry	Activity

[69] Available at: http://www.dol.gov/ilab/reports/child-labor/findings/2014TDA/srilanka.pdf visited on: 5/12/2015 at: 1:19 PM

Agriculture	Farming, activities unknown (2-4, 7)
	Fishing* (1, 3, 7)
Industry	Manufacturing,* activities unknown (3, 4)
	Mining,† including gem mining* (1, 3, 8, 9)
	Construction,* activities unknown (1, 10)
	Production of fireworks*† (1)
Services	Domestic work (2, 3)
	Transportation,* activities unknown (3, 10)
	Street vending and begging (1, 3, 10)
Categorical Worst Forms of Child Labor‡	Commercial sexual exploitation sometimes as a result of human trafficking (1-4, 11)
	Forced labor in domestic work* and begging* each sometimes as a result of human trafficking (1, 2, 12)
	Forced labor in farming,* fish-drying,* and fireworks* production (2, 11)

* Evidence of this activity is limited and/or the extent of the problem is unknown.

† Determined by national law or regulation as hazardous and, as such, relevant to Article 3(d) of ILO C. 182. ‡ Child labor understood as the worst forms of child labor *per se* under Article 3(a) – (c) of ILO C. 182.

Children, particularly from former conflict zones and from the northern and southeastern plantations and tea estates, are employed as domestic workers in third-party households in Colombo and in other urban areas.(1, 13) There are reports of children being employed as domestic workers due to debt bondage, and of children from tea estates being trafficked internally to perform domestic work in Colombo, for which their payments are withheld and movements are restricted.(2, 3, 11) Some child domestic workers are subject to physical, sexual, and emotional abuse.(3)

There are reports that children are subjected to bonded and forced labor in farming.(11) Children, predominantly boys, are trafficked internally for commercial sexual exploitation in coastal areas as part of the sex tourism industry.(2, 3, 11) Sri Lankan children who move abroad for employment, primarily to Middle Eastern countries, are vulnerable to forced labor and commercial sexual exploitation.(11)

There is a lack of current data on child labor, particularly in the agricultural sector and in manufacturing; there is also a lack of data on child labor in the Northern Province, which was excluded from the Government's 2008/2009 Child Activity Survey because of civil conflict in the region.(14)

Most children in Sri Lanka have access to basic education.(5) However, barriers to accessing education include difficulties traveling to school in some regions, lack of sanitation and clean water, and an inadequate supply of teachers. This is particularly true in the Northern and Eastern Provinces, which have been affected by the civil conflict that ended in 2009.(15)

LEGAL FRAMEWORK FOR THE WORST FORMS OF CHILD LABOR

Sri Lanka has ratified most key international conventions concerning child labor, including its worst forms (Table 3).

Table 3. Ratification of International Conventions on Child Labor

	Convention	Ratification
	ILO C. 138, Minimum Age	✓
	ILO C. 182, Worst Forms of Child Labor	✓
	UN CRC	✓
	UN CRC Optional Protocol on Armed Conflict	
	UN CRC Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography	✓
	Palermo Protocol on Trafficking in Persons	

The Government has established laws and regulations related to child labor, including its worst forms (Table 4).

Table 4. Laws and Regulations Related to Child Labor

Standard	Yes/No	Age	Related Legislation
Minimum Age for Work	Yes	14	Sections 13 and 34 of the Employment of Women, Young Persons, and Children Act (16)
Minimum Age for Hazardous Work	Yes	18	Section 20A of the Employment of Women, Young Persons, and Children Act (16)
Prohibition of Hazardous Occupations or Activities for Children	Yes		Part III, Employment of Women, Young Persons, and Children Act (17)
Prohibition of Forced Labor	Yes		Section 358A of the Penal Code (18)
Prohibition of Child Trafficking	Yes		Section 360 of the Penal Code (18, 19)
Prohibition of Commercial Sexual Exploitation of Children	Yes		Sections 286 of the Penal Code; Section 360 of the Penal Code (19, 20)
Prohibition of Using Children in Illicit Activities	Yes		Section 360C of the Penal Code; Section 288B of the Penal Code (18, 20)
Minimum Age for Compulsory Military Recruitment	N/A*		

Table 4. Laws and Regulations Related to Child Labor (cont)

Standard	Yes/No	Age	Related Legislation
Minimum Age for Voluntary Military Service Compulsory Education Age	Yes	18	Section 2 of the Hazardous Occupations Regulation (17)
	Yes	14	Section 43 of the Education Ordinance; Compulsory Attendance of Children at Schools Regulation (21-23)
Free Public Education	Yes		Section 47 of the Education Ordinance (22)

* No conscription (24)

There are no laws regulating employment in third-party households; thereby children ages 14 to 18 who are employed as domestic workers are vulnerable to exploitation.(13)

ENFORCEMENT OF LAWS ON THE WORST FORMS OF CHILD LABOR

The Government has established institutional mechanisms for the enforcement of laws and regulations on child labor, including its worst forms (Table 5).

Table 5. Agencies Responsible for Child Labor Law Enforcement

Organization/Agency	Role
Department of Labor (DOL), Ministry of Labor and Labor Relations (MOLLR)	Enforce child labor laws and receive public complaints of child labor filed in national and district-level offices. Refer cases involving the worst forms of child labor to the police and National Child Protection Authority (NCPA).(25)
Children and Women's Bureau of the Sri Lankan Police (CWBSLP)	Enforce laws on child labor, child trafficking, commercial sexual exploitation of children, and the use of children in illicit activities.(10)
NCPA Police Unit	Inspect any premises, interrogate any person, and seize any property suspected to be involved with child abuse, including unlawful child labor.(10, 26)
Department of Probation and Child Care Services (DPCCS)	Coordinate services for child victims of forced labor, trafficking, and commercial sexual exploitation who have been referred to DPCCS by the police and the court. Refer children to centers that provide shelter, medical and legal services, psychological counseling, and life and vocational skills training.(27-29)

Law enforcement agencies in Sri Lanka took actions to combat child labor, including its worst forms.

Labor Law Enforcement

The Department of Labor (DOL)'s inspectorate employed 428 officers to enforce all labor laws, including those related to child labor. DOL provided training on legal procedures applying to child labor and hazardous child labor to government officials in districts; it also conducted awareness-raising programs for stakeholders helping to eradicate child labor.(30) More than 400 labor officers

received training on the collection of evidence during labor inspections, and training manuals for labor inspectors were translated into the local languages of Sinhala and Tamil.(31)

In 2014, DOL conducted 8,300 labor inspections, which included 200 child labor inspections. No child labor law violations were found during these inspections.(32) During the reporting period, DOL received 133 complaints of child labor, leading to the prosecution of 9 cases. Eight of these cases are pending in court, while one case was finalized with a fine of $750.(32)

During the reporting period, the Ministry of Labor and Labor Relations (MOLLR) implemented the Labor Inspection System Application (LISA) in five of nine provinces. LISA is an automated system in which trained labor inspectors use handheld tablets to input data and record findings during onsite inspections.(31) In thirty district offices, 140 DOL staff members have been trained in operationalizing LISA.(31) Inspectors can use the application to monitor and track specific children and to ensure that they do not return to child labor once they have been identified and removed.(33, 34)

Criminal Law Enforcement

The Children and Women's Bureau of the Sri Lankan Police (CWBSLP) is staffed by 45 officers in 36 of the country's 460 police stations. In police stations without CWBSLP representation, the officer in charge oversees all the functions of the bureau.(10) The National Child Protection Authority Police Unit (NCPA) has approximately 40 police officers who investigate complaints involving children, including child labor. The agency also has approximately 250 child protection officers based in the districts who are tasked with preventing child exploitation and victim protection.(10, 34) In 2014, the Government conducted training programs on combatting trafficking in persons. The Government also approved standard operating procedures for identifying, protecting, and referring human trafficking victims.(12)

In 2014, there were six reported cases and five settled cases involving forced child labor as a result of human trafficking.(32) Information on the number of investigations, prosecutions, and convictions of crimes involving the worst forms of child labor is not available for the reporting period. Both the CWBSLP and the NCPA face a shortage of funds that affects their ability to carry out their mandate.(10)

The Government of Sri Lanka has committed to investigating allegations of previous recruitment and use of children in armed conflict by non-state armed forces. While some recruiters of child soldiers were killed during the conflict, research has found no evidence of prosecutions and convictions of living survivors who had violated the law on children and armed conflict.(35-37)

COORDINATION OF GOVERNMENT EFFORTS ON THE WORST FORMS OF CHILD LABOR

The Government has established mechanisms to coordinate its efforts to address child labor, including its worst forms (Table 6).

Table 6. Mechanisms to Coordinate Government Efforts on Child Labor

Coordinating Body	Role & Description
The National Steering Committee on Child Labor	Coordinate the implementation of the Roadmap to End the Worst Forms of Child Labor, the Government's key policy document for the elimination of the worst forms of child labor.(1, 25, 38) Chaired by the Secretary of MOLLR and includes representatives from key government agencies, employer and workers' organizations, ILO, UNICEF, and NGOs.(25)
NCPA	Coordinate and monitor activities related to the protection of children, including activities to combat the worst forms of child labor.(39) Consult with the relevant Government ministries, local governments, employers, and NGOs, and recommend policies and actions to prevent and protect children from abuse and exploitation.(40)
National Anti-Trafficking Task Force (NTF)	Coordinate government anti-trafficking interventions among ministries, departments, law enforcement agencies, and civil society groups. Led by the Ministry of Justice and includes representatives from NCPA, the Sri Lanka Police, Immigration, Foreign Employment Bureau, and civil society groups.(10, 41)

GOVERNMENT POLICIES ON THE WORST FORMS OF CHILD LABOR

The Government of Sri Lanka has established policies related to child labor, including its worst forms (Table 7). **Table 7. Policies Related to Child Labor**

Policy	Description
Sri Lanka's Roadmap 2016 on the Worst Forms of Child Labor (2011–2016)	Specifies time bound goals, including developing and/or strengthening the management, coordination, implementation, resource mobilization, and reporting of programs that will lead to the elimination of the worst forms of child labor by 2016.(1) Provides district-level mainstreaming strategies to address specific sectors of child labor, including armed conflict, plantations, fisheries, and tourism. Outlines strategies to include child labor issues within social protection and education goals.(1)
The National Human Resources and Employment Policy for Sri Lanka	Provides an overarching umbrella framework to several existing national policies related to employment and human resources formulated by different ministries. Sets eliminating child labor in hazardous activities as a priority and a

	goal of zero tolerance for the worst forms of child labor by 2016.(42)
National Education Sector Development Framework and Program II (ESDFP-II) (2012–2016)*	Aims to increase the equitable access, quality, and delivery of education. Supports accelerated learning and nonformal education for dropouts from the formal education system.(43)
National Plan of Action on Anti Human Trafficking	Plans the implementation of anti-trafficking activities for each member of NTF on an annual basis. (41)

* Child labor elimination and prevention strategies do not appear to have been integrated into this policy.

The Government has not yet approved the draft National Child Protection Policy. The Policy is intended to ensure effective coordination among all organizations and actors working for the protection and development of children in Sri Lanka; it also outlines key policy recommendations including strengthening and expanding nonformal education opportunities for vulnerable children (including child laborers) in geographic locations with the highest concentrations of vulnerable households. It recommends measures to prevent and eliminate the trafficking of children including through improved detection and identification of traffickers and victims, and to provide greater protections to child victims.(44)

The Government anticipates that the new national child labor policy, drafted by the National Steering Committee on Child Labor with technical assistance from the ILO, will be finalized in 2015.(32) The draft policy aims to end the worst forms of child labor by 2016 through a variety of activities, including effective enforcement of relevant laws and mainstreaming child labor into key development policies and programs.(10)

SOCIAL PROGRAMS TO ADDRESS CHILD LABOR

In 2014, the Government of Sri Lanka funded and participated in programs that include the goal of eliminating or preventing child labor, including its worst forms. The Government has other programs that may have an impact on child labor, including its worst forms (Table 8).

Table 8. Social Programs to Address Child Labor

Program	Description
Child Labor Free Zone by 2016†‡	Local government initiatives that seek to eliminate child labor through the identification of children engaged in child labor, a rehabilitation program, assistance to families of children at risk of engaging in child labor, and an awareness-raising campaign. Operated by the District Secretariats with assistance from the MOLLR and with technical and financial support from the ILO.(45) The program was piloted in Ratnapura in 2013, and

expanded to Kegalle and Ampara districts in 2014.(45-47)

Shelter for Victims of Human Trafficking	IOM-funded Ministry of Child Development and Women's Affairs (MOCDWA) shelter that provides victims, including children, with safe shelter and access to medical, psychological, and legal assistance. In 2014, MOCDWA and IOM provided training to shelter staff on victim identification, first aid, counseling skills, and security.(12, 48)
Decent Work Country Program (2013–2017)	ILO technical assistance project detailing the policies, strategies, and results required to make progress toward the goal of decent work for all. Includes four strategies to reduce the worst forms of child labor: (1) capacity building for mainstreaming worst forms of child labor into sectorial plans and programs, (2) area-based integrated approach within districts, (3) strengthening institutional mechanisms for improved coordination and monitoring, and (4) development of a knowledge base for tracking progress.(49)
UN Development Assistance Framework (UNDAF) (2013–2017)	Agreement pegging UN assistance to Sri Lanka's long-term development priorities with the goal of sustainable and inclusive economic growth with equitable access to quality social services, strengthened human capabilities, and reconciliation for lasting peace. Stipulates that UN agencies will support national efforts to strengthen justice for children and achieve the goal of zero tolerance of the worst forms of child labor, including the trafficking of children for exploitative employment.(50)
Transforming School Education*	A $100 million WB-financed, 5-year education project to support the ESDFP. Objectives include promoting access to primary and secondary education, improving the quality of education, and strengthening governance and delivery of education services.(51) Appoints school attendance committees to promote school enrollment and attendance; runs school nutrition and health programs.(25)
New Beginnings for Children Affected by Conflict and Violence*	USAID-funded project implemented by Save the Children and DPCCS. Objectives include improving care and protection for children, and strengthening child protection mechanisms. (52)

* The impact of this program on child labor does not appear to have been studied.

† Program was launched during the reporting period. ‡ Program is funded by the Government of Sri Lanka.

2. Hazardous forms of child labour invisible[70]
Sri Lanka conducts child activity survey

A small number of children in marginalized groups are engaged in hazardous work with little or no schooling. The number is so small that it is almost invisible, which prompted authorities to look deeper.

A recent survey on child labour in the country carried out by the Department of Census and Statistics, with assistance from the International Labour Organisation, shows that 1.5 percent of the child population is engaged in hazardous labour while 1 percent was engaged in work earning under Rs. 4,000 a month.

The 'Child Activity Survey' based on data collected in 2008/9 and which was released last August, showed that the estimated child population was around 4,338,709 of which 87.1 percent are not engaged in any work of economic value. The number of children engaged in work of economic value was at 12.9 percent.

"Sri Lanka is among the few countries that are expected to achieve Millennium Development Goals (MDG's) set by United Nations General Assembly and this has been corroborated by the country's universal social and health indicators. As a result, Sri Lanka is viewed as a model low income country that has achieved extraordinary success in attaining high levels of male and female literacy, school enrolment rates, life expectancy with low levels in child and infant mortality despite the country's comparatively low per capita income," the Department of Census and Statistics said.

"However, amidst such favourable general socio- economic standards, there remain pockets of children of marginalized groups in the country that have either not attended school at all or have dropped out prematurely from the schooling system. This has been identified as a situation with a potential to create a child labour problem in the country.

"Child labour, when the numbers are small and especially when it is not concentrated, is hardly visible. It has also been observed that the traditional survey instruments, such as population, Housing and Labour Force surveys do not fully capture such situations, as the main objectives of those surveys are not geared towards the issue. Therefore investigations in to all the activities of children with special survey approaches are required to identify different activities of children and to decipher child labour in all it forms."

[70] *The Island*, reported on June 11, 2012 available at: http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=54165 visited on: 5/12/2015 at: 1:31 PM

According the statistics office, 10.4 percent of the child population is engaged in work that is not classified as child labour. These children mostly work in their own homes, lending a hand to the day-to-day upkeep of their homes.

One percent of the child population is engaged in non hazardous child labour while 1.5 percent is in hazardous forms of child labour mainly in the manufacturing sector, the survey showed.

The total number of children engaged in child labour in Sri Lanka is around 107,259 or 2.5 percent of the total child population.

School attendance among the total child population is at 94 percent. School attendance among working children is at 80.4 percent, 53.4 percent among those engaged in child labour and 29.9 percent among those engages in hazardous forms of labour.

The majority (66.3 percent) of the children are engaged in elementary occupations which includes street and mobile vendors, street services, domestic helpers, agricultural and related labour workers, labourers engaged in mining, construction, manufacturing, transport and related workers.

At national level about 61 percent of the children are engaged in the agriculture industry. The overwhelming majority (80.8 percent) of the children engaged in economic activities at national level, work for the gain of their families without payment (unpaid family workers).

The average work-time by children aged 5 to 17 years is estimated at 13.3 hours a week.

"About 70 percent of the working children have reported that they work less than 14 hours in a week, in other words less than 2 hours a day on average. Over half of working children (55.4 percent) work in their own homes," the statistics office said.

Out of 557,599 working children, 86,428 (15.5 percent) children work for payments, either while attending school or not attending school.

The average monthly income in both cash and in-kind for a child workers is Rs. 3,820. Of those children who are working for payments, 37.8 percent earn less than Rs. 2,000 per month. About 34 percent of the children in paid employment receive their payments on daily basis.

The number of children engaged in family work is estimated at 3,634,588. Family work is identified as cooking, shopping, clearing, washing cloths, collecting firewood, fetching water, caring for children or elderly. Out of this total, 82.2 percent are engaged in family work while schooling. The average number of hours engaged in family work is five hours per day. At national level, 40 percent of children engaged in family work spend two or less hours a day in their tasks. Children who are

attending school spend 4.7 hours a day on average on family work and this average rises to 10.1 hours per day for children who do not attend school.

The estimations of total child labour and hazardous child labour populations in the country is 107,259 and 63,916 respectively out of 4,338,709 children estimated to be the total child population in the country.

Child Labour: National Policies in Sri Lanka

National Legislation and Policies Against Child Labour in Sri Lanka[71]

Legislation

Constitutional safeguards

Under the Constitution of Sri Lanka, 1978, Article 27 (13) Directive Principles of State Policy and Fundamental Duties, the State pledges to 'promote with special care the interest of children and youth so as to ensure their full development, physical, mental, moral, religious, and social, and to protect them from exploitation and discrimination'.

In addition, the Draft Constitution (August 2000) Article 22, entitled Special Rights for Children, gives constitutional guarantees to the right of a child to be protected from abuse; to have access to free education between the ages of 5 and 14, and to not be employed in any hazardous activity. It also defines conclusively a child as a person under the age of 18 years.

Minimum age for employment

The minimum age for employment of children was raised to 14 years in December 1999 by an amendment to the Employment of Women, Young Persons and Children Act (No. 47), 1956. At present, the minimum age of employment in all sectors is 14 years. Further, through the Ministry of Labour, the legislation has been amended to provide for payment of compensation to victims, by employers violating the minimum age of employment laws.

Child trafficking

In April, 2006 the Penal Code was amended to reflect the international standards prescribed by the ILO Convention No. 182 and now deems the trafficking of persons for exploitative employment as a crime. The Penal Code was also amended in 2006 to recognize the recruitment of children in armed conflict as a crime, even where such recruitment is not forced or compulsory in nature.

Hazardous Child Labour

[71] Retrieved from: http://www.ilo.org/legacy/english/regions/asro/newdelhi/ipec/responses/ srilanka/ational.htm visited on: 5/12/2015 at: 4:21 PM

In August 2006, there has been a change in the legislation which now empowers the Ministry of Labour to enact laws that prohibit the employment of children in hazardous forms of child labour. Accordingly, a list of hazardous forms of child labour is in the process of being finalized.

Compulsory education

Under the regulations framed in 1997, under the Education Ordinance of 1940, education and attendance at school were made compulsory for every Sri Lankan child aged between 5 and 14 years.

International Conventions

Sri Lanka is a signatory to the:

- ILO Worst Forms of Child Labour Convention (No. 182);
- ILO Minimum Age for Employment Convention (No. 138);
- ILO Forced Labour Convention (No. 29);
- ILO Abolition of Forced Labour Convention (No. 105);
- UN Convention on the Rights of the Child (CRC).

Government policies and programmes

Since 1994, the Government of Sri Lanka has given high priority to the protection of children from physical and sexual abuse, from exploitation through child labour, and from the effects of armed conflict. In 1996, a Presidential Task Force on the prevention and control of child abuse was set up, which made far-reaching recommendations, including the establishment of a National Child Protection Authority (NCPA) functioning under the direct purview of the Executive President. The NCPA was established in June 1999. The basic goal of the NCPA is the elimination of child abuse in all its forms and manifestations. The NCPA operates in four main areas: protection, advocacy, rehabilitation, and legal reform. Since very often, child abuse entails an element of trafficking, the NCPA is the pre-eminent national agency driving the anti-trafficking mission. With support from the ILO's International Programme on the Elimination of Child Labour (IPEC), the NCPA has initiated an anti-trafficking unit. The powers and functions of the NCPA and its strategic location under the Executive President eminently qualify it to be the coordinating agency with the relevant ministries, provincial councils, local authorities, and private as well as public sector organizations.

In March 2001, Sri Lanka ratified the ILO Convention No. 182 and subsequently developed a National Plan of Action (NPA) to combat trafficking of children for sexual and labour exploitation, with support from the IPEC project for combating child trafficking for labour and sexual exploitation.

In October 2002, the Ministry of Employment and Labour took the initiative to begin developing a national policy and plan of action to eliminate the worst forms of child labour as a matter of priority and requested ILO assistance to do so. This process was a participatory one with stakeholder

participation that went beyond the alliance of the ILO's constituents and was undertaken at the national as well as local levels. A Domestic Workers Act has also been developed with support from a trade union, named the National Workers Congress (NWC).

In October 2006, the Government of Sri Lanka presented its Ten Year Development Plan known as the Mahinda Chinthanaya -- one of the leading and guiding documents in respect to the development policies of the country. The issue of child labour is well articulated in several chapters therein. The new government policy also gives special focus to the plantation sector which is a prime sending area for child domestic workers, children in small factories and boutiques and other forms of exploitative employment, including the trafficking of children as child soldiers.

In September 2007 A Youth Employment Policy & National Action Plan, supported by the ILO, was presented for public comments and feedback. The policy takes into consideration the importance of eliminating child labour by placing great emphasis on the issue of access to quality education.

MINIMUM AGE OF EMPLOYMENT AND RELATED LAW'S IN SRI LANKA

ACT	**Age in Yeas / Child**	**Age in Years / Young person**
1. National Child Protection Authority ACT. No. 50 of 1998	18 less	
2. 1939 No 48 Children and Young Persons Ordinance as amended	14 less	15-16
3. 1956 No. 47 Employment of Women, Young Person and Children Act as amended by Act Nos; 43 of 1964, 29 of 1973, 32 of 1984 and the regulations made thereunder	14 less	15-18
4. 1954 No 19 Shop & Office Employment Act	14 less	15-18

World Report on Child Labour (extract)[72]

The case for accelerated global action targeting child labour and the lack of decent work opportunities for youth is very clear. Some 168 million children remain trapped in child labour while at the same time there are 75 million young persons aged 15 to 24 years of age who are unemployed and many more who must settle for jobs that fail to offer a fair income, security in the workplace, social protection or other basic decent work attributes.

This World Report focuses on the twin challenges of child labour elimination and ensuring decent work for youth. This focus is driven by the obstacles that child labour and the youth decent work deficit pose to implementing the Post-2015 Development Agenda and by the close connection between the two challenges. The Report makes the case that achieving decent work for all, one of the likely core Sustainable Development Goals for the post-2015 period, will not be possible without eliminating child labour and erasing the decent work deficit faced by youth.

The Report begins with a background discussion of standards, concepts and policy. It then proceeds to a discussion of the two-way linkages between child labour and youth employment: first, how child labour and early schooling leaving affect the transition paths of youth and their eventual employment outcomes; and second, how youth employment difficulties and low returns to education can impact on household decisions concerning child labour and schooling earlier in the lifecycle. The Report then addresses the issue of child labour among 15–17 years age group, the overlapping group that is relevant to broader efforts relating to both child labour and youth employment. The Report concludes with a set of recommendations for aligning and improving the coherence of policies and programmes addressing child labour and the youth decent work deficit.

How child labour and early schooling leaving affect the transition paths of youth and their eventual employment outcomes

Evidence from ILO School-to-Work Transition Survey (SWTS) programme indicates that between 20 and 30 per cent of adolescents and young adults in the low-income countries included in the SWTS programme complete their labour market transition by the age of 15 years, i.e. as child labourers.[73] The same survey source indicates that even more youth in these countries leave school prior to this age (see Figure 17), driven, *inter alia*, by poverty, social vulnerability, problems of education access and quality and gender-related social pressures.[74] How do the employment outcomes of former child labourers and others who began the transition to work at an early age differ from those of other young persons?

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[72] By ILO, available at: www.ilo.org/ipec/Informationresources/WCMS_358969/.../index.htm visited on: 5/12/2015 at: 4:40 PM

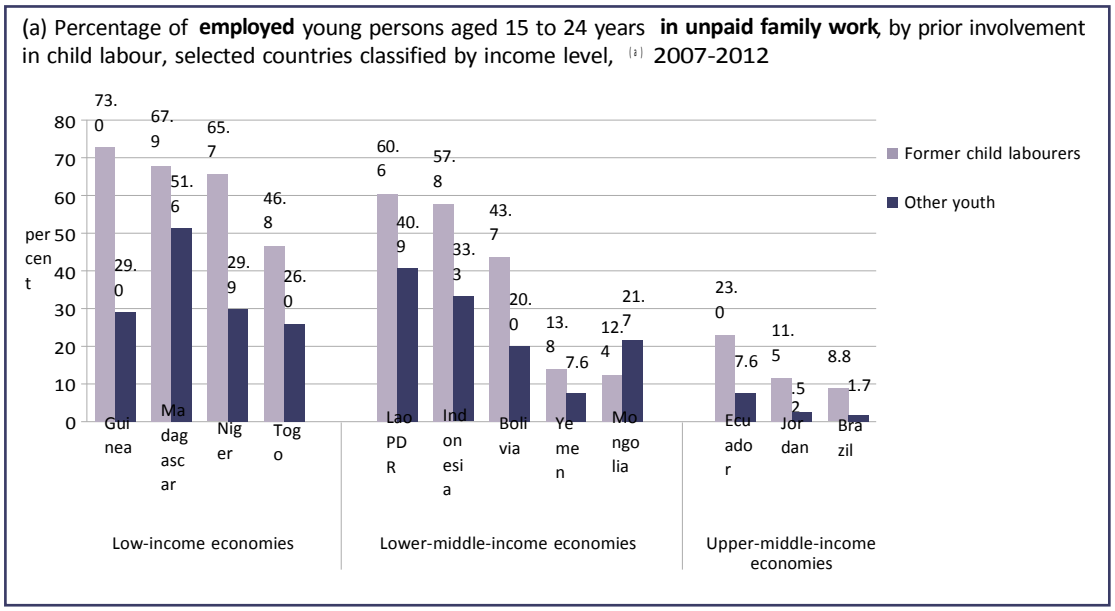
[73] ILO: *Global Employment Trends for Youth 2013: A generation at risk* (Geneva, 2013).

[74] For a more detailed discussion of this point, see, for example, ILO: *World report on child labour 2013: economic vulnerability, social protection and the fight against child labour* (Geneva, 2013); and ILO: *Joining forces against child labour. Inter-agency report for The Hague Global Child Labour Conference of 2010* (Geneva, 2010).

A survey programme supported by the Statistical Information and Monitoring Programme on Child Labour (SIMPOC), the statistical arm of the ILO International Programme on the Elimination of Child Labour, allows us to partially address this question. The SIMPOC surveys contain information on the age at which individuals begin working, allowing for simple comparisons of the employment and schooling outcomes of those that were already working by the age of 15 years with those that began work after this age.

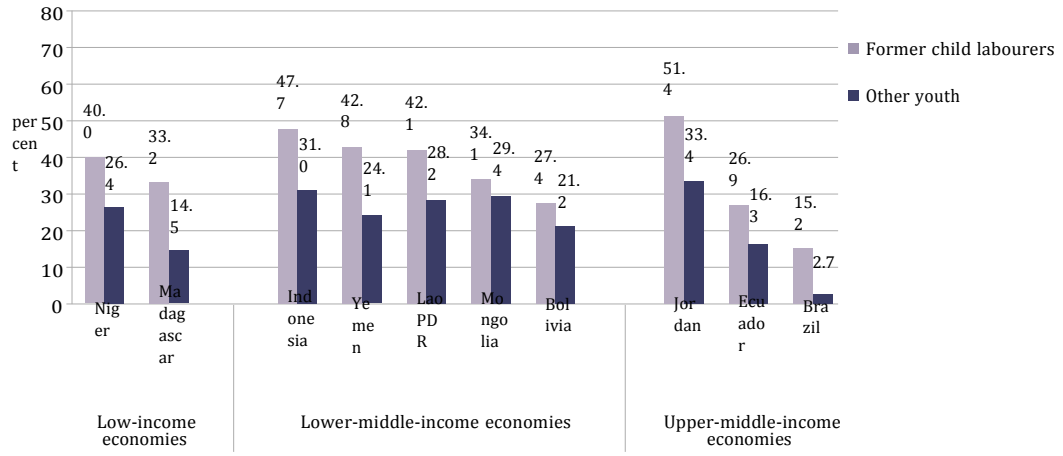
The results of this comparison are consistent across the 12 countries where these data are available – *prior involvement in child labour is associated with lower educational attainment and with jobs that fail to meet basic decent work criteria.*[75] Young persons who were burdened by work as children are consistently more likely to have to settle for unpaid family jobs (Figure 1a) and are also more likely to be in low paying jobs (Figure 1b).

Figure 1. Young persons who worked as children are more likely to be unpaid family workers



[75] Decent work sums up the aspirations of people in their working lives. It involves opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men. The definition of decent work is discussed further in Box 2 and its measurement is discussed in Box 4.

(b) Percentage of **employed** young persons aged 15 to 24 years in **lowest earnings quintile**, by prior involvement in child labour, selected countries classified by income level, 2007-2012



Note: (a) World Bank country income classifications by GNI per capita as of 1 July 2012: Low-income: US$1,025 or less; Lower-middle-income:
US$1,026 to US$4,035; Upper-middle-income: US$4,036 to US$12,475; and High-income: US$12,476 or more.
Source: Calculations based on national household surveys (see Appendix 1, Table A1).

This information, however, is limited essentially to a person's activity status at two distinct stages of the lifecycle – specifically, work status during childhood (i.e., up to the age of 15 years) and job status (at a particular point) during youth (i.e. the 15–24 years age group). The results from the SIMPOC surveys do *not* tell us anything about how the first status affects the transition trajectory leading to the second one, information that is critical to understanding *why* premature work involvement influences employment outcomes during youth.

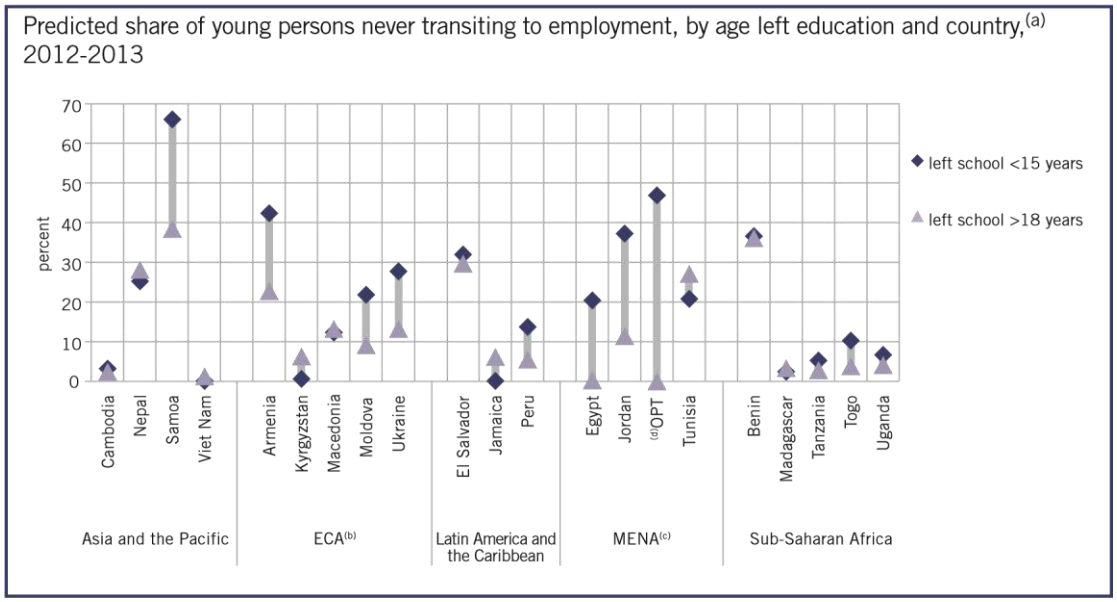
We now therefore turn to the issue of *transition to work* and how early school leaving can influence the transition path. Another important ILO data initiative – the School-to-Work Transition Survey (SWTS) programme – allows us to characterize the transition paths of youth in developing countries and how beginning the transition to work at an early age affects the transition paths and outcomes of young persons.

Large shares of youth leave school at or below the general minimum working age of 15 years – as set forth in ILO Convention No. 138[76] – in the developing countries that were included in the SWTS

[76] ILO Convention No. 138 allows a Member State whose economy and educational facilities are insufficiently developed to initially specify a minimum age of 14 years. National laws or regulations may permit the employment or work of children aged 13 to 15 years on light work which is (a) not likely to be harmful to their health or development; and (b) not such as to prejudice their attendance at school, their participation in vocational orientation or training programmes approved by the competent authority or their capacity to benefit from the instruction received. A Member whose economy and educational facilities are insufficiently developed may substitute the ages 13 and 15 for the ages 12 and 14 for light work.

programme. This group of early school leavers is at greater risk of remaining outside the world of work altogether, i.e. of never transiting to work (Figure 2).[77]

Figure 2. Early school leavers are generally at greater risk of remaining outside the world of work altogether



Notes: (a) Countries selected on the basis of data availability. (b) ECA - Eastern Europe and Central Asia region. (c) MENA - Middle East and North Africa region. (d) OPT - Occupied Palestinian Territory.
Source: Calculations based on ILO School-to-Work Transition Surveys.

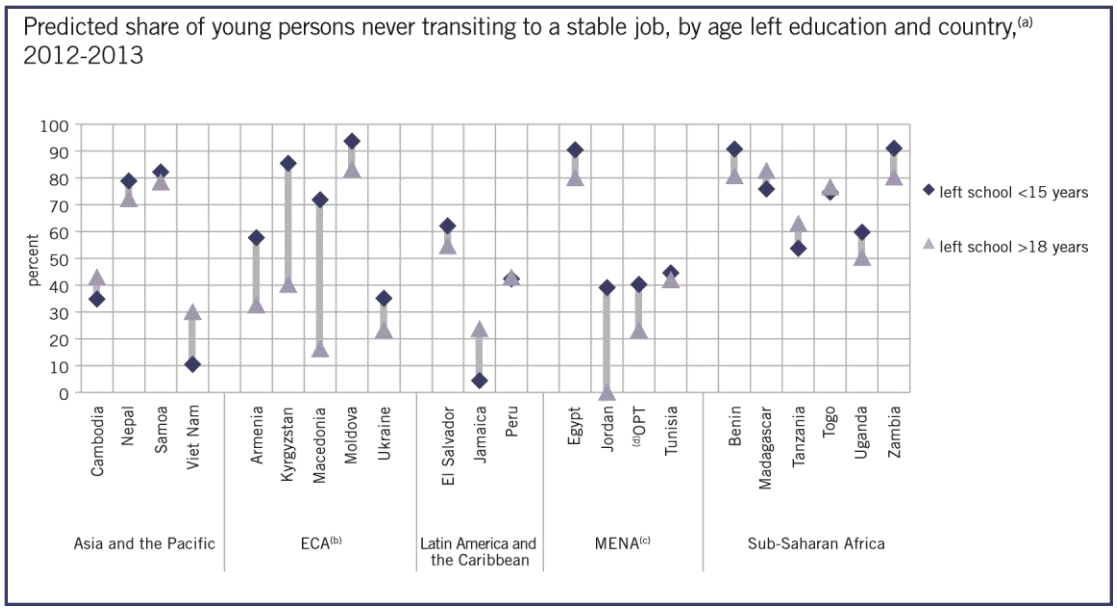
Early school leavers who do eventually transit are less likely than more-educated youth to ever secure *stable jobs*, where we define stable jobs as paid work with a contract of 12 months or more (Figure 19).[78] Job stability, in turn, is critical to security in the workplace and ultimately to decent work, the desired outcome of the transition to work.

Those leaving school prior to the age of 15 years that *do* manage to secure jobs take longer to do so than other youth. Figure 4, which reports results for the duration of the transition to the first job, indicates that the difference in duration times between early school leavers and other youth is often very large. Early school leavers securing stable jobs also take more time to do so than better-educated youth in the SWTS countries (not shown). These results run counter to the common perception that better-educated school-leavers with more specialized skill sets have relatively greater difficulty in gaining an initial foothold in the labour market.

[77] For further details regarding the methodology, see UCW: *Pathways to work in the developing world: An analysis of young persons' transition from school to the workplace*. UCW Working Paper (Rome, 2014).

[78] Following the model used for the analysis of the SWTS programme. See Elder, S.: *ILO School-to-Work Transition Survey: A methodological guide* (Geneva, ILO, 2009). This indicator should be considered with care in our case for two reasons. In low- and middle-income countries, the share of paid employment jobs tends to be much lower than in high-income countries (for which the concept of stable employment has been developed). Moreover, in our sample we have countries with very different level of development and economic structures: this reflects of course on the prevalence of stable employment among youth. As has been demonstrated in the national reports summarizing the SWTS results, a majority of adolescents in low-income countries complete the transition to self-employment rather than a stable job.

Figure 3. Early school leavers are generally less likely than their more-educated counterparts to secure *stable jobs*



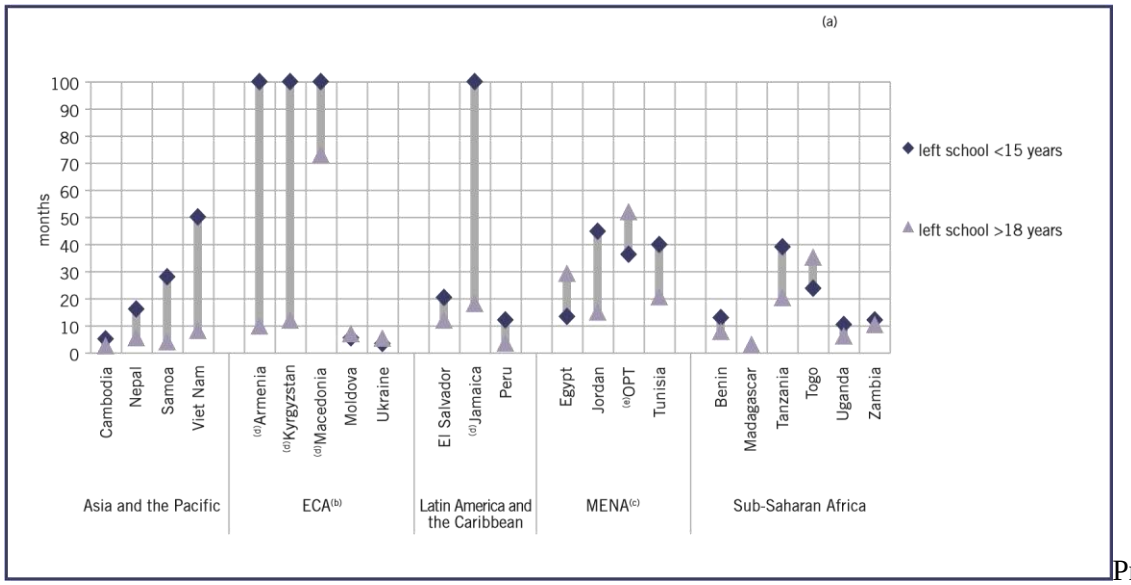
Notes: (a) Countries selected on the basis of data availability. (b) ECA - Eastern Europe and Central Asia region. (c) MENA - Middle East and North Africa region. (d) Occupied Palestinian Territory.
Source: Calculations based on ILO School-to-Work Transition Surveys.

Taken together, these results indicate that children forced by their household circumstances or other factors to leave school prior to their fifteenth birthday are doubly disadvantaged: they are less likely to ever find jobs and those who do find jobs take much longer to do so. The results reinforce a central message of this Report: in many national contexts policy interventions addressing premature school leaving and child labour are critical to broader efforts towards ensuring decent work for young persons.

Why the employment situation of youth matters for child labour

How are the labour market conditions faced by young people relevant to child labour? In theoretical terms, the answer is clear. Poor youth employment prospects can serve as a disincentive to investment in children's education earlier in the lifecycle. In other words, in countries where there are few opportunities for decent work requiring advanced skills, and where returns to education are therefore limited, parents have less reasons to delay their children's entry into work and to incur the costs associated with their children's schooling. By the same reasoning, in countries where the demand for skilled labour is high, and returns to education are therefore significant, families have a strong incentive to postpone their children's transition to work and to instead invest in their education.

Figure 4. Early school leavers take longer to find first jobs



Predicted duration of transition to a first job, by age left education and country, 2012-2013

Notes: (a) Countries selected on the basis of data availability. (b) ECA - Eastern Europe and Central Asia region. (c) MENA - Middle East and North Africa region. (d) Armenia, Kyrgyzstan, Macedonia FYR and Jamaica have been top coded at 100. (e) Occupied Palestinian Territory.
Source: Calculations based on ILO School-to-Work Transition Surveys.

We now move from theory to practice, reviewing evidence from real world case studies concerning the impact of youth employment on child labour and schooling decisions. Broadly, the cases that we cite indicate that, in keeping with theory, increased demand for skilled workers is accompanied by increased school participation and reduced child labour. This is an area, however, where substantial knowledge gaps remain.

The first case focuses on the impact of access to high-yield seeds by farmers in a set of villages in India in the late 1960s.[79] Adoption of these new seeds was not straightforward and required considerable experimentation and learning. Farmers with higher levels of education were arguably more equipped to go through this process of experimentation and learning and thus to profitably take-up the new seeds. The introduction of these seeds, in other words, *increased* the returns to education.[80] The study of this case shows that the areas where the new seeds were most profitable due to advantageous soil and climate conditions, and where the increase in returns to education were therefore greatest, households responded by increasing their children's school enrolment.[81]

[79] Rosenzweig, M.R.: "Why Are there Returns to Schooling?", in *American Economic Review*, Vol. 85, No. 2, pp. 153-158 (1995); and Foster, A.D. and Rosenzweig, M.R.: "Learning by Doing and Learning from Others: Human Capital and Technical Change in Agriculture", in *Journal of Political Economy*, Vol. 103, No. 6, pp. 1176-1209 (1995).

[80] Large landowners, who had better access to production inputs such as tractors, tubewells, fertilizers and pesticides, also enjoyed a considerable advantage in this context.

[81] Foster, A.D. and Rosenzweig, M.R.: "Technical Change and Human Capital Returns and Investments: Evidence from the Green Revolution", in *American Economic Review*, Vol. 86, No. 4, pp. 931-953 (1996). The study authors do not investigate the possible role of a substitution effect in explaining this result. It is

Not all children, however, benefited equally from these developments. The increase in enrolment was much higher among children from landed households able to take advantage of this new technology than for children from households without land.[82] The study also showed that the benefits of the high-yield seeds introduction in terms of school attendance depended on the availability of schools in the areas in question.[83] Consistent with experience in other countries, access to services (in this case schools) was a necessary condition for the potential increase in returns to education to be become effective.

Another interesting experience in India involves the rapid growth of the information technology (IT) industry beginning in the 1990s, which also strongly affected returns to education in the Indian labour market. The growth of this industry resulted in a strong increase in the demand for highly skilled workers, and in particular those with a good command of the English language. A study of this case shows that, over the period from 1995 to 2003, the districts that experienced the greatest influx of businesses and jobs in the IT services industry also saw a higher increase in school enrolment. The study also shows that the increase in school enrolment was particularly marked in schools where English was the language of instruction.[84]

Two cases from outside India offer further insight into how children's school participation can be affected by changes in returns to education in a local labour market. The first case involves the recent rapid growth of the garment sector in Bangladesh.[85] This growth primarily benefited women, both because this sector primarily employs female workers and because education was associated with better work conditions relative to the available alternatives. A study of the impact of the garment sector expansion shows that the school participation of younger girls (aged 5 to 10 years) *increased* in direct proportion to the rate of expansion of the garment sector.[86] The second case involves the rapid expansion of Mexico's export manufacturing industry in the late 1980s and 1990s. The findings of this case show that the effects of factory openings depend on the type of labour demanded: expansions in low-skilled job opportunities (i.e. opportunities in jobs requiring little education) tend

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possible, however, that the introduction of the high-yield seeds also decreased labour requirements on the farm, including labour provided by children.

[82] Foster, A.D. and Rosenzweig, M.R.: "Technological Change and the Distribution of Schooling: Evidence from Greenrevolution India", in *Journal of Development Economics*, Vol. 74, pp. 87-111 (2004).

[83] Foster, A.D. and Rosenzweig, M.R. (1996), op. cit.

[84] Shastry, G.K.: "Human Capital Response to Globalization: Education and Information Technology in India", in *Journal of Human Resources*, Vol. 47, No. 2, pp. 287-330 (2012).

[85] In the context of the garment sector in Bangladesh, the International Labour Organization (ILO) and the World Bank International Finance Corporation launched the Better Work programme in Bangladesh in November 2013 with the aim to provide assessments of factory compliance with national law and international core labour standards, publish transparent public reporting on findings, and provide advisory support for factories to make necessary improvements. The partnership between government, employers, unions, buyers, and other industry stakeholders will focus on promoting sustainable change in the sector by helping factories address working conditions, and to build factory-level capacity for labour administration and worker-management relations. The programme will also provide training and advisory services to factories to improve working conditions and competitiveness.

[86] Heath, R. and Mobarak, A.M.: *Does Demand or Supply Constrain Investments in Education? Evidence from Garment Sector Jobs in Bangladesh*, Working Paper (2012).

to *lower* school attainment, while expansions in high-skilled job opportunities tend to *increase* school attainment.[87]

Other case studies underscore the importance of knowledge and perceptions. Clearly, if parents are unaware of (or misperceive) a change in returns to education they will be unable to respond to this change or may respond in a manner that is not consistent with labour market signals. A study carried out in the Dominican Republic found that, in the face of information indicating that actual returns to education in the labour market were higher than initially thought, children stayed in school longer and delayed their entry into the labour market.[88] In a similar vein, individuals' perceptions of the returns to education were investigated in Madagascar.[89] It was found that the provision of information helps students and parents to more accurately assess average returns to education and results in increased school participation.

The cases we have discussed clearly indicate that increased demand for skill and returns to education translate into increased investment in education. The labour market prospects of young persons, and particularly returns to education in the labour market, have a strong influence on household decisions concerning the division of children's time between work and school earlier in the lifecycle. These findings represent another important argument for addressing youth employment and child labour issues handin-hand – not only does child labour affect youth employment prospects but youth employment prospects plainly affect child labour. Expanding decent work opportunities for youth, and particularly for vulnerable youth, it follows, constitutes an important strategy for addressing child labour. Interventions aimed at illustrating the benefits of education are also relevant.

Child labour among adolescents aged 15 to 17 years

Hazardous work among youth who are above the general minimum working age but not yet adults (i.e. those in the 15–17 years age group)[90] constitutes a worst form of child labour and a violation of international labour standards. The ILO Convention No. 182 on the Worst Forms of Child Labour (1999) calls on countries to take immediate and effective measures to eliminate this and other worst forms of child labour as a matter of urgency.[91]

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[87] Atkin, D.: *Endogenous Skill Acquisition and Export Manufacturing in Mexico*, Working Paper (2012).

[88] Jensen, R.: "The (Perceived) Returns to Education and the Demand for Schooling", in *Quarterly Journal of Economics*, Vol. 125, No. 2, pp. 515-548 (2010).

[89] Nguyen, T.: *Information, Role Models and Perceived Returns to Education: Experimental Evidence from Madagascar*, Working Paper (2008).

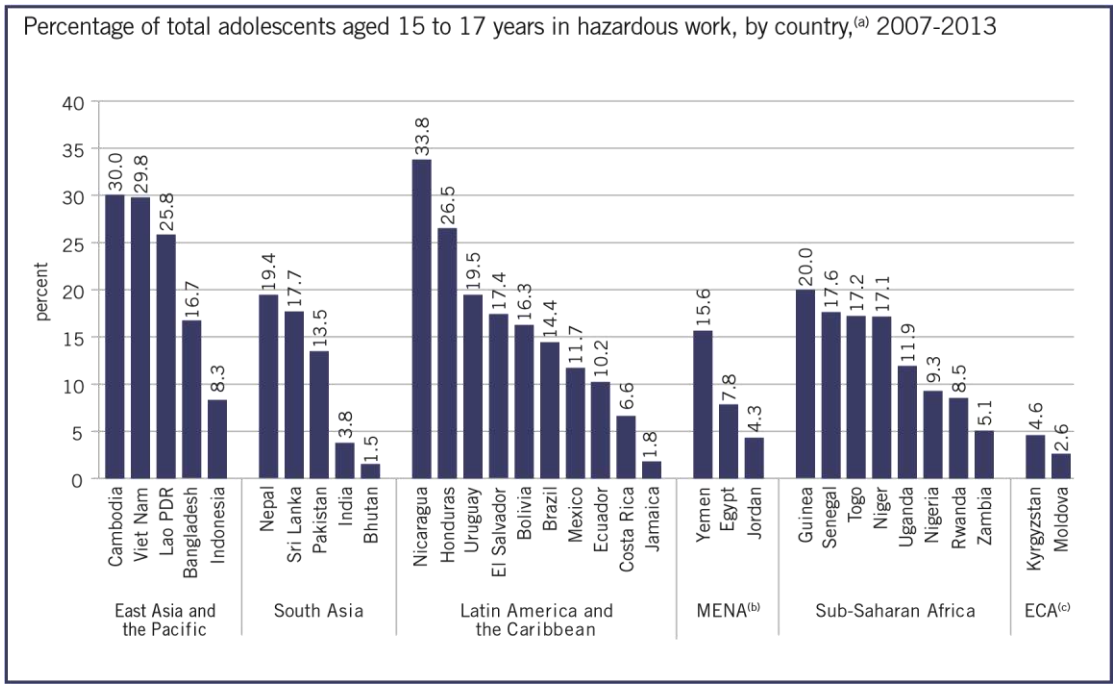
[90] In countries where the general minimum working age is 14 years, the lower age boundary should also technically be 14 years. However, for comparability, in this section we apply the minimum age boundary of 15 years in all countries.

[91] ILO Convention No. 182 on the Worst Forms of Child Labour (1999) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour. (Entry into force: 19 November 2000).

The latest ILO global estimates for the year 2012 indicate that both the share and absolute numbers of adolescents aged 15 to17 years in hazardous work is considerable:[92]

- adolescents aged 15 to 17 years in hazardous work total 47.5 million;
- adolescents aged 15 to 17 years in hazardous work account for 40 per cent of all those employed in the 15–17 years age group, a clear indicator of the decent work deficit facing this age group; and
- adolescents aged 15 to 17 years in hazardous work account for over one-quarter (28 per cent) of the overall group of children in child labour.

Figure 5. A high share of adolescents in many countries hold jobs that are hazardous and therefore that constitute child labour



Notes: (a) Countries selected on the basis of data availability. (b) MENA - Middle East and North Africa region. (c) ECA - Eastern Europe and Central Asia region.

Source: Calculations based on national household surveys (see Appendix 1, Table A3).

These stark numbers underscore the importance of distinguishing between decent work and forms of work constituting child labour in programmes promoting youth employment. The policy implications are equally clear: national policies should be directed towards removing youth from hazardous jobs or towards removing the hazardous conditions encountered by youth in the workplace. While the ultimate policy goal should be decent work, these figures make clear that a critical first priority in achieving this goal needs to be the removal of youth from hazardous forms of employment.

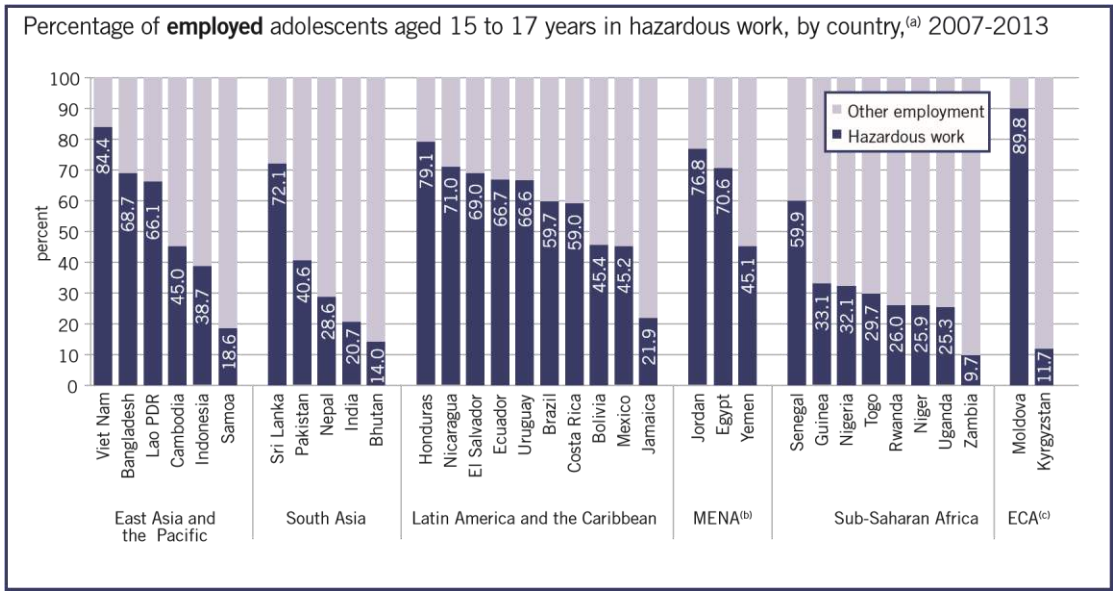
Country-specific numbers and shares of adolescents in hazardous work are reported in Figure 5. The list of countries is limited by data availability and is therefore unfortunately far from complete,

[92] IPEC: *Global child labour trends 2008 to 2012* (Geneva, ILO, 2013).

underscoring the general need to improve statistics on hazardous work (the country-specific data sources are listed in Appendix 1, Table A3). The estimates indicate that there are substantial shares of adolescents in hazardous work in most countries where data are available, although there is a large variation across countries and regions.[93]

Another way of viewing the issue of hazardous employment is its importance *relative to overall* employment for the 15–17 years age group. In other words, the share

Figure 6. Adolescents in hazardous work in fact constitute the majority of employed adolescents in this age group in many countries of *employed* youth in this age group that are in hazardous work.



Notes: (a) Countries selected on the basis of data availability. (b) MENA - Middle East and North Africa region. (c) ECA - Eastern Europe and Central Asia region. Source: Calculations based on national household surveys (see Appendix 1, Table A3).

We saw earlier that globally those in hazardous work accounted for 40 per cent of those employed in the 15–17 years age group. Country-level estimates, reported in Figure 6, also suggest that a very high share of employed adolescents aged 15 to 17 years are in hazardous work across most countries.

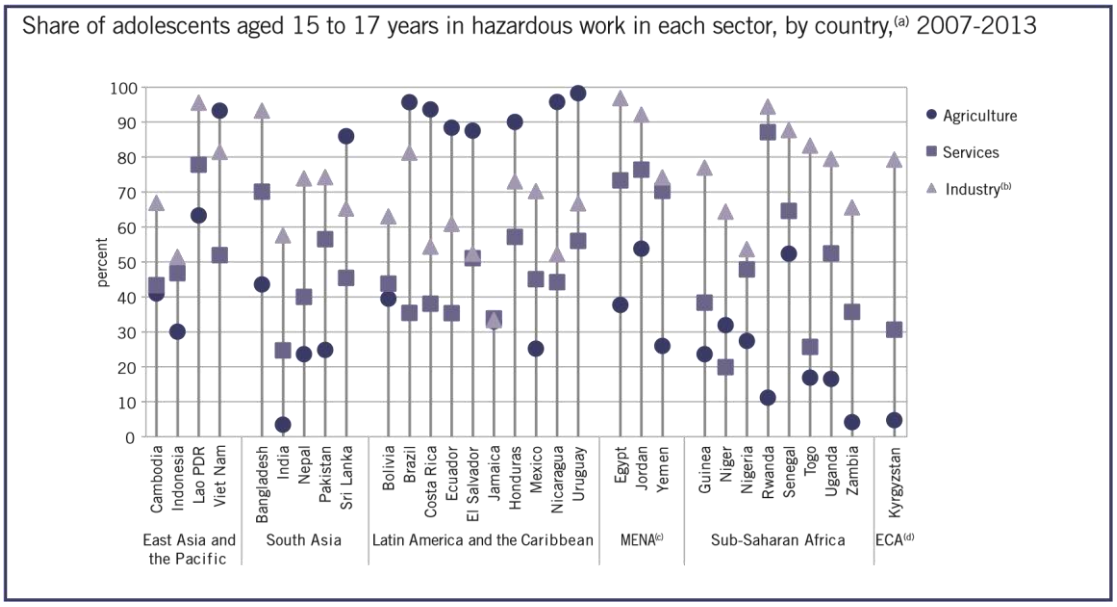
Calculating the share of employed adolescents aged 15 to 17 years in hazardous work in each sector offers further detail in terms of where in the economy the risk of hazardous work is the highest. Youth working in industry, which includes manufacturing, electricity, gas, water, mining and construction, face the higher risk of hazards in all regions except Latin America and the Caribbean (Figure 7). In this region, the agriculture sector, which comprises fishing, forestry, livestock herding and aquaculture, in addition to subsistence and commercial farming, is where employed youth are most likely to find themselves in hazardous jobs.

[93] As survey instruments and survey reference data differ across countries, national comparisons are indicative only.

The way forward: A coherent policy approach for tackling child labour and the youth decent work deficit

We have demonstrated above the close link between child labour and youth employment outcomes. Here we discuss the logical policy conclusion emerging from this link – *the need for a coherent policy approach that tackles child labour and the youth decent work deficit in an integrated fashion.* Looking forward, promoting decent work for all will be a critical part of the Post-2015 Development Agenda. Such a coherent industry and agriculture policy approach to education, child labour and youth employment will be central to the achievement of this goal.

Figure 7. Hazardous work appears especially common among adolescents employed in



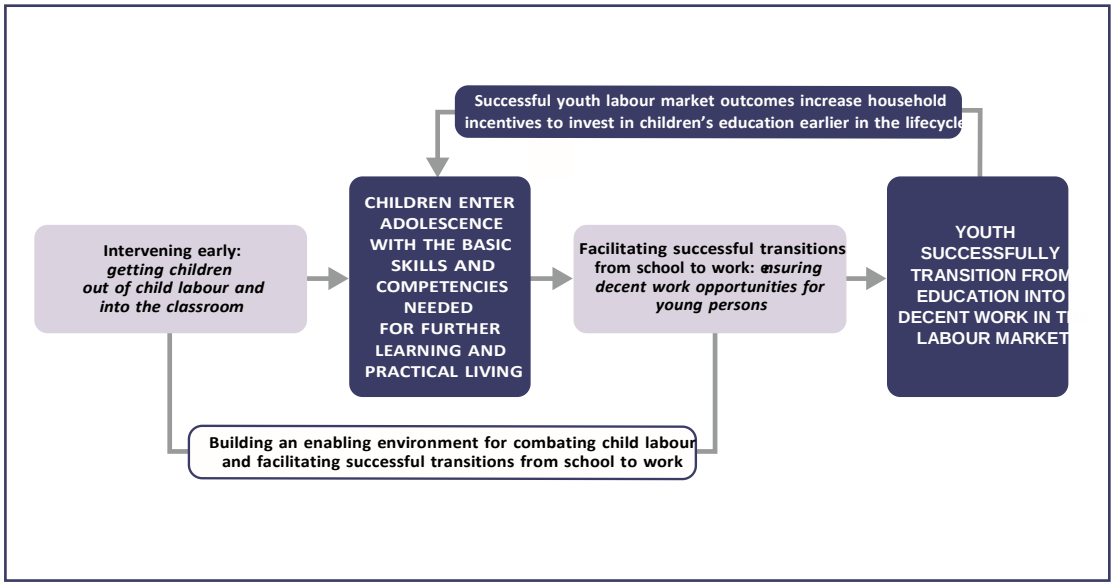
Notes: (a) Countries are selected on the basis of data availability. (b) Industry includes manufacturing, electricity, gas, water, mining and construction. (c) MENA - Middle East and North Africa region. (d) ECA - Eastern Europe and Central Asia region. Source: Calculations based on national household surveys (see Appendix 1, Table A3).

Policy coherence means policies that take into full account the close relationship between education, child labour and youth employment outcomes in the countries where child labour is a relevant issue. Figure 8 illustrates this in more concrete terms. A set of policies early in the lifecycle are needed to promote education as an alternative to child labour, and, following from this, to ensure that children enter adolescence with the basic skills and competencies needed for further learning and securing decent work. This foundation is in turn crucial to the success of policies at the next stage of the lifecycle for promoting improved youth employment outcomes, and for ensuring that youth successfully transition from education into decent work. Policy success in creating decent work opportunities for youth can also have an important positive feedback effect earlier in the lifecycle by creating incentives for parents to invest in the education of their younger children.

- **Intervening early:** ***Getting children out of child labour and into school.*** We have seen above how children's early school leaving and premature involvement in work can negatively influence the pathways to work taken by young persons. This underscores the critical

importance of intervening early in the lifecycle against child labour and educational marginalization as part of a broader strategy to improve youth employment outcomes. Removing children from child labour and getting them into school are not only key goals in and of themselves but also critical to ensuring that children enter adolescence with the basic knowledge and

Figure 8. A coherent policy response to child labour and the lack of decent work opportunities for youth



skills for further learning and successfully transitioning to working life. Early intervention also obviates the need for more costly remedial measures later in the lifecycle. The goal of child labour elimination, in other words, is a necessary starting point for realizing the global Decent Work Agenda for all, including among youth.

Fortunately we do not have to reinvent the wheel in terms of how to intervene against child labour. We can build on the wide body of evidence concerning the causes of child labour and extensive programming experience addressing child labour that has accumulated over the last two decades.[94]

The evidence and experience accumulated to date points to two policy pillars that are especially important for combating child labour – education and social protection. Ensuring free, compulsory and quality education through to the minimum age of employment, provides families with the opportunity to invest in their children's education as an alternative to child labour and makes it worthwhile for them to do so. Expanding social protection helps prevent

[94] The *Roadmap for Achieving the Elimination of the Worst Forms of Child Labour* adopted at The Hague Global Child Labour Conference (2010); and *The Brasilia Declaration on Child Labour* emerging from the III Global Child Labour Conference (2013), together offer a key framework for policy efforts.

child labour from being used as a household survival strategy in the face of economic shocks and social vulnerability.

- **Facilitating the transition from school to work:** ***Promoting decent work opportunities for youth.*** We have also seen how increased demand for skills and greater returns to education can translate into increased investment in education.

  The labour market prospects of young persons, in other words, and in particular returns to education in the labour market, can have a strong influence on household decisions concerning the division of children's time between work and school earlier in the lifecycle. Expanding decent work opportunities for youth, and particularly for vulnerable youth, it follows, is not only critical for addressing the youth employment crisis but is also a necessary element in a strategy that addresses child labour.

  Again it is not necessary to reinvent the wheel in terms of how to promote and facilitate transition to decent work. While there is no one-size-fits all approach to tackling the youth employment crisis the extensive existing body of evidence and policy experience points to a set of core policy areas that need to be considered in relation to national and local circumstances.[95] Besides pro-employment macroeconomic policies, specific types of interventions considered particularly relevant include enhancing young people's employability through investing in education and training; strengthening labour market institutions; and encouraging youth entrepreneurship.

- **Addressing adolescents in hazardous work:** ***Eliminating child labour among those aged 15 to 17 years.*** Both the share and absolute numbers of adolescents aged 15 to 17 years in hazardous work is considerable. A total of 47.5 million of them are in hazardous work, accounting for 40 per cent of all employed adolescents aged 15 to 17 years and over one-quarter of all child labourers. These stark numbers underscore the importance of according special attention to the critical 15–17 years age group in efforts to combat child labour *and* in efforts to promote decent work for youth.

  In instances in which adolescents aged 15 to 17 years are working in sectors or occupations that are designated as hazardous[96] or where there is no scope for improving working

[95] The ILO provides comprehensive guidance based on past evidence and experience in the "Call for Action on the
Youth Employment Crisis" agreed by governments, workers and employers at the June 2012 International Labour Conference. ILO: *The youth employment crisis: A call for action*. Resolution and conclusions of the 101st Session of the International Labour Conference (Geneva, 2012).

[96] It is important to reiterate that ILO Conventions No. 138 and No. 182 state that the specific types of employment or work constituting hazardous work are determined by national laws or regulations or by the competent authority. When countries ratify ILO Conventions No. 182 and No. 138, they commit themselves to determining work to be prohibited to persons under 18 years of age. Article 4 of Convention No. 182 in this context specifies: The types of work referred to under Article 3(d) [work which, by its

conditions, the policy requirement is clear: they must be removed from the hazardous job. In these instances it is imperative that there is a strategy in place for providing withdrawn youth with adequate support services and second chances for securing decent work. Risk mitigation is a strategic option in instances where youth are exposed to hazards in sectors or occupations that are *not designated as hazardous in* national *hazardous work lists* and where scope for change in work conditions exists. Such a strategy involves measures to remove the hazard, to separate the adolescent sufficiently from the hazard so as not to be exposed, or minimize the risk associated with that hazard.

- **Mainstreaming gender:** ***Accounting for the special vulnerabilities of female children and youth*****.** Adequately accounting for gender concerns is critical to the success of early interventions against child labour and of later interventions promoting successful transition to decent work. Female children face special difficulties in entering and remaining in school owing to factors such as early marriage and the demands of domestic responsibilities within their own home. Girls are also particularly vulnerable to worst forms of child labour such as commercial sexual exploitation and to hidden forms of child labour such as domestic work in third-party households. This situation highlights the overarching need for inclusive education strategies, including girl-friendly schools, which are adaptive to and supportive of the unique schooling challenges faced by female children. It also calls for targeted interventions addressing the variety of cultural, social and economic factors that leave female children especially vulnerable to certain types of child labour.

Female youth in many regions suffer from fewer opportunities in the labour market and greater difficulties in transiting to decent work. They are also often confined to a narrower range of occupational opportunities than their male counterparts. Young women's career trajectories can be severely limited as a result of societal and familial expectations that they quit their work after marriage or after the birth of the first child. The disadvantaged position of female youth in the labour market underscores the need for continued efforts ensuring equal opportunities and treatment of young women and men in education and in work.

- **Ensuring informed policy development:** ***Filling knowledge gaps relating to child labour and youth employment.*** Despite significant progress in building the evidence base in the child labour and youth employment fields, this Report has shown that important knowledge gaps persist, constituting an important constraint to policy formulation. Key gaps include: (a) the specific impact of child labour on future labour market outcomes, and on how this impact may

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nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children] shall be determined by national laws or regulations or by the competent authority, after consultation with the organizations of employers and workers concerned, taking into consideration relevant international standards, in particular Paragraphs 3 and 4 of the ILO Recommendation No. 190 on the Worst Forms of Child Labour (1999).

vary depending on different types of child labour and depending on whether child labour is combined with school attendance; (b) the specific types of hazardous work performed by youth, and the factors that underlie their involvement in hazardous work. Developing adequate measurement criteria for hazardous work is an important related priority; (c) the role of youth labour market conditions and returns to education – and of *expectations* in these areas – on household decisions concerning children's school and work earlier in the lifecycle; and (d) the impact of policies and interventions relating to child labour and youth employment. There is a need for more evidence, *inter alia*, on the impact of policies targeting hazardous work among youth, the impact of youth employment policies on child labour, and on the impact of child labour policies on youth employment.

- **Ensuring the necessary conditions for progress: *Building an enabling environment.*** Progress in getting children out of child labour and into school and in providing decent work opportunities for youth will not be possible in the absence of an enabling economic and legal environment. Sustained, inclusive and sustainable economic growth, a critical component of the Post-2015 Development Agenda, will be essential to expand decent work opportunities for youth and to ultimately erase the youth decent work deficit. Such macroeconomic and growth policies can support youth employment by encouraging economic diversification and the development of sectors that are conducive to the creation of jobs for youth. Expanded decent work opportunities has the added effect of increasing returns to education, and, following from this, creating incentives for children to remain in school rather than enter work prematurely.

  Achieving sustainable progress against child labour and promoting decent work for youth requires a supportive legislative environment which is in line with international standards and effectively mainstreamed into national development policies, plans and programmes. This has the important effect of signalling national intent and of providing a framework for action. Within the child labour realm, ratification of ILO Convention No. 182 on the Worst Forms of Child Labour (1999) and ILO Convention No. 138 on the Minimum Age (1973) has now occurred in most countries of the world. The critical next step on the legislative front is to ensure that these Conventions are effectively domesticated into national legislation and effectively enforced. This process should include the elaboration of national lists of hazardous work that is prohibited for all persons below the age of 18 years.

  In the context of youth employment, it is critical to ensure young persons' rights at work in order that they receive equal treatment and are protected from abuse and exposure to hazards.[97]

[97] A recent learning package to support trade unions, employment services, education and training institutions, as well as youth organizations, in their initiatives aimed at raising adolescents' awareness of their rights at work, see ILO: *Rights@ Work 4 Youth: Decent work for young people: Facilitators' guide and toolkit* (Geneva, 2014).

The International Labour Conference's 2012 resolution identifies a number of key areas that can guide governments and their social partners in developing youth employment policies that are consistent with the provisions of international labour standards. In particular, the enforcement of labour laws and collective agreements should be strengthened, and the participation of young people in employers' and workers' organizations and in social dialogue should be enhanced.

Judiciary on Child Labour

A. Indian Judiciary on Child Labour

1. *M.C. Mehata v. State of Tamil Nadu*[98] in this case Hon'ble SC of dealing with menace of child labour in the state of Tamil Nadu issued various directions, *inter alia.*,

- Every state government must conduct a survey, to be completed within six months, on the types of child labour carried out in the state.
- The survey could begin with the modes of employment mentioned under Article 24 of the Constitution of India. The most hazardous employment would rank first in priority, to be followed by a comparatively less hazardous employment, and so on.
- To ensure compliance with Child Labour (Prohibition and Regulation) Act, 1986, an employer must be asked to pay a sum of Rs 20,000 as compensation for every child employed in contravention of the provisions of the Act.
- The employer would be liable to pay this amount even if he were to disengage the child presently employed.
- The inspectors, appointed under Section 17 of the Act, would bear the responsibility of ensuring this.
- The sum paid as compensation should be deposited in a fund to be known as Child Labour Rehabilitation-cum-Welfare Fund.
- Such a fund should be established district-wise or area-wise.
- The fund so generated should be used only for the concerned child. The income earned through the fund would also be a part of the fund. To generate greater income, the fund could be deposited in a high-yielding scheme of any nationalised bank or other public body.
- The State should ensure that an adult member of the family (whose name would be suggested by the parent/guardian of the concerned child) whose child is in employment in a factory or a mine or in other hazardous work gets a job anywhere, in lieu of the child.

[98] AIR 1997 SC 699

- The employment could be combined with other assured employment as this would not require generation of much additional employment.
- The employment so given could be in the same industry where the child was employed or a public undertaking, and could be manual in nature. The undertaking chosen for employment shall be one that is nearest to the place of residence of the family.
- In those cases where it would not be possible to provide employment to the adult member, the appropriate government would deposit a sum of Rs 25,000 every month for each child employed in a factory, a mine, or any other hazardous employment, in the Child Labour Rehabilitation-cum-Welfare Fund.
- In case of obtaining employment for an adult, the parent/guardian shall have to withdraw their child from work. Even if no employment was provided, the parent/guardian shall have to see that the child is spared from the requirement to work, as an alternative source of income would have become available to him.
- The employment given or payment made would cease to be operative if the child is not sent by the parent/guardian for education.
- On discontinuation of the employment of the child, his education would be assured in a suitable institution. It would be the duty of the inspector to see to it that free and compulsory education up until the age of 14 is provided to the child.
- Penal provision contained in the Child Labour (Prohibition and Regulation) Act, 1986, would be used where employment of a child labour prohibited by the Act is found.
- Also, wherever child labour is employed in non-hazardous jobs (which is permissible under the Child Labour (Prohibition and Regulation) Act, 1986), the working hours of the child must not be more than four to six hours a day. Every child so employed must receive education for at least two hours each day. The entire cost of education must be borne by the employer. It would be the responsibility of the inspector to ensure this.
- **Monitoring Authorities**
  - ✓ The district collector would be responsible for monitoring the functioning of the inspectors.
  - ✓ In view of the magnitude of the task, a separate cell in the Labour Department of the appropriate government would be created.
  - ✓ The Secretary of the Labour Department would be responsible for monitoring the scheme.
  - ✓ Overall monitoring by the Ministry of Labour, Government of India, would be beneficial and worthwhile.

2. Cases filed by Bachpan Bachao Andolan and Supreme Court judgements (gist)[99]

The Cause	The Case	Reference	Highlights	The Impact
Missing Children	***Bachpan Bachao Andolan vs. Union of India and Others*** [WP (Crl) 75 of 2012]	Order issued in May,2013 (MANU/SC/0560/2013)	· Doctrine of Presumption to apply to all cases of a missing child. · FIR to be lodged in all cases of missing child and investigation initiated on the presumption of offence committed. · Special Juvenile Police Units to be formed in all districts. · SOP on missing children to be formulated along with the petitioner BBA. · NALSA to appoint paralegal volunteer to all police stations to assist in cases concerning children.	Ø All crimes against children to be investigated Ø Over 11,000 FIRs to be registered across the country Ø Specialised Police force for the protection of children Ø SOP on missing children issued by MHA for the Police Department Ø Centralised database called "Track Child" formed track missing children in all states. The system is running in all the states of the country.
Trafficking	***Bachpan Bachao Andolan vs. Union of India and Others [WP (C) 51 of 2006]***	2011 5 SCC 1, issued on 18th April, 2011	· Recognised Trafficking as an organised crime. · Defined "Trafficking" as per the Optional Protocol to UNCTOC.	Ø India ratified the "Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children" on 5thMay, 2011

[99] Retrieved from: http://www.bba.org.in/?q=content/legal-actions

Child Labour	***Bachpan Bachao Andolan vs. Union of India and Others*** [WP (C) 51 of 2006]	2011 5 SCC 1, issued on 18th April, 2011	· Banned Employment of children in circuses · Direction to establish AHTUs in all districts · Guidelines on implementation of the institutional framework for the protection of chidren	Ø Circus included in Schedule Part A of the CLPRA, 1986.
		Order dated 23rdSeptember,2011	· BBA filed an application for the total ban on child labour. · Supreme Court of India sought responses from the Union Government and all State governments within 4 weeks	Ø **On 4th Dec, 2012 the Ministry of Labour and Employment introduced the CLPRA Amendment Bill, 2012 in the Rajya Sabha banning child labour.** Ø Over Rs. 4,37,71,229 recovered
	Save the Childhood Foundation vs. Union of India and Others [WP (Crl) 2069/2005] (High Court of Delhi)	Order dated 15th July, 2009	· The Court ordered complete ban on child labour · Defined Roles and Responsibilities of all Government agencies in detail vis a vis child labour. · Fine of Rs. 20,000 for the victim for education and rehabilitation regardless of whether the offender is convicted. · 500 children to be rescued every month · FIRs to be lodged in Child Labour cases.	
		Order dated 21stMarch, 2011	· Direction on Rule of Law and responsibility of law enforcement agencies in the case of child labour	

		Order dated 28th May,2012	· Recovery of back wages · Cancellation/ Suspension of licenses	Ø Hitting the economics of child labour
Domestic Labour	***Bachpan Bachao Andolan vs. Union of India and Others*** [WP (Crl) 82 of 2009] (High Court of Delhi)	Order dated 24th December, 2010	· Regulation of placement agencies to prevent trafficking of domestic labourers · Registration of Placement Agencies working with domestic labourers · Payment of wages to domestic workers as per the Minimum Wages Act, 1948.	Ø Government of Delhi formulated the Delhi Private Placement Agencies (Regulation) Bill, 2012. Ø Recovery of back wages of the domestic labourer over period of employment ordered
Education	***Society of Private Unaided Schools vs. Union of India & Bachpan Bachao Andolan***	AIR 2012 SC 3445 April 2012	· Upheld the constitutional validity of the Right of Children to Free and Compulsory Education Act, 2009	Private schools are required to admit 25% of children from marginally oppressed strata.
Juvenile Justice	***Bachpan Bachao Andolan vs. Union of India and Others*** [WP (C) 51 of 2006]	Order issued on 18th April, 2011	· Government of India ased to constitute JJB, CWC and Children's Homes in all districts of the country. · NCPCR named as the statutory body to oversee the implementation of the Juvenile Justice (Care and Protection) Act, 2000.	
Child Marriage	***Bachpan Bachao***		· BBA sought directions to make	

	Andolan vs. Union of India and Others [WP (C) 51 of 2006]		registrations of marriages compulsory; disciplinary action against officials who fail to prevent child marriages; punitive action against individuals solemnizing child marriages; declare all child marriages null and void; rehabilitation fund for victim of child marriage.	
Institutional Frame work	***Bachpan Bachao Andolan vs. State of Bihar and Others*** [CWJC no:11819 of 2010] (High Court of Bihar)	Order dated 30th November, 2010	· Government directed to identify and rescue child labourers as per State Action Plan. · BBA to provide training to labour department and Dhawa Dhal.	State Action Plan for rescue of child labourers was formulated and an MoU was signed between Bachpan Bachao Andolan and the Government of Bihar for trainings.
	Bachapan Bachao Andolan vs. State of Punjab and Others [WP (C) 7565/2010] (High Court of Punjab)		· Directed Government of Punjab to formulate Plan of Action and Standard Operating Procedure for the rescue of Child Labourers.	The Plan was formulated and 1980 child labourers were rescued till 2011.
	Bachapan Bachao *Andolan vs. State of* ***Jharkhand and Others***		· The High court directed the constitution of State Child Protection Committees, CWCs, Children's Homes,	SCPCR was formed in Jharhand.

	***[WP** (PIL) 139/2011]* *(High Court of Jharhand)*		Shelter Homes. · Also ordered the implementation of the Juvenile Justice (Care and Protection)Act, 2000.	

***3. Bachpan Bachao Andolan v. Union of India*[100] SC of India prohibited the employment of children in circus and directed that,**

(i) In order to implement the fundamental right of the children under Article 21A it is imperative that the Central Government must issue suitable notifications prohibiting the employment of children in circuses within two months from today.

(ii) The Respondents are directed to conduct simultaneous raids in all the circuses to liberate the children and check the violation of fundamental rights of the children. The rescued children be kept in the Care and Protective Homes till they attain the age of 18 years.

(iii) The Respondents are also directed to talk to the parents of the children and in case they are willing to take their children back to their homes, they may be directed to do so after proper verification.

(iv) The Respondents are directed to frame proper scheme of rehabilitation of rescued children from circuses.

(v) We direct the Secretary of Ministry of Human Resources Development, Department of Women and Child Development to file a comprehensive affidavit of compliance within ten weeks.

4. ***Labourers Working on Salal Hydro Project v. State of Jammu & Kashmir and Ors.***[101]

SC held that*, "[W]e are aware that the problem of child labour is a difficult problem and it is purely on account of economic reasons that parents often want their children to be employed in order to be able to make two ends meet. The possibility of augmenting their meagre earnings through employment of children is very often the reason why parents do not send their children to schools and there are large drop outs from the schools. This is an economic problem and it cannot be solved merely by legislation. So long as there is poverty and destitution in this country, it will be*

[100] MANU/SC/0431/2011
[101] MANU/SC/0243/1983

difficult to eradicate child labour. But even so an attempt has to be made to reduce, if not eliminate the incidence of child labour, because it is absolutely essential that a child should be able to receive proper education with a view to equipping itself to become a useful member of the society and to play a constructive role in the socio-economic development of the country. We must concede that having regard to the prevailing socio-economic conditions, it is not possible to prohibit child labour altogether and in fact, any such move may not be socially or economically acceptable to large masses of people. That is why Article 24 limits the prohibition against employment of child labour only to factories, mines or other hazardous employments. Clearly, construction work is a hazardous employment and no child below the age of 14 years can therefore be allowed to be employed in construction work by reason of the prohibition enacted in Article 24 and this constitutional prohibition must be enforced by the Central Government. The Central Government would do well to persuade the workmen to send their children to a nearby school and arrange not only for the school fees to be paid but also provide, free of charge, books and other facilities such as transportation. We would suggest that whenever the Central Government undertakes a construction project which is likely to last for some time, the Central Government should provide that children of construction workers who are living at or near the project site should be given facilities for schooling and this may be done either by the Central Government itself or if the Central Government entrusts the project work or any part thereof to a contractor, necessary provisions to this effect may be made in the contract with the contractor."

ISSUES RELATED TO WOMEN WORKFORCE

LEGAL PROTECTION TO WOMEN IN SRI LANKA[1]

Factories Ordinance of 1950 and subsequent Amendments, Maternity Benefits Ordinance of 1941, Shop and Office Employees Act of 1954, Young Persons and Children Act of 1956 and various laws relating to women in Sri Lanka

The Laws that apply to working women in Sri Lanka are:

1. Women's safety and health in the workplace –
    1. Factories Ordinance of 1950 and subsequent Amendments -
2. women's rights during the period of maternity
    1. Maternity Benefits Ordinance of 1941
    2. Shop and Office Employees Act of 1954,
3. Law protecting the rights of women in the workplace
    1. Employment of Women,
    2. Young Persons and Children Act of 1956 and subsequent amendments.
4. The equality of men and women is enshrined in the Constitution of Sri Lanka and as a member state of the ILO Sri Lanka is obliged to create the environment for decent work, which in turn leads to productivity and security of service for men and women alike. The ILO's Decent Work Agenda states that Productive Employment and Decent Work are key elements to achieving a fair globalization and the reduction of poverty.

Fair Treatment

Equal Pay

In accordance with the Constitution of Sri Lanka, all persons are equal before the law and entitled to equal protections of the law. It also prohibits discrimination on the ground of sex besides many other grounds. However, neither in Constitution nor in Labour Laws, we find a provision requiring equal pay for work of equal value.

Source: §12 of the Constitution of Sri Lanka 1978

[1] Retrieved from: http://www.salary.lk/home/labour-law, visited on 5/12/2015

Non-Discrimination

In accordance with the Constitution, there cannot be any discrimination on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds. There is no special provision in constitution or labour laws to prevent discrimination in employment related matters. Laws also prohibit discrimination against disabled persons in matters of employment as well as workers involved in union activities.

Source: §12 of the Constitution of Sri Lanka 1978

Sri Lanka has ratified ILO Convention No. 111 on Discrimination (Employment and Occupation) and Convention No. 100 on Equal Remuneration. However, the CEACR has repeatedly called attention to shortcomings in the legal framework on workplace discrimination.

Sri Lanka has not adopted generally applicable legislation that makes workplace discrimination unlawful. The government takes the position that provisions of the Sri Lankan constitution address discrimination. However, the CEACR notes that the constitution "provides guidance for protection but usually cannot be invoked directly by persons requiring protection against discrimination . . . there is no general provision in legislation relating to employment in the private sector which provides protection against discrimination."[2]

Equal Treatment of Women at Work

In accordance with the Sri Lankan Constitution, Every citizen is entitled to the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise. However, certain labour law prohibits employment of women in the same industries as men (especially mining sector).

Source: §14(1)(g) of the Constitution of Sri Lanka 1978; §02 of the Employment of Females in Mines Ordinance, 1937; §86 of Factories Ordinance

Maternity and Work

[2] See Joseph Stiglitz, *Globalization and Its Discontents* (2002), for a thorough analysis and critique of the formula and its failures. Stiglitz is a Nobel Prize-winning economist and former chief economist of the World Bank.

Maternity Leave

The duration of maternity leave is 12 weeks (84 days) excluding weekly holidays, Poya days and statutory holidays, out of these 12 weeks, 02 weeks maternity leave is before confinement (including the day of her confinement) and 10 weeks following the day of confinement.

In accordance with the Maternity Benefits Ordinance, 12 weeks, inclusive of all non-working days, maternity leave is allowed. For the third and subsequent confinement, duration of maternity leave is 42 days excluding weekly holidays, Poya days and statutory holidays. Under the Maternity Benefits Ordinance, 6 weeks, inclusive of all non-working days, maternity leave is allowed.

Maternity leave is granted to a female worker upon providing a notice to her employer mentioning that her date of delivery is within a month or 14 days (in case of shop and office worker). After confinement, she must inform the employer, within a week, about her date of delivery for the purpose of ascertaining the number of days she is permitted to absent herself from the employment. She should also, specify the number of children she has.

There is no provision in law regarding extension of maternity leave in case of complications or sickness due to confinement or in case of multiple births.

Source: §02 of the Maternity Benefits Ordinance, 1939; §18(B) of the Shop and Office Employees Act, 1954

Income

Maternity Leave under the Shop and Office Employees Act is fully paid leave while under the Maternity Benefits Ordinance, 6/7th (86%) of a worker's wages are paid for the period.

Maternity benefits are provided to a woman who has worked at least one hundred and fifty days within the period of one year, under the employer from whom she claims such benefit, immediately preceding the date of the notice that women may give to the employer before confinement.

Source: §18(C) of the Shop and Office Employees Act; §3-5 of the Maternity Benefits Ordinance

Free Medical Care

Under the Health Services Act of 2000, maternity homes are established. Family Health Bureau, established under the Ministry of Health in Sri Lanka is responsible for provision of comprehensive ante-natal and post-natal care. The medical care is available to all free of charge.

Source: Health Services Act, 2000

Job Protection

No Harmful Work

Pregnant workers (covered under the Maternity Benefits Ordinance, 1939 or the Shop and Office Employees Act, 1954) must not be employed in any such work that may be injurious to her or her child's health during the three months before the expected date of confinement. Similar prohibitions are enacted for employment in injurious work in three month after child birth.

Source: §10(B) of the Maternity Benefits Ordinance, 1939; §18(D) of the Shop and Office Employees Act, 1954

Protection from Dismissals

In accordance with the Maternity Benefits Ordinance and the Shop and Office Employees Act, it is illegal for an employer to dismiss a female employee due to her pregnancy or any other reason connected with her pregnancy in all aspects of employment. So it could be ascertained that the employment of a worker is secure during pregnancy and maternity leave.

Source: §10 of Maternity Benefits Ordinance; §18(E) of Shop and Office Employees Act

Right to Return to Same Position

In accordance with the Maternity Benefits Ordinance and Shop and Office Employees Act, a woman cannot be served a notice of dismissal during her maternity leave. It gives workers the right to return to job, however, not necessarily to same position.

Source: §10 of the Maternity Benefits Ordinance; §18(E) of Shop and Office Employees Act

Breastfeeding

Nursing breaks are not provided under the Shops and Office Employees Act. However, Maternity Benefits Ordinance provides for two paid breaks, each of at least 30-minute duration during nine hours of working day, till the child is one year old.

Employer should provide nursing facilities to the workers for nursing their children. The duration of each nursing break is 30 minutes if a crèche or other suitable place is provided by the employer; otherwise it would not be less than one hour.

Nursing breaks are provided in addition to the meal or rest break provided and they are regarded as time worked.

Source: §12(B) of the Maternity Benefits Ordinance

Sexual Harassment

In accordance with the Sri Lankan Penal Code, unwelcome sexual advances by a person of authority in a working place are considered sexual harassment. The perpetrator of harassment may be punished either with imprisonment up to a term of five years, or with fine, or both. He/she may also be ordered by the court to pay an amount, as determined by the court, to the victim of harassment for injuries.

Source: §345 of the Penal Code of Sri Lanka, 1885

The Lydie's Diamonds Case (2003)[3]

One case dramatically joined issues of freedom of association and sex discrimination. Swarna, a worker at the Belgian-owned Lydie's Diamonds Ltd. Factory, described what happened there:

"There are 240 workers in the plant. More than 200 women. We polish diamonds, real diamonds. Our pay was too low, only 2,300 rupees [per month—about $25]. We asked for a raise. The

[3] Justice for All: The Struggle for Worker Rights in Sri Lanka, by Lance A. Compa, Research Studies and Reports, Cornell University 2003

Belgian plant manager refused to even talk to us. We formed a union with the United Federation of Labor. The plant manager refused to deal with us. On January 23, 2002, we held a one-day strike for recognition and negotiations. When we returned, the company excluded 15 of the most active workers and asked the rest of us to sign letters saying we are not union members and that the union made us strike against our will. I signed the letter because I was afraid for my job. The company dismissed people who did not sign the letter."

"Management promised to raise our wages but did not. Many of us became active organizing for the union again. The company hired a new security agency called ShieldBuy. The head of it was a former military man who bragged to us, 'I killed 12 people when I was in the army' and threatened to throw out onto the road any worker who caused trouble. This frightened many workers because by 'trouble' he meant union activity. I remained active in building the union, and they targeted me for victimization."

"On October 14 the security agents stopped me coming out of the factory and accused me of stealing diamonds. I strongly protested and kept on my way trying to leave. They forcibly detained me. [Swarna is a tiny, slender woman about five feet tall and weighing 90 pounds.] They forced me to have a full body search including the vaginal and anal cavities. A woman agent performed the search but the men agents watched her. They did not find any diamonds. They wanted to frighten me and humiliate me in the eyes of my co-workers because I was a union supporter.

"I was protesting all the while. The plant manager interdicted me for three days. When I returned, the plant manager told me he did not interdict me, he fired me. He offered me 30,000 rupees severance pay [about $320] to sign a letter agreeing with the dismissal. I refused. The next day, almost all the workers went on strike to support me. We had only two demands: bring me back to work, and change to a new security agency. The company called the police, who came and beat some of the strikers. Whenever workers called police about abusive treatment by the security guards the police ignored us, but they came for management right away and broke up our strike.

"The workers agreed to go back to work, but the company refused to take back 80 workers. These were the leaders and the most active workers in the strike. The company sent a blacklist letter to the other diamond firms in the zones telling them not to hire these workers and giving all the names."

At this point in the interview, a co-worker said, “I applied for a job at another diamond factory. The personnel manager told me he could not hire me because he had a letter from Lydie’s saying I was a troublemaker.”

Swarna ended her account with the most recent development: “On November 28, 2002, the plant manager sent me a letter stating I was dismissed for assaulting the security guards when they detained me and searched me. Imagine! He killed 12 people and me such a tiny woman.”

The UFL union has lodged complaints with the labor department on all the dismissals. The labor commissioner has called the parties to meetings, but Lydie’s managers have refused to meet in the presence of the union. The case remained unresolved in late 2003

Unawareness and Unfamiliarity about the Issue 'Sexual Harassment at the Workplace': A Case of Sri Lankan Working Women

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Sexual harassment at the workplace is an issue that has gained a lot of awareness around the world during the last four decades. While the few studies that do exist in Sri Lanka have indicated a high prevalence of the problem in Sri Lankan workplaces (e.g. Adikaram, 2005, 2010; Wijayatilake and Zachariya, 2001), whether employees are actually aware of this issue and the concept of sexual harassment at workplaces in Sri Lanka still remains a mystery. Prior research clearly indicates that when people are aware of the issue, more behaviors would be considered as sexual harassment, than when they are unaware of the issue (Brewis, 2001; Pickerill, Jackson, and Newman, 2006). This identification of behavior as sexual harassment, in turn, will determine how people construct the meaning of the term and how they react to such behaviors.

Thus, the main intention of the present paper is to explore how aware and familiar women employees of Sri Lanka are about the issue of 'sexual harassment at the workplace', as well as how knowledgeable and aware they are about the various legislations and anti-sexual harassment policies that exist in the country and their organizations.

The main study from which this article is drawn, explored the meaning construction process of the notion of 'sexual harassment at workplaces', based on the social constructionist philosophical premise, and employing the grounded theory strategy of inquiry (Chamaz, 2003). Data for the present study was collected through 40 individual interviews and 4 focus group discussions of 4 to 5 respondents each. Purposive sampling at the initial stages of data collection and theoretical sampling in the successive stages was employed. The data analysis started simultaneously with data collection and thus with the first interview. In line with the process specified in the grounded theory approach, data were collected and analyzed in two main stages as open coding and selective coding (Charmaz, 2003).

The study revealed that although there is an increased consciousness and lack of tolerance regarding violence against women in Sri Lanka in the recent past (Jayaweera, 2002), respondents awareness about various forms of violence are clearly not sufficient. Some respondents have not even heard of the term 'sexual harassment at work places'. Some have heard of the term, but not relating to workplaces. Some respondents were very quick to assume it to be sexual harassment in buses, because, that maybe the most common and frequent harassment of a sexual nature they had faced. There were also a number of respondents, who thought sexual harassment means more severe behaviors of a sexual nature such as physical acts. Few respondents were also of the view that sexual harassment is rape or sexual assault.

It was thought worthwhile to delve deeper and uncover why these respondents are not aware of the issue. Generally, publicity given to the issue is found to heighten people's awareness and sensitivity about the issue (Pickerill et al., 2006). As research indicates, in many Western countries, which are considered to have individualistic cultures, much concern exists about women's rights and extensive discussion appears in the media about the issue of sexual harassment (Sigal et al., 2005). On the contrary, it is stated that in collectivist cultures less publicity is given to the issue, and discussion of the issue in the media is low due to their concern about social harmony and group cooperation. As publicity on issues such as sexual harassment can harm these collectivist beliefs, open discussions of the issue are avoided. Having a collectivist culture, it appears that, in Sri Lanka, publicity given to the issue is very low.

In Sri Lanka when and if publicity is given to the issue, it is about more severe incidents of harassment such as rape or assault than everyday occurrences of sexual harassment. Attesting this fact, when talking about their understanding and awareness of the notion of sexual harassment, many respondents stated about the rape and assault incidents they have read in newspapers or heard/seen on television. Furthermore, issues such as sexual harassment being considered a taboo in cultures such as Sri Lanka, and the existence of cultural norms expecting women to confirm to feminine identity by showing sexual ignorance and not speaking freely about sex, sexuality, and eroticism, (Tambiah, 1996) might also have led to this unawareness.

It was also interesting to note that the respondents were also unaware and thus were not knowledgeable about the law that prohibits sexual harassment in Sri Lanka (Penal Code

(Amendment) Act No.22 of 1995). At the same time, almost all the respondents whose organizations had anti sexual harassment policies stated that they were not aware of the contents of the policies, and sometimes even the existence of the policies.

All in all, the study indicated respondents' unawareness and unfamiliarity with the whole issue of sexual harassment. This, in turn, clearly has significant implications for the way in which they construct the meaning of 'sexual harassment'. There is a greater possibility for respondents to identify and think of a few behaviors as constituting sexual harassment as well as not to acknowledge and label instances of sexual harassment even when they experiences them. Furthermore, with this unawareness and ignorance, victims will tend to overlook and be passive when reacting to many instances of sexual harassment.

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Apparels short of labour breaking unfair taboo seems hard[4]

Sri Lanka's largest export earner, the apparels sector, is finding it difficult to break a social taboo on women working in garment factories and is finding it difficult to fill vacancies, this too after the Joint Apparel Association Forum and Board of Investments launched an island-wide media campaign to remove the unfair stigma and wipe their slate clean.

The apparel sector is finding it hard to remain competitive with the loss of trade concessions to the European Union, an appreciating rupee and rising energy costs.

However, many factories turning out top international branded garments for high-end retail chains have been able to improve production processes increasing cost efficiency and reducing their environmental footprint.

But the industry, predominantly employing women, is finding it difficult to attract enough labour as it has failed to fight the social stigma attached to women working in garment factories.

Ms. Ramya Weerakoon, Chairperson Trendyear Pvt Ltd and Council Member, Sectoral Head, National Chamber of Commerce (NCE), said the most difficult thing was for the industry to find enough workers.

"We need to raise the awareness of people because the most difficult thing for us is trying to find enough workers. There is a shortage of labour in the industry. There is no point in investing in green factories, sophisticated machinery and renewable energy sources if there are no workers to run the production facilities," she told a recent press conference organised last week by the NCE to highlight the problems faced by the export sector.

"The problem started with the free trade zones and the women were being called 'Juki girls' (in a derogative way) and a negative impression of them was created," she said.

"But this is no longer the case. Many women have found rewarding employment. Free transport and meals are also provided in many factories. We have to create awareness that working in a garment factory is a respectable job."

Ms. Weerakoon said just as much as migrant housemaids buoyed Sri Lanka's balance of payments, **women working in garment factories were able to uplift their lives and communities**.

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[4] *The Island* Available at: http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=49299 visited: 4/12/2015 at: 12:51 PM

Women often flocked to the free trade zones to escape poverty. There, they were **vulnerable to exploitation in the workplace.** Working conditions were poor and living conditions were equally bad. They were also vulnerable to sexual exploitation outside the factories as men found them to be easy prey, and thus **'Juki girl'** came to be a derogative for loose women.

Over the years, **the apparel industry took pains to improve working conditions and claim that core international labour standards are being enforced in a majority of factories, if not all. The industry a few years ago launched an international campaign which branded garments produced in Sri Lanka as 'Garments without Guilt'.**

Industrialists said this campaign, together with high quality finish, had helped Sri Lanka secure orders from top retailers, even after the Multi Fibre Agreement was phased out and Sri Lanka had to compete with other cheaper sources.

However, the social stigma prevailed and two years ago the Joint Apparel Associations Forum and Board of Investments launched a media campaign in a bid to erasing the 'unfair' stigma.

The young women who were the lifeblood of the industry and the country's economy had been unfairly treated by society by attaching a stigma on them. In most cases, they were not considered marriageable.

According to latest data available, apparel export earnings grew 3.7 percent during the eleven months ending November 2010 reaching US$ 3,038.4 million from US$ 2,930 million a year ago.

Some small and medium apparel manufacturing factories have closed down over the past few years as a result of tough times before the global economic meltdown broke in 2008 with buying officers here finding it difficult to meet orders.

According to one industry analyst, about 200 factories had closed down over between 2006 and 2008.

The industry directly employs around 280,000 to 300,000 individuals with one million dependents while a further 750,000 were indirectly employed. A high percentage of those employed by the industry are women.

Protection of the Female Domestic Migrant Workers: Concerns, Challenges and Regulatory Measures in Sri Lankan Context

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Abstract

Female Population as a percentage of the total in Sri Lanka was last reported at 50.66 in 2012.With the introduction of the concept of open economy to the country in 1977, new means of earning were integrated into the (traditional) economic process that existed. As a result, Sri Lankan females got more opportunities to enter into the economic process under the unskilled labour category especially in Middle Eastern Countries such as Jordan, Kuwait, Lebanon, Qatar, Saudi Arabia and UAE. From 1977 to date, there has been a gradual increase in women who leave the country to obtain domestic jobs in the above mentioned countries. Today Sri Lankan females migrate at a large scale as domestic workers to Middle Eastern Countries as well as Western Countries especially to European Countries, making it the highest and most stable source of foreign currency inflow to the country. In 2011, the total foreign remittance received from migrant workers was increased by 25% which was 5145 million USD and the female migrant domestic workers should be appreciated for their contribution of 75% out of the said amount. Though it contributes to the economic stability of the country it also led to create many social issues which seriously affect the Sri Lankan society. Family breakdown, increase in the offence of incest and increase in juvenile delinquencies are some of the issues. More critically, these females have to face many problems such as lack of social and occupational security, lack of recognition, wage discrimination and difficulties in access to justice. This could be considered as serious violation of their rights as humans and employees. The empirical data reveals that during the last three decades there were many instances reported that Sri Lankan female domestic workers had to undergo a wide range of hardships including refusal of

payments, violating the term of employment contract, physical and mental abuse, sexual harassments, rape and torture that led to disability or even death. Sri Lanka, as a member State to many international treaties which declared standards to protect the civil and economic rights of the people should have a responsibility to adopt a strong policy, international agreements and national laws which align with the international standards to ensure the protection of the rights of these workers. Though Sri Lanka has enacted some national laws and adopted a policy, the rights of the female domestic migrant workers are still violated massively. Therefore, the present study intends to critically evaluate the contemporary national laws and existing policy in relation to the protection of the rights of Sri Lankan female domestic migrant workers and make suggestions to strengthen the prevailing policy and laws. This objective will be achieved by testing the following hypothesis; the gap between the international standards and the national laws and the weak policy adopted by Sri Lanka led to violate the rights of the female domestic migrant workers. Relevant information from books, treaties, statues, journal articles and websites are referred as secondary sources and information and statistics gathered by relevant authorities are used as primary sources to complete this research.

Keywords: national laws, international treaties, and rights of female domestic migrant workers

Introduction

The total foreign remittance received from migrant workers has rapidly increased during the last two decades. The female migrant domestic workers should be appreciated for their large contribution to the national economy. However, female migrant domestic workers are more vulnerable to criminal victimization than the other (skilled labour or professional) migrant workers. This vulnerability leads to an increase in the criminal victimization against them day by day. Physical and mental abuse, sexual harassment, rape and physical torture that lead to disability or even death are common criminal offences which are committed against them by their foreign employers.

Religious and racial discrimination, lack of freedom of movement, association and expression, social stigma and unequal economic treatment are some other victimization they have to face during the period of their employment. All these victimizations amount to the serious violation

of their rights as human beings. In some instances, these females also commit crimes due to their vulnerable situations. The applied legal proceedings in the host countries against those cases are also highly debated. Therefore, protection of female domestic migrant workers especially their rights and a review of the role of law is of utmost importance in this regard.

Efforts were taken by the international community to provide human rights protection to migrant workers all over the world by introducing many international conventions. These conventions cover the large number of females who migrate for work, especially for domestic work and their families too. Sri Lanka is a member State who ratified almost all such instruments and also enacted several national laws to protect these people who largely contribute to the economy of the country.

In such a scenario, the empirical evidence reveals that female domestic migrant workers who fall into the category of either unskilled or low skilled are subject to a high level of violation of human rights including labour rights and sexual harassment, abuse and torture at their work places. Therefore, the present study intends to critically evaluate the contemporary national laws and existing policy in relation to the protection of the rights of Sri Lankan female domestic migrant workers and make suggestions to strengthen the prevailing policy and laws. This study will include a discussion on relevant international conventions too. The aforesaid objective of this research will be achieved by testing the following hypothesis; the gap between the international standards and the national laws and the weak policy adopted by Sri Lanka led to violate the rights of the female domestic migrant workers.

The paper consists of four main parts to analyze the said issues. The first part deals with the scenario of Sri Lankan females in labour migration which consists of more emphasis on the statistics of temporary departure of females in Sri Lanka for domestic work to Middle-East Countries, reasons for such migrations and the problems faced by these females. Then the discussion moves to a review of the International Standards with regard to the protection of the domestic migrant women workers. The third part is a critical analysis of the National Laws which carries the main findings of the study. The final part concludes the paper with the suggested legal remedies as one solution for this problem.

Female Labour Migration in Sri Lankan Context

Migration is the movement of people form one place to another in order to find work or better living conditions. It is estimated that approximately 215 million of people of the global population migrate today from one country to another for various reasons including education, seeking asylum, business and employment etc. With the introduction of open economy in 1977, people of Sri Lanka also found new pathways for earning money making unskilled or low skilled domestic employment in foreign countries as the most accessible one.

Today, foreign employment is a stable foreign currency inflow to Sri Lanka. According to the statistics of the Central Bank, Sri Lanka's remittances were US $ 5.2 Billion in 2011 and increased to US $ 6 Billion in the first half of 2012. It formed 8.2% of the GDP. These figures were expected to be further increased in 2013 which was succeeded. Annually, Sri Lanka sends 265,000 migrant workers approximately (out of 20 million population) to Middle East, European Union Countries, Western Europe, Far East Asia Countries, North and Central America, Australia and New Zealand, South East Asian Countries and South Asian Countries for various employments but mostly as domestic workers. This is 17% of the workforce of Sri Lanka which supports to earn over 35% of the country's foreign exchange.

In the beginning of 1980s, many females from poor and low income classes started to migrate temporary to foreign countries with the expectation of a good salary to over come their poverty and working in dignified condition as domestic workers. Therefore, it is pertinent to discuss the definitions of domestic work and domestic worker. Work performed-in for household/s means domestic work and any person engaged in domestic work within an employment relationship is called a domestic worker. According to the statistics published by the Ministry of Foreign Employment in Sri Lanka, most departures for foreign employment consist of female domestic workers or in other words housemaids. From 1996 to 2005, except in 1999 and 2003, it was more than 50% of the total departure for foreign employment. From 2006 to-date, the percentage of domestic migrant workers is between 40% and 49% out of the total foreign employment. In the year 2011, the percentage significantly decreased and it was 36%. From 1996 to-date, out of the total female migrants, 90% consists of domestic workers (housemaids) and many of them are employed in Middle-East Countries.

The increase in female migration for employment especially as domestic workers attribute to many negative issues. They are vulnerable to a high risk of labour exploitation, sexual harassment and abuse, rape, torture which leads to disability or loss of their lives. They have to face various forms of unexpected hardships after their arrival in the country of employment including unpaid wages. Many female domestic workers are mothers who have at least one child. These children are also vulnerable to various forms of violence inside or outside the home. One of the findings of a research carried out by the author last year, titled 'Violence against Children and Ensuring the Justice for Child Victims through Human Rights and Penal Laws Perspectives: Sri Lankan Experience' was that female migration for foreign employment (especially domestic work in Middle East countries) attributes to the increase in the rate of juvenile delinquency.

With all these problems, the rate of women labour migration is still relatively high. Females are seeking opportunities in the foreign labour market to achieving a few goals such as up lift the living condition of the family including their children's education or siblings' education and overcome social problems hindrance.

Global Concerns and International Human Rights Law

As said earlier, female domestic migrant workers are vulnerable to various forms of abuse which could be correctly considered as human rights violations. Therefore, they are also entitled to complete protection from those abuses under human rights law. Mainly, the issues relating to migrant domestic workers occur between the individuals in two countries (between an employment agency company or employer and the employee). The specific nature of these abuses necessarily calls for inventions of international law especially the international human rights law in considering the redress for those victims. Although international human rights law provides a wide range of standards to protect human rights of the people, by these standards alone, it is hard to address and cover all the aspects of abusive experiences that are faced by female domestic migrant workers. However, there are some core principles, such as non-discrimination and equal protection of the law adopted by the international human right law through the international instruments which compel the member States to enact national laws to provide legal protection to these women. The International Covenant on Civil and Political rights

(ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Elimination of All Forms of Racial Discrimination (CERD), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and International Convention on the protection of the rights of All Migrant Workers and Members of their Families (MWC) are significantly relevant. Among these international instruments, Migrant Workers Convention is the most noteworthy as it provides explicit and extensive human right protection to migrant workers all over the world.

Since the majority of the violence/abusive activities that are faced by the female domestic migrant workers are committed by the non-State actors such as employers and recruitment agencies, it is important to acknowledge and discuss (briefly) the ways in which the human rights framework has evolved to respond to abuse that is committed by individuals/private entities other than State. First, human rights treaty law was never designed with the sole objective of preventing abusive activities committed by the State. Those instruments were introduced affirmative duties of the State to ensure the basic (subsistence) rights of the people such as right to food, shelter, health, economy and education (e.g. standards in ICESCR). Second, those treaties included affirmative duties of the State in the private sphere against the violence/abusive activities committed by individuals against women under domestic violence (e.g. standards in CEDAW). The next question arises whether a particular State is bound to protect the rights which are guaranteed and secured by the international conventions with regard to non-citizens including (female domestic) migrant workers. The basic human right norms which are enshrined in the conventions are equally applicable to any human being, irrespective to the ratification of the treaty or enabling domestic statute in a particular country or their status (e.g. standards ICCPR). Therefore, it is reasonable to state that the international treaty law norms and standards should be extended to protect any human being including non-citizens (migrant workers) anytime irrespective to their status.

In a close scrutiny, it is demonstrated that the international standards which adopted the core principles of nondiscrimination (definition for discrimination – CERD and CEDAW) and equal protection before the law do not draw any distinction between men and women (Articles 3 ICCPR, Article 3 ICESCR, Article 1& 3 CEDAW) as well as citizens and non citizens (Article 2 ICCPR, Article 2(3) ICESCR, Articles 1(2&3) CERD - *Zaid Ban Ahmed Habassi* vs. *Denmark*

CERD Communication 10/1997) or domestic workers and skilled labour/professionals (Article 2 ICCPR).

More significantly, MWC explicitly includes non-discrimination and equal protection standards into the convention to protect migrant workers that are extended to the protection of the female domestic migrant workers.

Further to the above said standards, there are several other significant protective standards in international treaty law that provide protection against exploitative terms of work and employment contracts for female domestic migrant workers including equal rights in employment (Article 11 (1) CEDAW), fair wages (Articles 7(a) & 2 ICESCR), reasonable hours of work and working conditions (Article 5 (e) (i) CERD), rest, holidays with pay, and remuneration for public holidays etc… (Article 7(d) ICESCR, Article 25 CMW)).

International Labour organization (ILO) treaties also guaranteed many protections for migrant workers including female domestic migrant workers pertinent to employment contract, wages, and terms of work, reasonable working conditions, and holidays with pay. Some of them are: Migration for Employment Convention –Revised 97 of 1949, Minimum Wage Fixing Convention 131 of 1970, Protection of Wages Convention 95 of 1949, Recommendation 100 on the Protection of Migrant Workers (Underdeveloped 1955) and Protection of Wages Recommendation (Nno.85 of 1949).

Increase in number and the brutality of violent activities pushes the States either to ratify the International Conventions especially CMW or enact national laws aligning with the standards guaranteed by the Convention.

Evaluation of the National Frame Work

Sri Lanka has ratified the CMW in 1995 and also she has ratified all (8) fundamental Conventions, two Governance Conventions (this is out of four) and thirty Technical Conventions (this is out of 177) of the ILO. Out of forty Conventions ratified by Sri Lanka, of which thirty-one are in force, nine Conventions have been denounced later. Sri Lanka has endorsed the ILO Multilateral Framework on Labour Migration. Further, Sri Lanka is a member State to the international treaties mentioned in the previous chapter of this paper.

Prior to 1980, administration of labour migration was governed by the Fee Charging Employment Act No. 37 of 1956. The Act empowered the Commissioner of Labour to supervise the agencies involved in recruitment of workers for local and foreign employment. In 1980, a new statute, the Foreign Employment Agency Act No. 32 was enacted to govern the rising needs of the foreign employment industry in the face of stable and better flow of Sri Lankans for foreign employment. This Act was repealed by the Sri Lanka Bureau of Foreign Employment Act No. 21 of 1985. The Sri Lanka Bureau of Foreign Employment (SLBFE) (Section 3, Part I of the Act), the main regulatory body for labour migration was established under this Act with long term objective and responsibilities to develop and manage the entire industry. Currently, Sri Lanka Bureau of Foreign Employment Act No. 21 of 1985 is the main legislative enactment passed by the Parliament to govern this sector. In 1994 (Act No 4 of 1994) and 2009 (Act No 56 of 2009) amendments were introduced to the Act. The Association of Licensed Foreign Employment Agencies (ALEFA) was established (section 54, Part VIII of the Act) to regulate foreign employment agencies which are registered with the Association, ensuring and enforcing best ethical practices for foreign employment trade by strict disciplinary control. Sri Lanka Foreign Employment agency established under the Companies Act is the only State owned agency, a subsidiary of Sri Lanka Bureau of Foreign Employment which recruits people in foreign employment.

Apart from section 15 (m) of the Act which says 'undertake the welfare and protection of Sri Lankan employed outside Sri Lanka as one of the objectives of SLBFE' there is no single provision containing the main Act or the Amendments to stipulate the rights which are guaranteed by the international instruments especially the CMW and ILO Conventions or remedies for the violation of their rights. This could be identified as a fundamental weakness of the Act. New laws should be introduced to protect the human and labour rights of migrant workers including female domestic migrant workers throughout the process of migration from the country of origin to hosting country.

Part IV of the Act sets out legal provisions to prevent carrying on a business of a foreign employment without a license issued under the Act. Prior to 2009 every licensee should become a member of ALFEA, registering with ALFEA (section 54 (3) – part VIII of the Act) established under section 54 (1) of the Act. According to the Amendment introduced in 2009 (section 8 of Act No. 56 of 2009), it is not compulsory. The new Amendment creates an unhealthy situation in

the industry especially in maintaining the ethics and disciplinary control of the foreign employment recruiting agencies. Neither the Act nor the Amendments have a single provision to include the sub agents who directly deal with these women and the agencies, which is another demerit of the Act.

Trafficking is one of the related issues of labour migration which adversely affects female domestic migrant workers. Although 1985 Act or its Amendments did not pay any attention to this issue, the Convention on Preventing and Combating Trafficking in Women and Children for Prostitution Act No. 30 of 2005 passed by the Parliament to address the issue directly within the country as well as to give effect to the provisions of SAARC Convention. Under the Act, trafficking is recognized as a heinous crime corresponding with severe punishments. The law relating to extradition has been enhanced by this Act. Nevertheless, none of the legislations set out a single provision relating to rehabilitation of the women who faced abusive/violent activities by their employers.

In this background, the National Labour Migration Policy was developed in 2008 by the State which is a pioneering initiative taken in the South Asian Region with regard to the protection and promotion of the welfare of migrant workers and their families. The policy is developed in three sections. In other words the policy is developed to achieve three main goals namely; good governance and regulation, protecting and empowering migrant workers and migration and development in the labour migration industry.

Signing Bilateral Agreements with hosting countries (with Qatar signed in 2008 with Kuwait signed in 2012 and with Oman to be signed shortly), signing Memorandum of Understanding with hosting countries, (with Saudi Arabian Government), promoting social protection schemes with hosting countries, (with UAE, Kuwait & Qatar governments) introducing new insurance schemes for migrant workers paid by the employers in the hosting countries (with Jordan and negotiations are taking place with Saudi Arabian Government) some initiatives have been taken under this policy to protect the female migrant workers including female domestic migrant workers.

Since there are no alternative livelihoods/employments, especially for female domestic migrant workers, after returning to the country of origin (Sri Lanka) , these women are forced to re-

migrate. Though the Act does not have any provision to institutionalize the aftercare and reintegration service to protect the socio economic rights of returnee migrants, a reintegration policy was developed in 2006 to address this issue by the SLBFE. However, this has not been effectively implemented.

The dispute between the migrant worker or his/her family member and the recruiting agency (section 44 of the Act) with regard to the term of the employment contract, there is no strong legal provision stipulated in the Act (other than an action instituted in the competent District Court) against the recruiting agency who deliberately avoids the inquiry.

Introduction of a minimum age limit for potential domestic migrant workers who wish to be employed in Saudi Arabia could be viewed as violation of mobility and economic development. Further, this restriction may be analyzed as gender discrimination against females and un-equal treatment for poor uneducated young females. This minimum age restriction is not an effective protection as it does not prevent any form of violence committed by the employers in hosting countries against women who are above the stipulated age limit.

Conclusion

Over the years, foreign employment has generated significant inflows of remittance and played as a safety control device for local unemployment. Overseas migration has opened-up employment opportunities for many women, who may not have been previously active in the local labour force. Vulnerability of female domestic workers who migrate under unsafe conditions is a major issue, despite all the measures and safeguards that were introduced by the State science 1980.

Sri Lankan migrant workers, who are employed overseas, including female domestic migrant workers, are not covered by the national labour law sphere. Thus the SLBFE Act is only a primary piece of legislation applying to Sri Lankan workers migrating for overseas employment. However, the State cannot escape from its responsibility towards the migrant employees including female domestic migrant workers. The State should provide adequate and effective protection for these women and their families too. Enacting and implementing laws towards their protection is one possible way of safeguarding their needs and rights. Therefore, strong national

laws which align with international human rights treaties standards, laws which govern the bilateral agreements with receiving/hosting countries to protect them from various forms of violence and laws which provide socio economic welfare of these workers may undoubtedly play a great role in protecting this group of people who contribute to the economic development of the country.

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Sri Lanka Shadow Report

To the Committee on the Elimination of All Forms of Discrimination Against Women

Prepared by

The Women and Media Collective Colombo[5]

July 2010

[5] Retrieved from: http://www2.ohchr.org/english/bodies/cedaw/docs/ngo/WMD_SriLanka48.pdf, visited on 5/12/2015

Article 11

Employment

Low levels of women's economic participation

With reference to **para 291 of the COs,** we wish to make the following points:

As reflected in the GOSL report, there is no substantial change in the women's labour force nor labour force participation rates. It should be noted that women's labour force participation (51.3) is highest from age the group (45 - 49).[6] This is because:

- Women are able to take on regular paid work only after completing child rearing and caring obligations;[7]

- The non-enumeration of women's economic contributions within the home and women's role in provision of economically valued food items through home gardening and household based small scale activities. Non enumeration of women's work within the home and homesteads results in under estimation of actual economic contributions of women to the national economy;

- The lack of policy focus on meaningful paternity leave regulations and on nation-wide support and provisions to address changing household structures and responsibilities between women and men also is a cause for gender based differences in labour force participation.

Employment Status

Most employed women are found to be in the agricultural (36.9%) and service sectors (37.6%). Only 25.4% of women were found to be in the industrial sector[8]. Furthermore, only 21% of women who have education above senior secondary high school (GCE A' levels) are

6 The Highest male participation rate (97.2) was reported from age group (35 – 39).
7 Department of Census and Statistics. Ministry of Finance and Planning. (2009). Quarterly Report of the Sri Lanka Labour Force Statistics. Excluding Northern Province.
8 Department of Census and Statistics. Ministry of Finance and Planning. (2009). Quarterly Report of the Sri Lanka Labour Force Statistics. Excluding Northern Province.

employed while 47.9% of women with similar educational qualifications are unemployed[9]. A combination of gender based differences exist where women are strongly expected to comply with social norms of behaviour to take on roles as wives and mothers that deter them from either seeking regular employment and/or discourage employers from enlisting women of child bearing age into the workforce.

Maternity Leave

Sri Lanka has a long history of affording Maternity Benefits to women in employment in the formal sector. The Maternity Benefits (Amendment) Act, No 43 of 1985 places two limitations on maternity leave: i.e (i) it is limited to the birth of the first two children of a woman employee (ii) it is restricted to 'live births'.

The Act does not formally recognize entitlements to maternity leave of women who may have undergone a miscarriage (natural abortion) at any stage of the pregnancy. Maternity Leave benefits are also not applicable to the Informal Sector.

Furthermore, the Establishments Code 1985, Chapter XII, sets out that:

A female officer required to retire on marriage will not be eligible to maternity leave under this section in respect of an illegitimate child. [10]

The operation of this regulation is optional, i.e. the employer may or may not penalize a pregnant woman on the basis of whether the child is legitimate (conceived within formal marriage) or not. However, the fact of its existence highlights the avenues that are available to discriminate against a woman based on social norms of marriage.

In addition, there are no clear guidelines that allow for women who adopt infants the right to paid maternity leave. Paternity leave is only limited to three days and is limited to the public sector. Furthermore, the Maternity Benefits Ordinance in section 12A (1) recognizes that the

9 Department of Census and Statistics. Ministry of Finance and Planning. (2009). Quarterly Report of the Sri Lanka Labour Force Statistics. Excluding Northern Province.

10 Ministry of Public Administration (1985). Establishments Code of the Government of the Democratic Socialist Republic of Sri Lanka. Volume I. Colombo.

Minister has the power to make regulations requiring the establishment and maintenance of crèches in prescribed trades, with a prescribed number of women workers. Regulations related to these provisions are yet to be made. Recent ad hoc extension to maternity leave in the public sector has however created confusion among women workers and employers, as these were done without consultation with employers and women's groups.

Women with Disabilties

In 2001, approximately 158,446 women with disabilities were enumerated in the national census. It is likely that this figure is much higher today, due to the war and other factors. Many remain marginalized in terms of enjoyment of social and cultural rights, (marriage, child bearing) as well as economic rights (employment). There are few provisions available for persons with disabilities in access to employment and higher skills training. Most government and private schools and places of employment are not constructed with access to persons with disabilities. Many women with disabilities are vulnerable to abuse within and outside the family and community environments[11] .

Migrant Women Workers

With reference to **para 292 and 293 of the COs**, The National Labour Migration Policy for Sri Lanka is a well formulated document which needs to be implemented without delay [12]. The State actively encourages male overseas employment migration on grounds that female overseas migration impacts adversely on families, households and society in general. However, the fact that approximately 42% of females who migrated as housemaids were between the ages 30 and 44 years[13], indicates that women (of child bearing ages) are utilizing avenues for higher income employment opportunities overseas. There is growing evidence that the GOSL is unable to cope with the range and extent of rights violations of

11 Association of Women with Disabilities. 2010. Girls and Women with Disabilities. Colombo.
12 Sri Lanka Ministry for Foreign Employment Promotion and Welfare. (2008). The National Labour Migration Policy of Sri Lanka. Colombo. The Official Poverty Line (estimated to be the Real Total Expenditure Per Person Per Month) in 2002 was Rs. 1,423 in 2002. This figure was estimated to be the same for the period 2006/07.
13 Sri Lanka Bureau of Foreign Employment (2009). Annual Statistical Report of Foreign Employment 2008. Colombo.

their citizens employed overseas. Voting rights for Sri Lankan migrant workers abroad should be considered.

There continues to be no social security benefits for migrant workers following their return to Sri Lanka. More directives could be given to sustainable economic interventions as well as to the voluntary pension scheme implemented by the Department of Social Services which could be availed of by returning migrant workers.

Trafficking

The 2002 SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution recognizes the extent of the problem within the South Asian region. The Sri Lankan government tightened regulations against trafficking of persons to 20 years imprisonment in the amendments to the Penal Code in 2006. Trafficking of women, however, continues to take place, albeit at a relatively smaller level compared to the numbers of women who travel overseas as migrant workers. Trafficking of women appears to be increasing as found in periodic reports in the media and is considered an emerging area of concern.

Women Free Trade Zone Workers

More than 50,000 women employed in mainly garment factories have been affected by changes in the global markets that saw a reduction in investment in and demand for products from Sri Lanka. Most workers who are between the ages 18 and 30 do not receive direct financial or other benefits that accrue to government through these exports. They are also vulnerable to losing their employment, especially in the light of trade sanctions against Sri Lanka being considered by the international community in recent years. For instance, it is not clear whether government has identified alternative employment opportunities for women should the GSP Plus trade benefit not be renewed in August 2010.

Women in Poverty

Official statistics give very limited sex disaggregated data which limits access to a gender based poverty profile; for example, there is no sex disaggregated data on number of persons and number of poor households by sector or, household size by poverty status.

In the Government's highly gendered poverty alleviation programmes, the family based household is conceptualised as being headed by a male. Hence, often in situations where the woman is the de facto main income provider for the household, she is not automatically entitled to the immediate benefits of such programmes.

Women in the Plantation Sector

With the privatization of the plantation sector over the past decade, there has been no significant improvement of the working conditions for women in relation to gender based wage discrimination and entitlements. Few women in the plantation sector have access to marketable skills which results in them continuing to be confined to low wage jobs.

Article 11- Equality in Employment and Labour Rights.

Although the government and international agencies have acknowledged the importance of gender sensitive policy in the phase following the end of armed conflict, both policy and practice have failed to adequately address the livelihood and employment needs of women. Further, in many instances, state income generation programmes tend to be only in sex-stereotyped activities, such as sewing. During the conflict period the role of women in the agricultural sector expanded with an increasing number of women engaging in casual wage labour.[14] Currently, there are greater numbers of women who are de facto and de jure heads of household seeking employment in general due to conflict and the flight or death of men. Coupled with the feminization of the informal sector this creates space for the exploitation of women as cheap labour.

14 Leelangi Wanasundara, 'Rural Women in Sri Lanka's Post-Conflict Rural Economy', Centre for Women's Research, 2006 at http://www.fao.org/docrep/009/ag114e/AG114E08.htm

Traditionally, rural women have generated income through the utilisation of forest resources.[15] Due to deforestation and prevalence of land mines and Unexplored Ordinances (UXOs) women are currently unable to access these resources, which limit their livelihood opportunities.

Further, even when women have ownership to land and thereby to means of generating an income, they often encounter problems with proving ownership due to loss or lack of documentation and accessing land due to land mines, high security zones, etc. When they are able to access land, use is not viable due to lack of water and agricultural implements.[16] No programmes currently exist to address the needs of women who were injured and/or disabled due to the conflict. There is also no gendered comprehension of women's role as primary care givers in the aftermath of armed conflict which increased the number of disabled. The plight of increased number of female headed households[17] is particularly precarious in this context and special initiatives by the state are required to address them. Wives of the disappeared are another group of conflict affected women who need assistance with suitable employment or income generating activities as in most cases the disappeared husband was the primary/sole income earner. The need to acknowledge and cater to women's role as primary income earners becomes critical in these contexts.

INDIAN POSITION ON LAWS RELATING TO SEXUAL HARASSMENT

15 Leelangi Wanasundara, 'Rural Women in Sri Lanka's Post-Conflict Rural Economy', Centre for Women's Research, 2006 at http://www.fao.org/docrep/009/ag114e/AG114E08.htm

16 Ibid.

17 In 3 Grama Niladhari Divisions in the Mullaitivu district as of May 2010 1080 widows were identified by the local authorities- Report regarding resettlement in Mullaitivu as at 16 May 2010', The Kachcheri Mullaitivu.

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. It's not all, women living in those countries having developed legal system faces other problems like being fired out of work, ridiculed, societal pressure or promises of desired promotion, etc. that makes them left with no words. 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. Studies have shown that 1 out of every 3 working women are touched by sexual harassment. Every country is facing this problem today. No female worker is safe and the sense of security is lacking in them. There are certain developments in laws of many countries to protect women workers from sexual harassment. During 2007 alone, the U.S. Equal Employment Opportunity Commission and related state agencies received 12,510 new charges of sexual harassment on the job. Sexual harassment is rooted in cultural practices and is exacerbated by power relations at the workplace. Unless there is enough emphasis on sensitization at the workplace, legal changes are hardly likely to be successful. Workplaces need toframe their own comprehensive policies on how they will deal with sexual harassment. Instead of cobbling together committees at the court's intervention, a system and a route of redress should already be in place.

India is a democratic country. All citizens have the fundamental right to live with dignity under article 21 of the constitution of India. But there is no law specifically dealing with sexual harassment. Laws are not able to provide justice to the victims. There are various cases brought before the supreme court of India but all cases were not successful in laying down new laws for sexual harassment. In 1997, Supreme court tried to lay down guideline in Vishakha's case .These guideline were somewhat successful because in this case supreme court argued that there is a need for separate laws but it was not given the required attention. Sexual harassment: the law According to the law in India, sexual harassment violates the women's fundamental right of gender equality and life with dignity under article 14 and article 21 respectively. Indian Penal Code, provides protection against women's sexual harassments such as in IPC: · Section 294 deals with obscene acts and songs at public place. · Section 354 deals with assault or criminal force against women. · Section 376 deals with rape. · Section 510 deals with uttering words or making gestures which outrages a women's modesty. There is another act passed by legislature

for protecting women's interest namely, Indecent Representation of Women, Act (1997). This act has not been used in cases of sexual harassment but there are certain provisions in this act which can be used in 2 ways: 1) If a person harasses another by showing books, photographs, paintings, films,etc. containing indecent representation of women than he will be liable with minimum 2yrs. imprisonment. 2) Section 7 of this act punishes companies, if there is indecent representation of women like showing pornography. The harassed women can also go to civil courts for tortious actions like mental anguish, physical harassment, loss of income in employment of victim, etc Sexual harassment can be distinguished on two basis, one of them is quid pro quo in which a woman gets sexually harassed in exchange of work benefits and sexual favours this also lead to some retaliatory actions such as demotion and making her work in difficult conditions. Another is 'hostile working environment' which imposes a duty on employer to provide the women worker with positive working environment and prohibits sexist graffiti, sexual remarks showing pornography and brushing against women employees.

On 9th December, 2013 "The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013" has come into force. The Act is based on the Supreme Court guidelines in the case of Vishakha vs. State of Rajasthan [1997 JT (7) 384]. Vishakha guidelines, as laid down by the Supreme Court put the onus of a safe working environment on the employer. The guidelines also state that it shall be the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or redressal of acts of sexual harassment by taking all steps required. The guidelines also lay down a grievance redressal mechanism that mandates all companies, whether operating in the public or private sector, to set up Complaints Committee within the organisation to look into such offences. The new law brings in its ambit even domestic workers in both organized and unorganized sectors. The Act makes it the duty of every employer to provide a safe work environment which shall include safety from all the persons with whom a woman comes into contact at the workplace; organize workshops and awareness programmes; provide assistance to the woman if she so chooses to file a criminal complaint; initiate criminal action against the

perpetrator and treat sexual harassment as a misconduct under the service rules and initiate action for such misconduct.[18]

Case Laws:

Mrs. Rupan Deol Bajaj v. Kanwar Pal Singh Gill, 1996 AIR 309

Judges: Mukherjee M.K. (J) & Anand, A.S. (J)

This case has changed the meaning of the terms, modesty and privacy in such a way that, any kind of harassment or inconvenience done to a women's private or public life will be considered as an offence.

Vishaka & others Vs. State of Rajasthan & others

J.S. Verma C.J.I., Mrs. Sujata V. Manohar and B.N. Kirpal. JJ.

(AIR 1997 SUPREME COURT 3011)

In this case Supreme Court laid down the following guidelines which recognized it not only as a private injury to an individual woman but also as the violation of her fundamental rights. These guidelines are significant because for the first time sexual harassment is identified as a separate category of legally prohibited behavior. These are subjected to all workplaces until any other legislation is passed by parliament in this regard. The guidelines are as follows:

· It is the duty of every employer to deliver a sense of security to every women employee. · Government should make strict laws and regulations to prohibit sexual harassment.

· Any act of such nature should result in disciplinary actions and criminal proceedings should also be brought against the wrong doer.

· The organization should have a well set up complaint mechanism for the redressal of the complaints made by the victim and should be subjected to a reasonable time.

· This complaint mechanism should be in the form of complaint committee which need to be headed by a women member and at least 50% of the committee members should be women so

[18] Retrieved from: http://www.foxmandal.com/wp-content/uploads/2015/04/Laws-against-sexual-harassement-at-work-place.pdf

that victims do not feel ashamed while communicating their problems. This complaint committee should also have a third party involvement in the form of NGO or other body which is familiar with this issue. There is a need of transparency in the functioning of this committee and for that there is a requirement of submission of annual report to the government.

· Issues relating to sexual harassment should not be a taboo in the workers meeting and should be discussed positively. · It is the duty of the organization to aware the female employees about their rights by regularly informing them about the new guidelines issued and legislation passed.

· The employer or the person in charge is duty biased to take the necessary and reasonable steps to provide support to the victim of sexual harassment takes place due to the act or omission of the third party.

· These guidelines are not limited only to government employers and should also be followed by employers in private sectors.

Medha Kotwal Lele & ors. v. Union of India & Others: This case helped the Visakha's case to implement the guidelines successfully by issuing notices to all states and the union territories to impart the necessary steps.

Apparel Export Promotion Council vs. A.K. Chopra

Judges: Dr. Anand, CJI & V.N. Khare

2000(1) SLJ SC 65: AIR 1999 SC 625

Facts: The respondent was Private Secretary to the Chairman of the Apparel Export Promotion Council, the appellant in the case. It was alleged that the respondent tried to molest a woman employee of the council, Miss X (name withheld by the Supreme Court), who was at that time working as a clerk-cum-typist, on 12-8-88. Though she was not competent or trained to take dictations, he took her to the business Centre at Taj Palace Hotel for taking dictation and type out the matter. There he tried to sit too close to her and despite her objection did not give up his objectionable behavior. After she took dictation from the Director, he (respondent) took her to the Business Centre in the basement of the Hotel for typing the matter and taking advantage of the isolated place he again tried to sit close to her and touch her despite her objections. He repeated his overtures. He went out for a while but came back and resumed his objectionable

acts. He tried to molest her physically in the lift also while coming to the basement but she saved herself by pressing the emergency button, which made the door of the lift open.

The respondent was placed under suspension on 18-8-88 and a charge sheet was served on him. A Director of the Council was appointed as Inquiry Officer and he held that the respondent acted against moral sanctions and that his acts against Miss X did not withstand the test of decency and modesty and held the charges levelled against the respondent as proved. The Disciplinary authority agreeing with the report of the Inquiry Officer imposed the penalty of removing him from service with immediate effect, on 28-6-1989. The respondent filed a departmental appeal before the Staff Committee and it was dismissed. The respondent thereupon filed a writ petition before the High Court and a Single Judge allowing it opined that "the petitioner tried to molest and not that the petitioner had in fact molested the complainant". The Division Bench dismissed the appeal filed by the Council against reinstatement of the respondent, agreeing with the findings of the Single Judge.

The Supreme Court observed: The High Court appears to have over-looked the settled position that in departmental proceedings, the Disciplinary authority is the sole judge of facts and in case an appeal is presented to the Appellate Authority, the Appellate Authority has also the power and jurisdiction to re-appreciate the evidence and come to its own conclusion, on facts, being the sole fact-finding authorities. Once findings of fact, based on appreciation of evidence are recorded, the High Court in Writ jurisdiction may not normally interfere with those factual findings unless it finds that the recorded findings were based entirely on no evidence or that the findings were wholly perverse and /or legally untenable. The adequacy or inadequacy of the evidence is not permitted to be canvassed before the High Court. Since, the High Court does not sit as an Appellate authority, over the factual findings recorded during departmental proceedings, while exercising the power of judicial review, the High Court cannot normally speaking substitute its own conclusion, with regard to the guilt of the delinquent, for that of the departmental authorities. Even insofar as imposition of penalty or punishment is concerned, unless the punishment or penalty imposed by the Disciplinary or the Departmental Appellate Authority, is either impermissible or such that it shocks the conscience of the High Court, it should not normally substitute its own opinion, and impose some other punishment or penalty.

The Supreme Court held: Judicial Review is directed not against the decision, but is confined to the examination of the decision making process. Lord Haltom in Chief Constable of the North Wales Police vs. Evans, (1982)3 ALL ER 141, observed: "The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches, on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the Court."

The Supreme Court further held: The material on the record, thus, clearly establishes an unwelcome sexually determined behavior on the part of the respondent against Miss X which is also an attempt to outrage her modesty. Any action or gesture, whether directly or by implication aims at or has the tendency to outrage the modesty of a female employee, must fall under the general concept of the definition of sexual harassment. The evidence on the record clearly establishes that the respondent caused sexual harassment to Miss X, taking advantage of his superior position in the Council.

The Supreme Court referred to the definition of sexual harassment suggested in Vishaka vs. State of Rajasthan, (1997) 6 SCC 241 and held: An analysis of the definition shows that sexual harassment is a form of sex discrimination projected through unwelcome sexual advances, request for sexual favours and other verbal or physical conduct with sexual overtones, whether directly or by implication, particularly when submission to or rejection of such a conduct by the female employee was capable of being used for affecting the employment of the female employee and unreasonably interfering with her work performance and had the effect of creating an intimidating or hostile working environment for her. That sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female and needs to be eliminated and that there can be no compromise with such violations, admits of no debate.

The Supreme Court further held: In a case involving charge of sexual harassment or attempt to sexually molest, the courts are required to examine the broader probabilities of a case and not get swayed by insignificant discrepancies or narrow technicalities or dictionary meaning of the expression "molestation". They must examine the entire material to determine the genuineness of the complaint. The statement of the victim must be appreciated in the background of the entire case. The Supreme Court set aside the order of the High Court and upheld the departmental action.

ISSUES RELATED TO DOMESTIC WORKERS

Domestic Work in Sri Lanka[1]

Domestic Servants Ordinance and Chauffeur's Ordinance protects Domestic Workers in Sri Lanka. Know more about national laws that protect domestic workers in Sri Lanka

What says the national law about domestic workers, what are the rights? The legal situation regarding domestic workers is somewhat complex in Sri Lanka. Two existing, pre-independence laws applying to domestic workers, are considered obsolete as modern working conditions have changed drastically. The 2 laws are;

1. The Domestic Servants Ordinance of 1871 (Amended 1936) and
2. The Chauffeur's Ordinance of 1912.

As these 2 laws are now out of use, the sector of domestic work is governed under some applicable provisions of the Industrial Disputes Act, as private work arrangements are also covered under this law.

However, a majority of people, including trade unions, are unaware that some provisions of the Industrial Disputes Act can be used by domestic workers.

Under this law, verbal agreements can be considered binding and as such, domestic workers, who often do not have written contracts, can seek legal relief. However, this law only provides limited legal rights for domestic workers.

Therefore, Sri Lanka is currently looking into the possibility of the ratification of the International Labour Organization's (ILO) Domestic Workers Convention of 2011. The Government has so far not made an official policy announcement whether Sri Lanka will ratify this agreement or not.

Who is a domestic worker?

The definition is somewhat unclear as there is no specific, functional law, pertaining to domestic workers.

However, domestic work can be defined to mean work performed in, or for, a household. A Domestic worker is a person engaged in domestic work within an employment relationship.

[1] Retrieved from: http://www.salary.lk/home/labour-law/domestic-work-in-sri-lanka, visited on 5/12/2015

Under the Industrial Disputes Act even non-regular work within the domestic/household context can be considered domestic work as long as an employment relationship can be established.

Where can the domestic worker complain if there is under payment or any other problem?

Domestic workers can complain to the Department of Labour and/or the Commissioner of Labour and under the Industrial Disputes Act can bring a case to the Labour Tribunal. In the case of physical abuse domestic workers can use the standard laws of the country and can complain to the police and resort to legal action, if desired.

Wages

- Wages of domestic workers differ depending on the location of employment. Wage rates in Colombo tend to be higher than in other parts of the country.
- Domestic cooks are paid around Rs 500 per day.
- Live-in maids, the most common form of domestic employment in Sri Lanka, are paid around Rs 8,000 per month, or more depending on the employers capabilities.
- Caretakers and private drivers are also considered domestic workers. Wage rates may change depending on the location and work experience.

Legal rights not available to domestic workers

Domestic workers, although captured under the Industrial Disputes Act, do not benefit from the Wages Board ordinance. Therefore, there is no minimum wage officially stipulated for any category of domestic workers. This means workers such as household maids, cooks, private/household drivers, caretakers must bargain for their pay.

Domestic workers are also not covered under any of the national social security laws. This means employers are not under obligation to make payments to the Employees Trust Fund for the worker and they do not have to pay gratuity even after many years of work.

Employment of children as domestic workers

At present, the minimum age of employment in all sectors is 14 years. The employment of children under the age of 14 is illegal is Sri Lanka.

Employment of children, particularly little girls, as domestic workers, in Colombo, has reduced sharply over the last few years following better implementation of child protection laws in the country. However, both girls and boys from poor families, particularly from the plantation community, continue to be employed as domestic workers by households in Colombo and other urban areas.

In addition to existing domestic laws, Sri Lanka has signed the:

- ILO Worst Forms of Child Labour Convention (No. 182);
- ILO Minimum Age for Employment Convention (No. 138);
- ILO Forced Labour Convention (No. 29);
- ILO Abolition of Forced Labour Convention (No. 105);
- UN Convention on the Rights of the Child (CRC).

Domestic Workers' Rights in Sri Lanka - Work like Any Other, Work like No Other: Need for a Legislative Intervention

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Background

The phrase 'work like any other, work like no other' taken from the ILO Report on Domestic Workers is used in this paper in the context of domestic workers performing their work similar to other workers, but domestic workers are not protected by labour legislation, while other workers are protected. As the plight of the domestic workers has transformed from a domestic issue to global concern, the International Labour Organization (ILO) has adopted a Convention Concerning Decent Work for Domestic Workers (Convention No.189) on 16 June 2011. The Convention provides for working hours, minimum wages, overtime payment, daily and weekly rest, paid annual leave, social security, maternity protection, safe and healthy working environment, trade union rights and protection from all forms of abuse, harassment and violence. The Convention will come into force twelve months after the ratification of two members of the ILO. It is believed that Uruguay may ratify the Convention soon, and become the first member to ratify the Convention. However, as Sri Lanka is a state party to all important human rights conventions of the United Nations and core conventions of the ILO which protect the basic rights and interests of all workers, it has an obligation to protect the rights and interests of the domestic workers as well.

Methodology

This paper discusses, in the light of relevant international declarations, recommendations, covenants and conventions, the extent to which labour law regime consisting of legislation, regulations and decided cases protect the rights and interests of domestic workers in Sri Lanka. The scope of this paper is limited to rights and interests of domestic workers in Sri Lanka.

Outcome

Most of the domestic workers are females and children, and they are subject to forced labour, sexual abuse and harassment. The provisions in the Penal Code relating to forced labour, sexual abuse and harassments are applicable to all, including domestic workers. The Employment of Women, Young Persons and Children Act provides that minimum age for employment is fourteen years, and minimum age for hazardous nature of employments is eighteen years. The Act is also applicable to domestic workers without any distinction. A regulation gazetted under the Act provides that a young person who has attained the age of fourteen years but is under age of eighteen years cannot be employed as a domestic worker in such a manner to preclude at least three hours of leisure between the hours of 6.00 a.m. and 8.00 p.m. on any day, and enjoying at least seven consecutive days of leisure in every period of four months.

The Industrial Disputes Act is applicable to domestic workers as interpretation to the words 'workman', 'industry' and 'industrial dispute' in the Act would include a domestic worker as well. The Act also provides that relief for unjustified termination of services of a domestic worker is not reinstatement, but compensation. Hence, this provision in the Act also recognizes that domestic workers are covered by the Act.

The question arises whether a domestic worker can make an application to a labour tribunal to recover balance wages or arrears of wages. In *Karunaratne* v. *Appuhmay*, Pandita- Gunawardene, J. has stated that a workman cannot make application to recover balance wages in arrears *simplicitor*. However, in *Sirisena* v. *Samson Silva,* Rajaratnam, J. has stated that unpaid wages can be awarded by a labour tribunal when the tribunal makes a just and equitable order for termination of services. In *Wijedeera* v. *Babyhamy* also Rajaratnam,J. has stated that labour tribunals shall have regard to proved arrears of wages when they make just and equitable orders.

Hence, a domestic worker could recover balance wages or arrears of wages when he couples it with relief for termination of his services. If he wishes to recover balance wages or arrears of wages in *simplicitor* without coupled with relief for termination of services, the appropriate forum would not be a labour tribunal, but the Commissioner of Labour.

The Trade Unions Ordinance provides for registration of trade unions, and rights and immunities of the registered trade unions. Interpretation to the words 'workman', 'trade union' and 'trade dispute' in the Ordinance is broad enough to include domestic workers

as well. The Industrial Disputes Act which provides, *inter alia*, for trade union rights of the workmen is also applicable to domestic workers. However, as domestic workers are generally illiterate, singly employed at households and neglected by the society, trade union rights cannot be realistically exercised by them.

The Wages Boards established under the Wages Boards Ordinance determine terms and conditions of employment in the trades covered by the Ordinance. As the word 'trade' has commercial connotations it cannot be interpreted to include 'domestic service'. The Workmen Compensation Ordinance provides for payment of compensation for accidents in employment and occupational diseases. But, the interpretation to the word 'workman' provides 'any person who …works under a contract with an employer for the purposes of his trade or business...' The words 'trade' or 'business' in the Ordinance also cannot be interpreted to include 'domestic service' within their scope. The Maternity Benefits Ordinance is applicable to woman workers employed in any 'trade'. Hence, the Maternity Benefits Ordinance is also not applicable to domestic workers.

Domestic workers are expressly excluded from the application of the Payment of Gratuity Act. However, it is possible for them to claim gratuity from a labour tribunal after termination of their services as they are covered by the Industrial Disputes Act. The Employees' Provident Act is applicable only to the employees in covered employments. However, an Order published by the Minister under the Act expressly excludes domestic service from covered employment for the purpose of the Act. The Employees' Trust Fund Act provides that the liability of an employer to pay contributions under the Act shall commence after the day fixed in relation to employment by the Minister by order published in the Gazette. However, an Order published by the Minister under the Act expressly excludes domestic service in any household from the application of the Act.

There is no legislation in Sri Lanka to provide for working hours, minimum wages, overtime payment, daily and weekly rest, paid annual leave, social security, maternity protection and safe and healthy working environment for domestic workers.

Conclusion and Recommendations

Domestic workers rights are not only a domestic issue, but also an international labour issue. However, the failure of the labour legislation to protect the rights and interests of the domestic workers make them domestic slaves even in the 21st century in a country where religious values have recognized workers' rights (in the form of employers'

obligations) about 2,500 years ago. Hence, it is suggested to either amend the words that expressly or implicitly exclude the domestic workers from the application of existing labour legislation, or enact a special legislation to protect the rights and interests of the domestic workers.

References

Decent work for domestic workers, International Labour Conference, 99th Session, 2010

Karunaratne v. Appuhmay, (1970) 74 NLR 46

Labour Code of Sri Lanka, 2010

Sirisena v. Samson Silva, (1972) 75 NLR 549

Wijedeera v. Babyhamy, (1973) 79(1) NLR 88

International
Labour
Office

Geneva

Convention No. 189
Decent work for domestic workers

Domestic work is work. Domestic workers are, like other workers, entitled to decent work.

On 16 June 2011, the International Labour Conference of the International Labour Organization adopted the Convention concerning decent work for domestic workers, which is also referred to as the Domestic Workers Convention, 2011 (No. 189).

What is Convention No. 189?

What is a Convention of the ILO?

A treaty adopted by the International Labour Conference, which is made up of government, worker and employer delegates from the 183 member States of the ILO.

What is Convention No. 189 about?

Convention No. 189 offers specific protection to domestic workers. It lays down basic rights and principles, and requires States to take a series of measures with a view to making decent work a reality for domestic workers.

What does it mean to ratify a Convention?

When a country ratifies a Convention, its government formally makes a commitment to implement all the obligations provided in the Convention, and to report periodically to the ILO on the measures taken in this regard.

Recommendation No. 201 – how is it related to the Convention?

Domestic Workers Recommendation No. 201, also adopted by the International Labour Conference of 2011, supplements Convention No. 189. Unlike the Convention, Recommendation No. 201 is not open for ratification. The Recommendation provides practical guidance concerning possible legal and other measures to implement the rights and principles stated in the Convention.

How is the Convention to be implemented?

The Convention may be implemented by extending or adapting existing laws and regulations or other measures, or by developing new and specific measures for domestic workers. Some of the measures

required under the Convention may be taken progressively.

Who is covered by Convention No. 189?

What is domestic work?

Convention No. 189 defi nes 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.

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.

All domestic workers are covered by Convention No. 189, although countries may decide to exclude some categories, under very strict conditions.

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.

In implementing the Convention, will workers and employers be consulted?

The provisions of the Convention are to be implemented in consultation with the most representative workers' and employers' organizations (Article 18).

In addition, the Convention requires Governments to consult with the most representative organizations of employers and workers and, where they exist, with organizations that represent domestic workers and organizations that represent employers of domestic workers on four particular matters: (i) identifying categories of workers who would be excluded from the scope of the Convention; (ii) measures on occupational safety and health; (iii) measures on social security; and (iv) measures to protect workers from abusive practices by private employment agencies (Articles 2, 13 & 15).

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.

What are the minimum standards set by Convention No. 189 for domestic workers?

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).

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).

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).

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).

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).

Social security

- Social security protection, including maternity benefits (Article 14).
- Conditions that are not less favorable than those applicable to workers generally (Article 14).

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).

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).

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).

Private employment agencies

Measures to be put in place (Article 15):

- regulate of the operation of private employment agencies;
- ensure adequate machinery for the investigation of complaints by domestic workers;
- provide adequate protection of domestic workers and prevention of abuses, in collaboration with other Members where appropriate;
- Consider concluding bilateral, regional or multilateral agreements to prevent abuses and fraudulent practices.

Dispute settlement, complaints, enforcement

- Effective access to the court, tribunals or other dispute settlement mechanisms, including accessible complaint mechanisms (Article 17).
- Measures to be put in place to ensure compliance with national laws for the protection of domestic workers, including labour inspection measures. In in regard, the Convention recognizes the need to balance domestic workers' right to protection and the right to privacy of the households' members (Article 17).

MINIMIZING VULNERABILITY OF SRI LANKAN FEMALE DOMESTIC WORKERS[2]

Female domestic workers are highly vulnerable to adverse situations at the destinations to which they migrate, ranging from issues such as non-payment of agreed wages, to physical and sexual harassment, to confiscation of passports by employers, and denying of communication with family in Sri Lanka. It leads to physical and emotional trauma among female domestic workers. Is there a way to minimize these female domestic workers' vulnerability? It is often perceived that recruitment through formal channels minimize vulnerability. Is this true?

Why so vulnerable?

Table1: NatureofComplaintsReceivedbytheSLBFEbyFemalesin2012

Nature of Complaint	Number
Non-paymentofagreedwages	1,508
Sickness	1,491
Harassment(Physical&sexual)	1,478
BreachofEmploymentContract	1,069
Lackofcommunication with family	1,050
Notsentbackaftercompletingcontract	892
Other	760
Death	118
Problemathome(SriLanka)	64
Stranded-noreceptiononarrival	15
Stranded– no employment	37
Prematuretermination	37
Illegalmoneytransaction	10
Total	8529

Source: SLBFE

Domestic work is identified as one of the most vulnerable occupations among female migrants, due to multiple reasons. At the country of origin, those who seek female domestic work are often drawn from a vulnerable group in society – the poor. In Middle Easterncountries they are vulnerable because they are females, workers and foreigners, with no party with any interestin them.In some destination countries they are not considered as

[2] http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=113439#, visited on 4/12/2015

employees, while households where they work are not considered workplaces, and private persons who hire them are not considered employers. Moreover, their working environment and living quarters overlap blurs the lines that separate the two. Together, all these characteristics of this occupation make female domestic workers highly vulnerable to various forms of difficulties at their work places

Types of vulnerabilities

As depicted in Table 1, the most common complaints among Sri Lankan female migrant workers in 2012 were non-payment of agreed wages, sickness, and physical and sexual harassment. Together, these three issues accounted for over a third of complaints. The nature of complaints varies from issues emanating from specifics of the employment contract, to health issues to, controlling and abusive nature of the employer.

Protection from employment contracts

Certain aspects of vulnerabilities are supposed to be covered by employment contracts. For instance, an employment contract entered through a foreign employment agent normally has a written agreement specifying terms and conditions of employment. Similarly, ILO Convention No.189 requires that migrant domestic workers should receive a written job offer or contract, which is enforceable in the country of destination, prior to their arrival and stipulates that living-in workers have a right to keep their travel and identity documents with them. Employment through other informal channels often does not involve such clear specifications about employment. As such, does recruitment through formal agents minimize vulnerability at destination?

Vulnerability and the channel of recruitment

In Sri Lanka, recruitment of female domestic workers to foreign employment involves various channels, such as through agents, sub-agents, combination of agents and sub-agents, and direct contacts. These various types of recruitment channels protect female domestic workers from specific types of vulnerabilities at destination. A recent study by the IPS investigated the link between the recruitment channel and vulnerability at destination. The study was based on a sample of 1,409 females who were employed as domestic workers in Middle Eastern countries. The findings showed that vulnerability is multifaceted, involving various types of issues. Different aspects of vulnerability can be minimized through different recruitment channels and no recruitment channel will protect a

migrant from all types of vulnerabilities. For instance, if a female domestic worker secured employment through a formal recruitment agent, she has lower chance of being forced to work longer hours with no overtime payment, while having a higher chance of being forced to work for a different employer. When a female domestic worker is employed through a combination of an agent and a sub-agent she has a higher chance of being forced to do activities that she had not initially agreed to. As such, the study finds that the effect of recruitment channel is specific to the type of vulnerability faced.

In this context, potential migrants should be well informed about the various types of vulnerabilities associated with domestic employment and how to strike a balance between these conflicting implications, through their choice of recruitment channel. An ideal way to provide such information is through a public awareness campaign, such as the one adopted by the Australian High Commission to discourage illegal immigration to Australia by boat. The benefits of such a public awareness campaign – that will highlight the benefits and challenges associated with different recruitment channels and vulnerabilities common to female domestic work, is that it will reach a broad cross section of viewer not limiting to potential female migrants. Then potential female migrants' friends, relatives, neighbors, community/religious leaders, etc., will be more knowledgeable and will be able to passively contribute in evaluating each recruitment channel in the context of potential vulnerabilities and in supporting the better informed potential female migrant to make an informed decision about her choice of recruitment channel.

ISSUES RELATED TO DISABLEMENT

WORKMEN'S COMPENSATION[1]

Workmen's Compensation in Sri Lanka: The Workmen's Compensation Ordinance of 1935 and subsequent Amendments is to provide for the payment of compensation to workers who are injured in the course of their employment by an accident arising out of the and during the course of their work.

The Workmen's Compensation Ordinance of 1935 and subsequent Amendments is to provide for the payment of compensation to workers who are injured in the course of their employment by an accident arising out of the and during the course of their work.

Who is entitled to claim compensation under the Workmen's Compensation Ordinance?

A workman is defined as "any person who has entered into or works under a contract with an employer for the purposes of his trade or business in any capacity, whether the contract is specified in writing or on an oral agreement, or whether it is a contract of service or apprenticeship or contracted personally to execute any work or labour".

The payment is calculated by time done, or work done or otherwise. The Ordinance considers 'period of service' as a continuous period which has not been interrupted by a period of absence from work not exceeding fourteen days

The law applies to

1. Government Department and local bodies.
2. in the case of workmen who are masters of registered ships or seamen subject to certain modifications detailed in Section 25 (As per Part IV of the Ordiance)

However, persons working as members of the Armed Forces of Sri Lanka, other than those persons employed in a civilian capacity in those Forces, and members of the Police Force are not included under this Ordinance.

When can a worker claim Compensation?

If any worker contracts a disease that could be reasonably attributed to the type of work he/she is doing while employed in any process or contracts an occupational disease as described in Schedule III, such as Anthrax infection, poisoning by lead, nitrous fumes etc., (please see

[1] Retrieved from: http://www.salary.lk/home/labour-law/compensation/workers-compensation, visited on 4/12/2015

Schedule III for the entire list), then the compensation can be claimed under the terms of this Ordinance.

Is anyone else entitled to claim worker's compensation?

The Ordinance also provides for compensation to be paid to the dependants of the worker, in the event of his/her demise as a result of a work related accident or occupational disease.

What is the amount of compensation that can be expected?

Part III of this Ordinance addresses the compensation payable in detail. The amount of compensation payable for injuries sustained to a worker is listed in the relevant Schedules under this Ordinance.

- Schedule I - addresses permanent partial disablement as a result from injury. Where the injury is not listed therein compensation will be computed proportionately with the loss of earning capacity.
  In the event multiple injuries are caused by the same accident, the amount of compensation will be an aggregated amount, but it will not exceed the amount payable if permanent total disablement had been the result.
- Schedule IV - addresses instances where death results from the injury and the worker was in receipt of monthly wages. It also addresses compensation for permanent total disablement as a result of the injury sustained. The maximum payable is Rs.550,000/- in the case of death or permanent disablement.

What is the process for the payment, distribution and recovery of compensation?

Under Section 11(1) the Ordinance stipulates that

1. no payment of compensation in respect of a worker whose injury has resulted in death and no payment of a lump sum as compensation to a woman or person under legal disability (age of 18 years) can be made directly by the employer to the dependants other than by depositing the sum with the Commissioner.
2. Any payments made directly to the dependents will not be deemed to be a payment of compensation.

3. Upon deposit of the compensation sum with the Commissioner, the Commissioner will deduct the actual cost of the worker's funeral expenses depending on the compensation payment.

As per Section 16 (1)

1. all proceedings for recovery of compensation can be brought before the Commissioner, after notice of accident has been given in the manner detailed in the Ordinance.
2. Such notice must be given as soon as is practicable and before the worker has voluntarily left the employment in which he was injured.
3. The claim for compensation must be made within two years of the occurrence of the accident and in the case of death, within two years from the date of death.
4. In the case of contracting a disease as a result of an accident, then the accident will deemed to have happened on the first day from which the worker was continuously absent from work.

Section 16 (2) states that

    1. the Commissioner may admit and decide upon a claim to compensation in the event notice required by the Ordinance has not been given or if the claim was not instituted within the stipulated timeframe, if he is satisfied that the failure to give notice or institute a claim was due to sufficient cause.

According to Section 20:

1. In the event a Commissioner receives information that a worker's death has been the result of an accident arising out of his/ her employment, the Commissioner is empowered to send a notice by registered post to the employer requiring the latter to submit within thirty days, a statement in the manner prescribed under the Ordinance.
2. This information should contain the circumstances of the death of the worker and indicating whether in the opinion of the employer, he is or not liable to deposit compensation on account of the worker's death.

3. The employer is obligated by law, unless he disclaims liability to deposit compensation on any ground other than there are no dependents of the deceased worker, to make the deposit of compensation within thirty days after the notice was served.
4. If the employer opines that he is not liable, then he must submit a statement indicating reasons for disclaiming liability. The Commissioner after an inquiry as he may deem fit, inform the dependents of the deceased worker, that it is open for them to prefer a claim for compensation and may give them further information as he thinks fit.
5. If the employer fails to pay compensation awarded within a period of thirty days, then he is liable to a surcharge of ten percent of the amount awarded.

As per Section 21:

1. Where a worker has given notice of an accident, a worker must submit himself to a medical examination if the employer offers free medical examination.
2. This must occur before the expiry of three days from the time of service of the notice of accident.
3. If the worker accepts such offer but deliberately disregards the instruction of the registered medical practitioner or if the worker refuses to accept such offer and thereafter either fails to take treatment regularly and if the injury is aggravated as a result of deliberate disregard of medical advice, then compensation if any shall be payable accordingly.

What is the process that workers need to follow in order to claim compensation?

Form ‘A’ titled Application for Compensation by Workmen must be duly filled in, giving name and address etc. of the applicant, date of accident, cause of injury, type(s) of injury, monthly wages of worker, date on which notice of accident was served on employer, etc.

The worker in his/her application requests the Commissioner to determine whether he/she is considered a worker within the terms of the Ordinance, whether the accident arose out of or in the course of the applicant’s employment, whether the amount of compensation claimed or any smaller amount is due and whether the respondent is liable to pay such compensation as may be due, etc.

How does the Ordinance define an employer?

An employer includes the Republic of Sri Lanka and anybody of persons whether corporate or unincorporated and any managing agent of any employer and the heirs, executors or administrators of a deceased employer and, when the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, means such other person while the workman is working for him.

Are there any limitations on the liability of the employer provided for under this Ordinance?

Under Section 3, an employer is liable to pay compensation to a workman for any injury caused due to an accident arising out of the course of his work, or as stated above if the workman contracts any occupational disease as a result of the type and nature of the work done.

However, under the same section 3 (a), the liability of the employer does not extend to personal injury that does not result in the total or partial disablement of the worker for a period of three days. Similarly under (b) of the same Section, the Ordinance states that in respect of an injury not resulting in death caused by an accident directly attributable to negligence on the part of the worker, the employer is not liable to pay compensation. Negligence is defined as: if the worker had been at the time of the accident been under the influence of alcohol or drugs, if the worker willfully disobeyed an order expressly given or framed for the purpose of securing the safety of the workers, or the willful removal or disregard by the worker of any safeguards or safety devices which he/she was aware were provided for securing his/her safety.

The employer is not liable to pay compensation to a worker in respect of any disease unless the disease can be directly attributable to a specific injury by accident as a result of his/ her employment or if the disease is reasonably attributable to the nature of his/ her employment.

Who is responsible for administering the Workmen's Compensation Ordinance?

The administering authority of this Ordinance lies with the Commissioner for Workmen's Compensation who along with Deputy Commissioners is appointed by the Judicial Service Commission. The Commissioner has the same jurisdiction as that of a civil cour

ILO CONVENTION CONCERNING EMPLOYMENT INJURY[2]

Various ILO conventions cover the issues of employment injury, but the ones most relevant to the issues in Sri Lanka are the Social Security (Minimum Standards) Convention, 1952 (No. 102), and the Employment Injury Benefits Convention, 1964 (No. 121).

C102 Social Security (Minimum Standards) Convention

The Social Security (Minimum Standards) Convention (C102)of 1952 relates to the broader aspect of providing social security, ranging from short-term benefits such as medical care and maternity benefits to long-term benefits relating to old age pensions, survivors benefits and invalidity benefits (ILO 1952). Employment injury is one of the three main branches of this convention providing for both long and short term benefits (ILO 2010b).

For employment injury protection, C102 prescribes measures to be taken to provide benefits for temporary disability, partial permanent disability, total permanent disability and incidents relating to the death of an employee. The convention extends coverage to non-national residents as well. Article 33 of the convention states that at least 50% of the workforce must be covered by the schemes in place; this must extend to the wives and children also in case of death of the breadwinner. If a country is given freedom from this Article, the convention states that all employees (and their wives and children) employed in an industrial workplace with more than 20 employees shall definitely be covered by the schemes in place.

The convention specifies the sort of medical care that injured employees should receive; inpatient and outpatient care from general and specialist doctors (allowing for house visits as well), dental care, nursing care and maintenance in rehabilitative institutions, medical accessories (pharmaceuticals, prosthetics *etc*.) and other non-traditional methods of medical care. The goal of the medical care should be to provide relief to the employed person and thus be conducive to his recovery and adjustment to normal life.

In case of employment injury, C102 prescribes that 50% of wages be replaced for temporary and permanent disability for a standard beneficiary, defined to be a ―man with a wife and two children‖. In case of death of the breadwinner due to employment injury, the standard beneficiary, defined to be a ―widow with two children‖, should be eligible to receive at least

[2] In-depth Assessment of Employment Injury Compensation Arrangements in Sri Lanka, Prepared by Rehana Thowfeek, Indika Siriwardena, Janaki Jayanthan, Shanaz Saleem and Ravi P. Rannan-Eliya, January 2014 Retrieved from: http://www.ihp.lk/publications/docs/ILOReportonEII.pdf, visited on 5/12/2015

40% of wages of the breadwinner which would signify the loss of support suffered. The wage replacement benefits should be paid periodically. The convention only allows lump sum payment to be made in case of temporary disabilities and in the special instance in which an authoritative body deems that the amount paid will be utilized properly.

C102 also states that periodic payments made for these contingencies should be adjusted to reflect changes in the cost of living.

C121 Employment Injury Benefits Convention

The Employment Injury Benefits Convention (C121) of 1964 directly relates to the provision of benefits to employees injured due to an ―industrial accident‖. The convention extends protection to all employees; but members may make exceptions for those employed in a casual nature, those employed not for the purpose of the employers business or trade, outworkers and family workers. However these exceptions can account for no more than 10% of the total workforce (ILO 1964).

C121 also defines the types of cash and medical benefits that injured employees should be entitled to. Medical benefit entitlements are the same as that prescribed by C102. In case of temporary disability the injured employee is entitled to receive at least 60% of wages for the duration of his disability after a waiting period of 3 days. For permanent total disability, the injured employee should receive 60% of his wages ―throughout the contingency‖. By definition of permanency, this implies that the injured employee is eligible to receive income replacements till his retirement. However the benefits are generally payable throughout the lifetime, a specified duration or until a presumed retirement age.

For the loss of a breadwinner, a survivor, defined in the same manner as C102, is entitled to receive a minimum of 50% of wages of the dead workman on a periodic basis ―throughout the contingency‖, which can be interpreted as the period for which the beneficiary remains dependent on the dead workman's income. Benefits to spouses may be suspended if he or she remarries. Survivors should also be eligible to receive a funeral benefit.

It is important to note that C121 states that all income replacement benefits are payable on a periodic basis and that the minimum rates of income replacement are; 60% for temporary and permanent disability and 50% for survivors in case of death of the breadwinner.

Convention C121 has been ratified by 23 countries. Sri Lanka is not among these countries. Sri Lanka has not ratified Convention C102 either.

Current employment injury arrangements in Sri Lanka[3]

Other than the rights workers have under the common law, the formal arrangements for EI compensation in Sri Lanka is worked out on the basis of employer liability, which makes employers liable for the costs of compensation. All formal sector employees, both public and private, are covered by the Workmen's Compensation Ordinance (WCO) of 1934. This is an employer liability system.

Common law

Any injured employee has the inherent right to sue his employer under common law. To do this, the worker must file a case in a district court; this case will be for personal injury caused by the employer rather than a workplace injury. To be successful, the worker will have to prove negligence and liability by the employer, who in turn can defend a claim on the grounds of culpability by the worker in the injury. Under common law there are a multitude of statutes that can come in to play to determine the ultimate course of any settlement. The value of any settlement will be based on a number of factors. These include previous cases that have similar backgrounds and other factors such as negligence of the employer, the employers' assets and financial capacity, etc. It is impossible to say whether an employee will necessarily receive a larger compensation if he sues the employer over opting to be settled under the WCO described below. Nevertheless, this option of redress will be expensive and carries significant risks for the worker of obtaining no compensation. No statistics are readily available on how many workers make use of this approach and how many are successful.

Government workers

Government workers consist of employees of the government, provincial councils, local governments and government departments. They account for 1 million employees in 2012 (Central Bank of Sri Lanka 2012) representing 11.7% of the labour force. There were also 200,000 semi-government employees in 2012.

The WCO, in its definition of an ―employer‖ includes the Republic of Sri Lanka and all local authorities. Thus, all public servants, whether in a permanent and pensionable post or not, are

[3] *ibid*

eligible to receive due compensation for work place injury according to the Workmen's Compensation Ordinance of 1934.

In addition to the above, beneficiaries of government employees in permanent and pensionable positions are also eligible to benefit from the Widows, Widowers and Orphans Pension Fund. The Department of Pensions operates this fund which was established under the Widows' and Orphans' Pension Fund Ordinance No 1 of 1898 and the Widowers' and Orphans' Pension Act No 24 of 1983. It provides a pension to the widows/widowers, orphans and/or dependants of public officers who are in permanent and pensionable positions if they die before becoming eligible to receive the pension. Widows, orphans and/or dependants of armed force personnel who die while on duty are also eligible to receive this pension.

The Department of Pensions also operates the Armed Forces Pension scheme that provides a disability pension to the armed forces personnel if they are injured while on duty. A lump sum of the amount equivalent to 5 years of salaries is paid along with the disability pension until the officer reaches the age of 57 (HPRA 2005).

Workmen's Compensation Ordinance

The Workmen's Compensation Ordinance (WCO) of 1934 is the first and only legislation passed in Sri Lanka to deal specifically with employment injury. The WCO was influenced and modeled on British Columbia's Workmen's Compensation Act of 1920 which established a similar system in that Canadian province (Chaklader 1998). Prior to its introduction, injured workers (or their dependent survivors) could in theory obtain compensation by suing their employers in the courts. But such action would have required time and money, and also was not guaranteed to deliver redress. Probably most affected workers would not have in fact made use of such an option, given the difficulties. The WCO provided workers with an easier and more automatic mechanism for obtaining compensation, but this was in return for giving up any rights to sue the employer in the courts.

Coverage

The WCO, technically, covers all workers, but our understanding is that in practice the benefits prescribed under it extend to the formal public and private sector employees only. The WCO defines an employment injury as a disablement suffered as a result of an employment related

accident that reduces the earning capacity of the workman; so temporary and permanent disability and death due to work related accidents are the contingencies covered.

The WCO defines a workman as ―any person who has entered into or works under a contract with an employer for the purposes of his trade or business in any capacity, whether the contract is expressed or implied, and oral or in writing and whether it is a contract of service or of apprenticeship.‖ Accordingly, it is understood that all employees irrespective of whether formal, contractual, out-workers, public or private should be protected by the ordinance. The WCO formally excludes the military and police personnel, workers of casual nature and those employed other than for the benefit of the employers' trade, such as domestic workers. By definition, the self-employed are excluded, due to the absence of an ―employer.

We thus estimate that only 35% of the labour force would in reality receive the benefits prescribed by the WCO; specifically 2.9 million employees in both public and private formal sector employment. Those excluded from coverage include self employed persons, family workers and employers in both formal and informal sectors and employees in the informal sector. Together they constitute of 5.2 million individuals accounting for 65% of the labour force (Department of Census and Statistics 2012).

Implementation

The implementation of the WCO is vested in the hands of the Commissioner of Workmen's Compensation, who enjoys the powers of a civil court in this regard. It is the Commissioner's responsibility to receive claims for compensation, conduct inquiries into accepted applications, settle disputed claims, and to collect compensatory payments from employers and dispense them to the claimants. The Ordinance makes it mandatory that all compensation made in respect of a fatal accident be channeled through the commissioner. However, compensation for non-fatal accidents may be paid directly to the injured employee with notice, through a memorandum to the commissioner that such has been done. The Ordinance obligates all employers to inform the Commissioner of any fatal and non-fatal accidents that occur to his employees within seven days of such an incident. However, this does not happen in practice and the Commissioner has not established any procedures for submitting such information, so there is considerable under-reporting of work-related injuries and diseases in Sri Lanka. The Ministry of Health estimates that 15% of all admissions in 2011 to the National Hospital of Sri Lanka in Colombo were due to work-related accidents, but relevant statistics are not collected as part of the routine information

system. It is presumed that the prevalence of occupational diseases could be higher, but they are rarely recorded as ―work related diseases‖ (Maduruwala 2013).

The current system of employment injury benefits is purely employer liability based. There is no mandatory insurance clause in the WCO that requires employers to be insured against employee injury risks. An employer may opt to insure his liability in this regard at his own discretion. Insurance companies offer workmen's compensation insurance policies to cover workmen's compensation liabilities. Further, personal accident insurance policies are available for employers to cover their liability to compensate any person who is injured at the business' premises, which will include his employees as well.

Under section 60 of Part XII, the WCO indemnifies an employer from legal action if the employee chooses to be compensated according to this ordinance. Employees must therefore choose between common law and the Ordinance when he decides on how he wants to be compensated. The WCO provides a relatively easier method for an employee to receive compensation for his losses. However, the compensation is limited compared to the settlement he may receive if he chooses to sue his employer. It is impossible to say that an employee will necessarily receive a larger compensation if he sues the employer over opting to be settled under the WCO.

Employers who have chosen to insure their liability using workmen's compensation insurance will be insured against the legal costs as well, if the injured employee decides to forgo compensation and pursue a lawsuit against the employer in civil court.

Compensation benefits

The WCO provides in its Schedule IV the exact compensation liable to be paid to an injured employee. This varies according to the wage class of the employee and the degree of the disablement he has suffered: permanent, permanent partial, temporary or death. The ordinance also specifies the method in which the compensation should be paid: periodic payments for temporary disabilities and lump sums for permanent disabilities and fatalities. In case of a temporary disability, half monthly payments should be made to the injured employee after a minimum three day waiting period. This amount ranges from a minimum of

Sri Lanka Rupees (Rs.) 1,320 half monthly for a victim earning less than Rs. 2,500 a month to a maximum of Rs. 5,500 half monthly for a victim earning more than Rs. 20,000 a month.

In the case of total permanent disability, the prescribed lump sum payments range from a minimum of Rs. 196,083 to a maximum liability of Rs. 550,000. The minimum lump sum payment for a death claim is Rs. 181,665 and the maximum is Rs. 550,000. This amount is split among the dependants according to the ruling of the Commissioner, and for funeral expenses up to a maximum of Rs. 20,000 may be deducted from this payment.

Other relevant legislations and schemes

Medical treatment for injured workers

All citizens of Sri Lanka are provided free healthcare services by the government, financed by workers and tax payers through general revenue taxation and provided through direct government delivery (Rannan-Eliya, et al. 2008). The Ministry of Health (MOH) operates an extensive network of hospitals and healthcare facilities throughout the country, which is in practice accessible to all. Various indicators show that Sri Lanka achieves high and equitable levels of access to healthcare services compared with comparable countries (O'Donnell, et al. 2007), and a high degree of financial risk protection against the costs resulting from medical treatment (van Doorslaer, et al. 2006). Available MOH services are provided without consideration as to the cause of any injury or disease. In this sense, injured workers have access to treatment when needed. However, what services are made available to all citizens is determined by MOH taking into account availability of financial resources. This implies that it is possible for the workers to experience injuries for which treatment is not adequately provided. However, creation of a separate funding arrangement to deal with such gaps would be contrary to the national policy that uses general revenue taxation to finance healthcare service for all without restriction or discrimination. It would also be undesirable in terms of international recommendations, where fragmenting risk pools for healthcare would obstruct and make attainment of universal healthcare coverage more unfeasible (World Health Organization 2010)

There is only one government hospital in Sri Lanka that provides specialized rehabilitative services in the form of physiotherapy and occupational therapy, located in Ragama in the Western Province. Other tertiary level hospitals too provide rehabilitation services to patients. Whilst there are many private fee-levying hospitals that provide such rehabilitative care, this,

however is a relatively expensive option that is not affordable for the majority of Sri Lankans, and certainly for the typical low-skill and low-wage workers.

Employees' Trust Fund Act

The Employees' Trust Fund Act No 15 of 1980 established the Employees' Trust Fund (ETF) to supplement the functions of the Employee Provident Fund (EPF) (described below). Employers must contribute three per cent of payroll to the ETF on behalf of their employees; who do not contribute to this fund. All employees from the private sector and all public servants who are not entitled to a civil pension (or till such an employee becomes eligible to receive a civil pension) are necessarily covered by this act. Section 18 of the ETF Act extends eligibility of membership to self-employed persons as well, and a subsequent amendment to the act in 1988 extends eligibility of membership to migrant workers. Self-employed and migrant workers who obtain membership with ETF must make a minimum monthly contribution of Rs. 200 to maintain membership. Though these provisions exist it is unlikely that many self-employed or migrant workers have obtained membership with the ETF. The ETF Act established the Employee's Trust Fund Board (ETFB) to administer and manage the ETF. Initially, the ETFB came under the purview of the Ministry of Labour. However, in 1997 it was brought under the Ministry of Finance and Planning. The ETFB consists of a board of nine members; six members appointed directly by the minister in charge of the ETF, two members representing employees appointed with consultation of the minister and one member to represent the employers nominated by the Employer's Federation of Ceylon (EFC). The EFC is the largest employer representative in Sri Lanka, with a membership base of over 500 companies. The ETF Board collects contributions and is required to invest them prudently on behalf of its beneficiaries. At the age of retirement or five years after complete cessation of employment, employees can claim their account balances with accumulated interest from the ETF in lump sum form. This serves as ETF's main statutory benefit. The ETF also provides certain non-statutory benefits to its active members (currently employed), including death benefits, permanent disability benefits, and financial assistance for medical emergencies and educational purposes.

The ETF provides the following benefits with relation to injury, which may not necessarily be work-related:

- Its permanent disability insurance scheme provides benefits to active members in case of permanent disability resulting in incapacity to work. The disability must result in more

than 50% loss of earning capacity of an injured employee for him to be eligible to receive this benefit. The benefit offered is subject to a ceiling of Rs. 200,000. In 2012 the ETF spent Rs. 5.6 million on forty permanent disablement benefit claims.

- In case of death of an active member, his legal heirs are entitled to claim the employee's account balance and accumulated interests along with a life insurance benefit offered by the ETF. This life insurance benefit is subject to a maximum of Rs. 100,000 and is automatically offered by the ETF to all beneficiaries who make a death claim within one year of the death of the member. However, the contributions should have been made regularly for the 12 months preceding his death except during the period when the member was terminally ill, in which case a minimum of 2 months contributions should have been made. In 2012 the ETF spent Rs. 49 million on a thousand life insurance benefits claims.

The figure of thousand life insurance benefit claims is far less than the number of deaths that would be expected in a given year out of an ETF membership of 2.2 million employees. The reason for the low claim rate is unclear, but may include lack of awareness of this benefit on the part of the beneficiaries who fail to make the claims within the one year period, thus forgoing the insurance benefits that they are entitled to. If so, it implies that if all potential claims were filed that the costs would increase several fold.

The Employees' Provident Fund Act

The Employees' Provident Fund Act of 1958 established the Employees' Provident Fund (EPF) for the benefit of all private and public sector workers who are not eligible for a civil pension. The EPF is a contributory old age income security scheme. The EPF is a contributory old age income security scheme; upon reaching the age of 50 for females and 55 for males the active contributors are eligible to claim their account balances along with all accrued interest payments. Unlike the ETF, both employees and employers contribute to the EPF; employers contribute 12% of the employee's earnings while the employee contributes 8% of his earnings to the fund. The benefits EPF offers include provision of refunds of account balances due to the employee in case of occurrence of a permanently disabling injury. This provides some short term income security to the injured employees who are active members of the EPF. The account balances can be claimed before reaching the retirement age if the member has to leave work owing to permanent disability, or by the beneficiaries in the event of death of an active member, immediately.

Termination of Employment of Workmen (Special Provisions)

The Termination of Employment of Workmen (Special Provisions) Act No 45 (1971) states that an employer cannot terminate the services of an employee for non-disciplinary reasons without the prior written consent of the Commissioner of Labour or the workman. This act applies to all Wages Board employees, Shop and Office employees and factory employees. An employee who feels that he is unfairly dismissed can make an application regarding it to the Labour Tribunal. An employee who is disabled due to a workplace injury is protected against dismissal as long as he is able to provide his services to the employer. In conjunction with laws such as the Shop and Office Employees (Regulation and Employment and Remuneration) Act of 1954 and the Public Sector Establishment Code, an employee who has provided more than one year of service is entitled to receive seven days of paid medical leave. This has practical application when the injured employee suffers a temporary or partial permanent disability and is unable to attend to his work immediately or prefers to continue in the employers' service.

Payment of Gratuity Act

The Payment of Gratuity Act No 12 (1983) mandates employers to make gratuity payments to those employees who have served for over five years at the time of their resignation. Section 3 (1) of the Act stipulates that the gratuity payment for a daily wage labourer be calculated on the basis of seven days of wages for his each year of service. As per Section 3 (2), the workmen (defined for the purpose of paying workmen's compensation) will be entitled for a gratuity payment at ―the rate of a sum equivalent to one month's gross wage or salary of that workman for each year of completed service‖ (Payment of Gratuity Act 1983).

If an employee with over five years of service sustains injury due to a work related accident and decides to leave his current employment then he too will be entitled to receive this gratuity payment. Thus, this also serves as a form of short-term income security for the workers who voluntarily leave work consequent upon work related injury.

Dying to Work? Why Health and Safety in the Work Place is an Important Economic Issue for Sri Lanka[4]

This week another ten workers in Bangladesh lost their lives in a deadly fire at a garment factory, another in a series of incident ranging from building collapses to fires that have claimed over 1,500 lives in the past year alone. This has brought new attention to working conditions in the garment industry in Bangladesh and has got everyone from policymakers and industrialists to human rights organizations and Western clothing brands very concerned. Sri Lankan stakeholders reading news of these incidents, however, can be content that such deadly working conditions do not exist here, and rightly so. Nevertheless, thinking more comprehensively about safety and health in the wider Sri Lankan work place context should be an important ongoing agenda. As Sri Lanka enters its middle-income transition, these issues become increasingly more relevant. Recognizing this, the Cabinet of Ministers in Sri Lanka has designated the second week of October as "National Occupational Safety and Health Week". In this context, this article discusses the importance of occupation health and safety in ensuring a productive labour force in Sri Lanka and the public policy issues that must be addressed.

The 'Hidden Epidemic'

Globalization, demographic change, and technological advancement, have witnessed a significant change in work environments around the world. These changes have resulted in a heightened need for proper health and safety at the workplace as it is important for moral, legal, and financial reasons. Ultimately, a healthy workforce will lead to enhanced social welfare and in turn, higher productivity.

Around the globe, every 15 seconds, a worker dies from a work-related accident or disease and every 15 seconds, 151 workers have a work-related accident. ILO estimates that over 2 million people die annually from work-related diseases and 321,000 people die each year from

[4] By Sunimalee Madurawala, Research Officer – IPS, Retreived from: http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=90097, visited on 6/12/2015

occupational accidents. Furthermore, 160 million non-fatal work-related diseases and 317 million non-fatal occupational accidents are recorded every year due to poor and inadequate Occupational Safety and Health (OSH) measures. The statistics are truly alarming. Occupational diseases remain largely invisible compared to industrial accidents. In rapidly changing working environments occupational diseases continue to increase as a 'hidden epidemic'.

The other side of the story is the economic loss due to occupational illnesses and diseases. The annual loss due to occupational illnesses and accidents is estimated to be 4% of global GDP (ILO, 2003). Estimated total cost of occupational injuries and diseases was US$ 250 billion for USA in 2007 (1.8% of GDP), AU$ 60.6 billion for Australia for the financial year 2008-09 (4.8% of GDP) (Yun, 2012) and US$ 4.9 billion for New Zealand (3.4% of GDP) in 2004-05 (Access Economics, 2006). The total cost of occupational injuries mainly consists of non-financial human costs, costs of the lost production, medical costs, and compensation for lost wages, production disturbance and administrative and legal overheads. It is not only the employers, workers and the governments who bear the costs of occupational injuries and diseases but also society as a whole as the financial and non-financial costs and negative consequences of occupational injuries and diseases ripple out.

Occupational Safety and Health in Sri Lanka: Critical Gaps

At present, OSH issues are mainly legislated under the Factories Ordinance No. 45 of 1942, which has separate provisions for health, safety and welfare of the employees. Workmen's Compensation Ordinance Act No. 19 of 1934, Shop and Office Employee's Act No. 15 of 1954, Municipal Councils by-laws and regulations also cover OSH related matters. Though the Ordinance has separate provisions for health and safety, it is quite obvious that the law has to be updated in response to the changes that have taken place over the last few decades in Sri Lanka. For instance, the construction industry in Sri Lanka has developed significantly in recent years and construction has transformed into a significant contributor to the national economy. Globally, this industry has been identified as one of the most hazardous among all industries, with the highest rate of accidents including deaths and disabling injuries. Despite this, the safety and health aspects of the construction industry remain at an unsatisfactory level in Sri Lanka (Halwatura and Jayatunga, 2011).

The country also does not have a formal reporting system to capture work-related injuries and diseases. Thus, statistical information related to OSH is less available and severely under

reported. Inadequacy of information about occupational hazards is one of the major obstacles to prevent occupational fatalities and diseases effectively. However, with the available data, Ministry of Health estimates that nearly 15% of the total admissions due to injuries at the Colombo National Hospital in 2011 were work-related. The prevalence of occupational diseases could be much higher but they are hardly recorded as "work-related diseases". It is estimated that only 1% of the estimated work-related accidents are reported in Sri Lanka in contrast to countries like Australia, New Zealand and Malaysia where the percentages of reported vs. estimated are as high as 89%, 88% and 79%, respectively (Wickramatillake, 2011).

In addition, at present, 60% of the country's labour force is employed in the informal sector – a sector which is considered to be more difficult to regulate and monitor. Poor working conditions and capital limitations which lead to the importation and use of obsolete machinery and equipment, poor machinery maintenance, limited access to material and limited information on physical and health risks caused by their occupation are some OSH issues related to the informal sector in the country (De Silva, 2003).

Creating awareness and building capacity on OSH among the stakeholders (employees, employers, government officials, etc.) also remains a challenge. OSH should be viewed as a shared commitment of all concerned parties and an investment for a healthier and productive labour force.

Tackling the Problem: New Initiatives

In response to these concerns in ensuring safe work places in Sri Lanka, some promising initiatives on OSH are taking place at the moment.

A separate unit of the Ministry of Health - 'Environment and Occupational Health Unit' - has been established to work on matters related to OSH. The unit is responsible for the establishment of occupational health units at district level and awareness and training programmes for targeted high-risk groups including the industrial sector. Public Health Inspectors (PHIs) under the Ministry of Health maintain an OSH Register and carryout walkthrough surveys (physical inspections) to evaluate the environment, welfare facilities and waste disposal measures by using simple methods and techniques. Apart from these steps already taken by the Ministry of Health,

establishing a good surveillance system to capture work-related diseases would definitely help to bridge the data and information gap on OSH in Sri Lanka.

A new piece of legislation titled, 'Occupational Safety, Health and Welfare Act' is already being drafted with the intention of ensuring safety, health and welfare of all persons at work, protecting against risks to safety or health, promoting a safe, healthy and decent working environment and providing consultation and co-operation between employers and workers on OSH. The proposed Act will be applicable to all places of work, including the public sector. Though the enactment of the new Act has been delayed for several years now, it is expected to become a reality soon. However, addressing the concerns of all parties involved should be done as OSH is a cross-cutting issue which encompasses many disciplines.

Examples and evidence from other countries which have strong OSH policies and laws (e.g., Japan, Malaysia, Singapore, and New Zealand) prove that the number of work-relates fatalities and diseases can be reduced significantly with such policies and laws. Steps have been taken to develop a "National Occupational Safety and Health Policy" for Sri Lanka by the Ministry of Labour and Labour Relations and the National Institute of Occupational Safety and Health. A National Steering Committee and seven Working Groups on Occupational Safety and Health Policy Development are currently working towards formulating a national policy on OSH.

OSH is a cross cutting issue which needs everyone's contribution and it should be considered as a shared commitment. It is true that much has to be done to promote OSH knowledge and culture in Sri Lanka but it is also true that there are several concerns that should be addressed. On the other hand, OSH measures should not be a burden to the employers. However, just because the problem is difficult to tackle it cannot be ignored. OSH is about human lives. It is about creating safer and healthy working places for the 8 million people employed in the country. It is about productivity enhancement through a healthy workforce, and ultimately it is about higher social welfare. Sri Lanka may be far ahead of Bangladesh. But aspiring to even higher standards, above our developing country peers, must be our goal.

A REVIEW OF DISABILITY LAW AND LEGAL MOBILIZATION IN SRI LANKA[5]

Fiona Kumari Campbell[6]

1. Introduction

This paper brings together a number of disability laws and disability related provisions in review. Due to the paucity of scholarly literature concerning disability law in Sri Lanka, this paper is tailored to both the local Sri Lankan reader and as well as international readers. As such the paper is necessarily technical in parts so as to provide assistance to future legal researchers, attorneys, disability studies scholars and activists. Theoretical critiques have been kept to a minimum.[7] The development of law always occurs in the context of a country's history, legal traditions, and of course contestations in local and international politics.

5 Variants of this paper were originally presented at the University of Colombo, Faculty of Law, Disability Rights Forum, January 17, 2012, Socio-Legal Studies Association (UK) Annual Conference, Hosted by the Kent Law School, Canterbury, United Kingdom, 3rd – 5th April 2007, and *Global Alliance for the Protection and Promotion of the Rights of People with Disabilities Conference*, Leonard Cheshire/ British High Commission, Waters Edge Resort, Colombo, Sri Lanka, 22 May 2007; In between, the Chapter has been substantially redrafted and added to for various purposes.

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7 For more theoretically inclined work see: Campbell, Fiona. K. (2010a) 'Disability, Legal Mobilisation and the Challenges of Capacity Building in Sri Lanka?', in C. Marshall, E. Kendall and R. Gover (eds.) *Disability: Insights from Across Fields and Around the World*, Volume III, Praeger Press, pp. 111-128, 2009; Campbell, Fiona K. (2010b) *A new horizon: using the concept of Ableism to Rethink Disability & Abledness*, paper for *Perspectives on Inclusive Development: Embracing Diversity and Creating Disability- Sensitive Communities*, pp.28 - 29, July 2010, Hilton Hotel, Kuching, Sarawak (Malaysia); Campbell, Fiona K. (2011). 'Geodisability Knowledge Production and International Norms: A Sri Lankan Case Study', 32(8), *Third World Quarterly*, pp.1425-1444; Gunawardena, Niluka. (2010). *Wounded Soldiers: Biographical disruption among disabled veterans in post-war Sri Lanka*, Paper for *Lancaster Disability Studies Conference*, Lancaster, U.K, 7 – 9 September 2010; Navaratne, Thanuja. (2007). Role of local disability movements in mainstreaming disability in development. *Empowered Newsletter*, LCI South Asia, 3(2), pp. 2-4; Perera, S. (1999). *Living with Torturers and Others essays of Intervention:Sri Lankan Society Culture and Politics in Perspective*, Colombo: International Centre for Ethnic Studies; Somasundaram, Daya. (2010). Collective Trauma in the Vanni - A qualitative inquiry into the mental health of the internally displaced due to the civil war in Sri Lanka, *International Journal of Mental Health Systems*, Section 4 (22), pp. 1 – 31.

The paper opens in Section 2 with a rendition of Sri Lanka's disability profile. Section 3, provides the global backdrop to 'geodisability knowledge' in order to provide clarity about frameworks acting as drivers of change and accountability. Shifting from the global to the local, Section 4 details law of country – those constitutional structures of Sri Lanka and inherited legal traditions. These structures require critical appraisal as they ultimately govern the development of disability law, create rights and remedies for disabled people at the grassroots level and conversely provide different challenges to inducing change from other countries such as the USA, India or Australia where context and legal reasoning can be dissimilar. Section 5, Disability Law in Sri Lanka, takes up the bulk of the paper and is an exhaustive overview of social policy structures, dedicated disability statutes, mental disability law, social insurance/security laws, injured employee legislation and future directions. In Section 6, the Paper turns toward social change and activism in its review of approaches to legal mobilisation, freedom of information, *locus standi* and the use of the writ of quo *warranto* and the writ of *habeas corpus* particularly for mental disability issues.

2. Disability in Sri Lanka

The island of Sri Lanka with a mass area of 1,340 kilometers (832 miles) lies 6° 55 N′, 79° 52′ E on the far southern edge of the Indian sub-continent. Its strategic position throughout the ancient and colonial times meant that it became a convergence point for trade among kingdoms and the intermingling of various civilizations and cultures. Developments in disability law and policy are produced within this broader global context and are constrained by "geodisability knowledge," the project of creating universal norms of disability.[8] Twenty-three percent of the population lives under the poverty line[9] (NCED: 2005: 7). As a poor, developing nation, Sri Lanka has reduced bargaining power. In terms of knowledge and identity, the counting of disabled Sri Lankans is a vexed question and many political claims and insecurities are at stake.

8 Campbell, Fiona K. (2011). 'Geodisability Knowledge Production and International Norms: A Sri Lankan Case Study', 32(8), *Third World Quarterly*, pp. 1425-1444.

9 The official Poverty Line for November 2011 is Rs.3269 (minimum expenditure per month): Department of Census and Statistics. http://www.statistics.gov.lk/poverty/monthly_poverty/index.htm

Social planning in the area of disability is made difficult by a shortage of information about the scope and needs of Sri Lanka's disabled constituency.[10] Because of these difficulties – the 'facts' contained here are at best illustrative and provisional. Like many other nations there are debates about the delimitation of disability definitions (what 'is' or 'is not' disability) and the usage of international instruments.[11] At a

2007 conference on Disability and Development (*Diriya '07*), disability was spoken of in terms of being 5% of the population and by others as being up to 20%. In Sri Lanka disability is produced through war, natural disasters, the ageing of the population and large numbers of people undertaking high risk work.[12] Despite these enumerative and conceptual limitations, a specific Sri Lankan pattern of impairment can be described: there is an estimated population of 900, 000 people with disabilities.[13] Although the incidence of physical disability produced by war has not been enumerated, estimates by the Asian Development Bank suggest in the vicinity of 100,000 persons.[14] There are also high levels of mental illness including war induced post-traumatic stress disorder. Fernandopulle et al (2002) argues a more far reaching approach to mental health is required, taking into account the consequences of living with years of civil and military conflict. It is estimated that 27.6% of the population in conflict areas in the North Eastern Province experience severe post-traumatic stress impairments.[15] Whilst some empirical data suggests that

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10 Japan International Cooperation Agency, (2002). *Country Profile on Disability Democratic Socialist Republic of Sri Lanka*, Planning and Evaluation Department, March 2002; Asian Development Bank. (2005). *Disability Brief: Identifying and Addressing the Needs of Disabled People*, Asian Development Bank, Bangkok.

11 Altman, Barbara. (2001). 'Disability Definitions, Models, Classification Schemes, and Applications' in Albrecht, G., Seelman, K. and Bury, M. (eds.) *Handbook of Disability Studies*. Thousand Oaks: Sage. pp. 97 – 122; Campbell, Fiona. (2001). Inciting Legal Fictions: 'Disability's Date with Ontology and the Ableist Body of the Law'. *Griffith Law Review* 10: 42 – 62; Lord, Janet. (2004). Mirror, Mirror on the Wall: Voice Accountability and NGO's in Human Rights Standard Setting, *Seton Hall Journal of Diplomacy and International Relations*, 5(2): pp.93 – 110.

12 Campbell, Fiona. K.(2010a) 'Disability, Legal Mobilisation and the Challenges of Capacity Building in Sri Lanka?', in C. Marshall, E. Kendall and R. Gover (eds.) *Disability: Insights from Across Fields and Around the World*, Volume III, Praeger Press, pp. 111-128, 2009.

13 Japan International Cooperation Agency, (2002). *Country Profile on Disability Democratic Socialist Republic of Sri Lanka*, Planning and Evaluation Department, March 2002; Wijewardene, K & M. Spohr. (2000). An attempt to measure burden of disease using disability adjusted years for Sri Lanka, *Ceylon Medical Journal*, 45(3): pp.110 - 115.

14 Asian Development Bank. (2005). *Disability Brief: Identifying and Addressing the Needs of Disabled People*, Asian Development Bank, Bangkok.

15 Asian Development Bank. (2004). *Technical assistance to the Democratic Socialist Republic of Sri Lanka for the Psychosocial health in conflict-affected areas Project*, November 2004, tar: sri 38129; De Silva, Damani. (2002). Psychiatric Service Delivery in an Asian Country: The Experience of Sri Lanka, *International Review of Psychiatry*, 14(1): pp. 66 70; Somasundram, Daya. (1996). Post-traumatic Responses to Aerial Bombing, *Social Science & Medicine*, 42(11): pp.1465 – 1471.

2% of the population experience 'severe' forms of mental illness, an additional 10% of persons experience a range of impairments from phobic states to depression.[16]

The suicide rate ranks amongst seventh in global statistics, with a ratio of 31: 100,000. Of these rates Thalagala (2000) estimates that 46% of these suicides are due primarily to depression.[17] Another UK based medical study undertaken in co-operation with Anuradhapura General Hospital documents that 'deliberate' self-harm through the ingesting of poisons has increased enormously in the last five years.[18][19][20] Two thirds of individuals admitted for self-poisoning were less than 30 years of age. Whilst this area remains under-researched, some sociologists have argued that impairment or indeed death is produced by the absence of support systems for young people who have difficulty coping with social and cultural expectations and of course, war and poverty.[21]

The 24 year war has not only resulted in significant levels of disablement but there is uncertainty about what such high levels of disability have had on transforming attitudes towards bodily or mental differences on the part of not-disabled members of the community.[21] The tsunami of December 2004 contributed to more instances of disablement, its effect on the capacity for legislative and policy frameworks to enhance the lives of disabled people is unknown. Sri Lanka has the full spectrum of disability focused non-government organisations

16 Mendis, N. (1998). *Development of Mental Health Care in Sri Lanka: Challenge and Opportunity*, *Proceedings of the 16th Anniversary of the establishment of the National Council for Mental Health*, Colombo, SL; Thalagala, N. I. (2000). *Attempted Suicides in Sri Lanka: Antecedents and Consequences,* Unpublished, MD Thesis, Institute of Medicine, University of Colombo.

17 Fernandopulle, Sudarshini *et al*. (2002). Mental health in Sri Lanka: Challenges for primacy Health Care, *Australian Journal of Primary Health*, 8(2), p. 35. (notes that Sri Lanka has only 28 psychiatrists and

18 child psychiatrist)

19 Eddleston, Michael. M H Rezvi Sheriff & Keith Hawton. (1998). Deliberate Self Harm in Sri Lanka: An Overlooked Tragedy in the Developing World, *British Medical Journal*, 317: pp. 133 – 135; Faunce, Thomas. (2005). Collaborative Research Trials: A Strategy for Fostering Mental Health Protections in Developing Nations, *International Journal of Law & Psychiatry*, 28: pp.171 – 181.

20 De Silva, P. (1989). *Suicide in Sri Lanka*, Institute of Fundamental Studies, Kandy; De Soysa, Piyanjali. (2011). The use of Psychology in the Administration of Justice in Sri Lanka, *Sri Lanka Journal of Forensic Medicine, Science and Law*, 2(1): pp.10 -14; Kasturiaratchi, N.D. *et al* (1997). *A Study of Suicide in Sri Lanka*. Colombo: Sumithrayo.

21 De Silva, Damani. (2002). Psychiatric Service Delivery in an Asian Country: The Experience of Sri Lanka, *International Review of Psychiatry*, 14(1): pp.66 70.

(NGO's), a number of umbrella bodies[22] and Disabled Peoples Organisations (DPO's).[23] A range of predominantly overseas funded and/or overseas-originated religious charities outnumbers these organisations. Additionally, there are a number of multilateral banks that actively support development projects.[24]

Summary:

- There is a shortage of data about the scope and needs of the disabled population; There is a contestation as to how many disabled people there are: 5% - 20%?
- High numbers of the population experience 'mental distress';

3. Global Contexts

The pre-eminent ideoscape and apparatus controlling the delimitation and definition of disability originates with the United Nations. Without consensual international disability norms it would not be possible to disclose and make visible the dynamics of disability at a country level and for the World

Health Organization (WHO) to map disability globally. The 'seeing' of disability, it is argued, enables a surveillance both globally (of each country) and individually (every individual is surveilled for conformity). Definitions of disability in many ways determine eligibility for pensions, funding, legal protections and impact enumerative estimates which shape demands of social planning. Whilst it is beyond the confines of this paper to have a thoroughgoing discussion of the government of disability globally, it is pertinent to outline a number of salient definitional instruments that are mandated for use by UN member nations, of which Sri Lanka is one, for the purposes of enumeration and program development.

The Human Development Index (HDI), a comparative measure of poverty, life expectancy and education has been used by the United Nations Development Programme (UNDP) as a tool for apportioning funds since 1993. Sri Lanka is ranked 97 and has a medium human development

22 Sri Lanka Confederation of Organizations of Handicapped People, Sri Lanka Federation of Special Needs Persons.

23 Central Organization of the Deaf, Sri Lanka Council for the Blind, United Disabled Action Front.

24 Asia Development Bank, World Bank, IMF and USAid.

ranking.[25] UN formations of disability are deeply embedded with a broader nosology of disease, which delimits disability in relation to a so-called 'objective' comparator referred to as health status (i.e. a person without a health condition). This is an instance of colonial enframing as the partitioning of 'disability' and 'not-disability' can obscure cultural differences around bodies and mentalities. With respect to making broader categorical

distinctions, the universal definition(s) of the 'disabled body', were introduced and systematised in 1980 by the UN World Health Organisation (WHO) in what has become a canonical document: the International Classification of Impairments, Disabilities and Handicaps (ICIDH). Even though this document is now obsolete, it has become a template for ways of thinking about and speaking of disablement matters and still makes the odd appearance in the literature as an explanatory framework. The ICIDH is infused within a biomedical discourse and is scoped to have definitional congruence with the International Classification of Disease (ICD-10).

In January 2001, the 54th World Health Assembly adopted the International Classification of Functioning, Disability and Health (ICF) (Executive Board WHO, 2001). The ICF has four dimensions related to disability, namely, impairment, activity, participation and context. Moreover, the ICF provides the basis and tool for implementing various United Nations instruments by member states and enacting coherent national legislation. Without the ICF, the networked nodes of UN governance would have difficulty communicating across state borders. Without the ICF, donors and financiers would have difficulties making comparative disability actuarial assessments across countries and programs. Advocates of global geodisability templates argue that universal systems can be used to bring 'into line' renegade nation states that do not appropriately plan for the needs of disabled people. It is a vexed question as to what approaches are 'renegade', what is the authoritative criteria and authoritative body and how recognition of cultural difference and contexts can be negotiated. Not long after the ICF was released, critics called for its revision.

In the Sri Lankan context, the usage of the comparator of a person without a health condition can obscure rather than clarify service delivery needs, especially if deliberations do not factor in socio-economic considerations, access to resources and consequential social exclusion. In the

25 International Human Development Indicators, 2011, UNDP http://hdrstats.undp.org/en/countries/profiles/LKA.html

mental health arena, mental health is described by WHO along the lines of coping with the 'normal stresses of life'. But as Fernandopulle *et al* (2002) points out the notion of normalcy explodes given the almost normalised extra stress of living with inter-ethnic conflict and war. Different cultural locations within the country would have a different threshold of what counts as disabled or not: for instance, children without birth certificates and with mild intellectual impairment may have no real sense of their age, hence communities have no real sense of developmental delay and therefore individuals are not seen as impaired.

Among the major outcomes of the Decade of Disabled Persons was the adoption by the UN General

Assembly, of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities in 1993. Whilst the Standard Rules are not legally binding, they act as a strong moral and political commitment for governments to take around equality measures for persons with disabilities. Member states are required to adopt legislative reforms in conformity with these rules. In August 2006, the General Assembly approved the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (CRPD). The Convention was opened for signatures on March 15th 2007. Sri Lanka was an early signatory but has yet to ratify the Convention. The mental health area is also regulated by UN governance that resolved at the UN General Assembly on 17th December 1991 to introduce The Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (UNMI principles). These instruments have come about through years of vigorous activism.

However, the issue of UN norm standard setting is deeply problematical as limited research exists to examine the processes of developing these standards and the role of cultural norms. The work of Lord (2004) documents the tensions and deals made between NGO's regarding access to planning forums and exposes the less known fact that internationally, there are only seven organisations that have ECOSOC status and of these organisations five are based in the developed world with limited regional representation.[26]

26 Lord, Janet. (2004). Mirror, Mirror on the Wall: Voice Accountability and NGO's in Human Rights Standard Setting, *Seton Hall Journal of Diplomacy and International Relations*, 5(2): pp. 93 – 110.

Banking donor institutions have developed their own frameworks to guide the type of projects they fund. The ADB as an example uses a framework that is known by the acronym KIPA – knowledge, inclusion, participation and access, to build disability strategies aimed at poverty reduction.[27] Whilst the ADB acknowledges disability to be a "multidimensional concept", where there is no single definition of disability it nonetheless defers to the UN apparatus to negotiate its way out of the definitional quagmire. We can conclude that even before exploring disability policy in the Sri Lankan context, the international system of knowledge articulation is highly regulated and prescriptive. Social and legal responses to disability occurs within the broader purview of the UN's Millennium Development Goals (MDG's) which Sri Lanka signed up to in 2000[28] and the Sri Lankan government's Mahinda Chintana – the Ten Year Horizon Development Framework 2006 – 2016 which is the current benchmark for social policy and engagement.

Summary:

- There is a trend emanating from the United Nations to adopt a universalist approach to disability in terms of definitions, international norms, disability surveys and coding;
- The ICF produces a common language for speaking about health and disability and how we demarcate these two population groupings;
- Within non-Western contexts there emerges the critical question of the comparator to determine a health and not-health status.

- *International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (CRPD)* establishes new international norms around disability rights and the alignment of domestic laws of members States.

4. Sri Lankan Law

27 Asian Development Bank. (2005). *Disability Brief: Identifying and Addressing the Needs of Disabled People*, Asian Development Bank, Bangkok.

28 National Council of Economic Development [NCED]. (2005). *Millennium Development Goals Country Report 2005 Sri Lanka*, Colombo: UNDP/NCED.

Sri Lankan law is a complex mixture of Roman-Dutch law and the British common law system and represents a system of legal pluralism with five legal systems operating independently and at times overlapping. In the Republic of Sri Lanka, state power is formed and shaped by the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka which is an amalgam of the Westminster model and the French Presidential System.[29] Whilst the Parliament is the unicameral legislative organ this does not imply Parliamentary sovereignty in the British sense, as this power is derived from the people whose sovereignty is inalienable as laid down in Article 4(a) of the Constitution.

The judiciary, whilst constituted independently of Parliament, does not have the power of judicial review typical of common law systems. Legislation once passed by Parliament is unable to be challenged as being unconstitutional in a court. Indeed, under Article 120, the Supreme Court has sole and exclusive jurisdiction to determine whether any Bill is inconsistent with the Constitution. Petitioners are only able to challenge the constitutionality of a proposed law at the Bill stage and only then within one week of the Bill being placed on the Order Paper of Parliament.[30] There is, in reality, an additional week as the Bill must also be published in the Gazette a week before being placed in the Order Paper.[31] Aside from any possible delays in making the gazetted Bill available, people without access to legal information (often from marginal populations) are deprived of the opportunity to study the Bill, consult others and file papers in court. It is critical then that any community education and legal mobilization strategies occur at this preliminary stage, including speculations as to the effects of the proposed law in the longer term. Once the Bill becomes law it is not possible to challenge its validity.[32]

Furthermore, Article 16(1) of the 1978 Sri Lankan Constitution states courts are not able to review laws that were in existence prior to 1978, even if those laws contravene international treaty obligations and/or Fundamental Rights as outlined in the Constitution. The mandate for any statutory changes is invested with Parliament alone. It is the observation of this author that many Bills end up being suspended in a holding pattern in the Legal Draftsman's office and

29 Cooray, L.J.M. (2006). *An Introduction to the Legal System of Sri Lanka*, Stamford Lake Publications, Colombo.
30 See Article 121(1), 1978 Constitution.
31 Should the Bill be classified as an Urgent Bill, this Bill does not need to be published in the Gazette prior to its presentation in Parliament. Since 1978, 128 Acts of Parliament have been passed as urgent Bills, such as the *Universities Act* No.16 of 1978.

32 Article 121(1).

disappear off the ledger. This may present a problem for ensuring that disability service provision is aligned with contemporary approaches. Many pre - 1978 incorporated organisations have objects that reflect outdated charity and remedial understandings of disability especially in the area of mental health law.

Of interest to this paper is the procedure for incorporating disability concerns into law. Sri Lanka like many other nations is a signatory to the key Human Rights Conventions but adopts a dualistic approach to international law. Whilst the President and government of Sri Lanka are able to enter into international treaties which would bind the country as an international state, these treaties according to a recent judgment of the Supreme Court would "have to be implemented by statute enacted under the Constitution to have internal effect",[33] hence Sri Lanka has non-self executing treaty arrangements.[34] To be clearer, the government needs to introduce or amend specific legislation for that treaty to have effect and become part of Sri Lanka's domestic law.

Chapter III: Fundamental Rights

In Articles 3 and 4 of the 1978 Constitution the people's sovereignty is extended and exercised in the form of Fundamental Rights (FR) (in Chapter III) and the Directive Principles of State Policy[35] (Chapter VI) which are to be used as a guide for interpreting the Constitution.[36] The Constitution contains no express right to health, however the Directive Principles of State Policy in Article 27(2) (c) in the context of environmental health, allude to the necessity to improve living conditions of citizens and hence may imply a right to health. Chapter III Fundamental Rights cover Articles 10 – 17. FR jurisdiction exists apart from and independent of other jurisdictions in Sri Lanka. The FR jurisdiction is exercised exclusively by the Supreme Court and has its own body of judicial precedent. The form of Fundamental Rights adheres to the usual rights discourse of international norms such as:

- freedom of thought, conscience and religion (Article 10),

33 *Nallaratnam v. Attorney General*, 2006, S.C. Spl(LA) No. 182/99.
34 *Nallaratnam v. Attorney General*, 2006, S.C. Spl(LA) No. 182/99.
35 Article 29 establishes that these principles do not confer legal rights nor are they enforceable in a court.
36 Wickramaratne, Jayampathy. (2006). *Fundamental Rights in Sri Lanka*, Stamford Lake Publications, Colombo.
[30] I discuss this case later in the paper.

- freedom from torture (Article 11),
- the right to equality (Article 12 (1)),
- freedom from arbitrary arrest, detention etc (Article 13) and freedom of speech, assembly, association etc (Article 14).

Article 12 (4) provides for the possibility of "special provisions" for women, children and disabled persons. To the best of my knowledge and after consulting other peers, there has been only one fundamental rights cases specifically concerned with the infringement of rights based on disability that went to judgement.[30] A small number of normal domestic laws have been engaged to address complaints.[37] The Fundamental Rights provisions of the 1978 Constitution await a range of disability rights cases to assess the extent that disabled people have their rights safeguarded by the highest law of the land.

In addition to constitutionally entrenched Fundamental Rights, there is also a judicial system of writs having constitutional force. Writ actions are regulated by Articles 140 and 141 of the Constitution and are jurisdictionally independent to FR law. Article 140 grants power to issue writs, other than writs of *habeas corpus:*

the Court of Appeal shall have full power and authority to inspect and examine the records of any Court of First Instance or tribunal or other institution, and grant and issue, according to law, orders in the nature of writs of *certiorari*,[38] prohibition, *procedendo*, *mandamus*[39] and *quo warranto*[40] against the judge of any Court of First Instance or tribunal or other institution or any other person.

37 An example of this is the filing of a complaint by Senarath Attanayake against Qatar Airways in the District Court of Colombo (Case No. 52805/MR). It appears that Mr. Attanayake was awarded damages of Rs. 10 million.

38 A Writ related to preserving uniformity of decisions through the whole judicial system, particularly to bring decisions of an inferior court or tribunal or public authority before the superior court for review so that the court can determine whether to quash such decisions.

39 A Writ "issued by a superior court to compel a lower court or a government officer to perform mandatory or purely ministerial duties correctly" (Garner, 2004, 980).

40 Literally, "by what warrant?" A Writ that can be used to require a person to show the basis of *authority* they have for a decision, e.g. this is a writ that compels a proof of authority.

And Article 141 grants power to issue writs of *habeas corpus:*[41]

The Court of Appeal may grant and issue orders in the nature of writs of *habeas corpus* to bring up before such Court - (a) the body of any person to be dealt with according to law; or (b) the body of any person illegally or improperly detained in public or private custody, and to discharge or remand any person so brought up or otherwise deal with such person according to law. ...

Mention is made of this system of prerogative writs as they can provide a vital avenue for the exercising of rights, the questioning of executive action and enforcement of administrative decisions related to disability. Even though writs cannot be used as a mechanism for the explicit enforcement of FR concerns, Article 126(3) states, that should the Court of Appeal in the course of a hearing believe there is *prima facie* evidence of an infringement of the provisions of Chapter III or IV, and then the court must refer the matter to the Supreme Court for determination. In Section 6 of this paper, there is an exploration of how a writ of *habeas corpus* could be used to assist in locating and releasing disabled people from their 'unwarranted' detentions in institutions or hospitals, the ways a writ *quo warranto* could be engaged to foreground the basis for service/pension eligibility decisions and the use of writs of *certiorari* and *mandamus* to support public interest legal actions.

The Human Rights Commission Act No. 21 of 1996 (HRC Act) established a permanent Human Rights Commission of Sri Lanka (HRCSL) for the country. The Human Rights Commission is an institution that performs a broad range of functions, from investigating and mediating human rights violations[42] to advising the government on appropriate legislative and administrative procedures.[43] Commissioners were to be appointed by the President on the advice of a

41 This Writ was finally recognised by Sri Lankan law in the *Courts Ordinance* (No.1 of 1889) and is founded on the notion that every person has a right to freedom from arbitrary and/or illegal detention or arrest. Under this Writ the Court has the power to compel authorities to produce the person (the corpus) before the court and show cause for the validity of the detention. As Pinto-Jayawardena & De Almeida Guneratne note "...the courts will consider not only the basis on which the detention was ordered, but also the 'validity of preliminary steps, so that any legal flaw in those steps will invalidate the detention" (Pinto-Jayawardena & De Almeida Guneratne, *Habeas Corpus in Sri Lanka:Theory and Practice of the Great Writ in Extraordianary Times* (Colombo: Law & Society Trust, 2011), p. 2.). Ed Note; From 1990, the writ remedies could also be exercised by the High Court of the Provinces under (Special Provisions) Act No 19 of 1990.

42 See Section 10(a), 10(b).

43 See Section 11(c)

Constitutional Council under Article 41B of the 17th Amendment.[44] However, since 2006 appointments to the Constitutional Council lapsed due to the nonfunctioning of the Constitutional Council, resulting in the non-appointment of Commissioners to the HRCSL affecting its capacity to make recommendations.[45] Later, the 18th Amendment was enacted doing away with the requirement of the Constitution Council and appointments of Commissioners to the HRCSL reverted to the sole discretion of the President. Under section 10 the HRCSL has the power to investigate violations of Fundamental Rights,[46] and can provide advice on legislation and procedures to enhance fundamental rights 10.[47] Section 11 (c) enables the HRCSL to intervene in proceedings before the courts. There is provision for conciliation or mediation, in s 16 of the Act. Unfortunately the HRCSL does not have the power to enforce its orders and is totally reliant on interventions by the President. It is not clear to what extent the HRC Act overall will inform dispute resolution under the more specific Protection of the Rights of Persons with Disabilities legislation.[48]

As previously noted other *quasi*-legal[49] frameworks govern the orientation of disability policy development and law, namely the Millennium Development Goals[50] and the *Mahinda Chinthana.* The *Mahinda Chinthana,* which can best be described as a social compact between the government and people, has a specific section on disabled people, who the document refers to as "differently able *(sic)* persons". There are a number of pledges orientated towards poverty alleviation, income protection[51]

44 Amnesty International, 2009.

45 As of August 2010, there were approximately 5,500 cases awaiting resolution (Collective for Economic, Social & Cultural Rights in Sri Lanka, 2010).

46 See HRC Act Section 10(a - b).

47 See HRC Act Section 10 (c).

48 The Protection of the Rights of Persons with Disabilities Act No 28 of 1996.

49 It is hard to ascertain with some of these policies what their legal basis is in law.

50 National Council of Economic Development [NCED]. (2005). *Millennium Development Goals Country Report 2005 Sri Lanka*, Colombo: UNDP/NCED.

51 In March 2007 the National Council for Person with Disabilities were directed to pay a monthly allowance of Rs.

physical access provision and significantly, a pledge to introduce a quota system of 3% in places of employment where there are 100+ employees[52] as well as new law with a disability rights framework.

Summary:

- Under Chapter III of Sri Lankan Constitution there is provision for the protection of Fundamental Rights;
- There is no express right to health in the Constitution, although this right is implied in Article 27(2) of the Directive Principles of State Policy;
- Judicial power to review legislation is restricted to the Supreme Court having the sole jurisdiction to determine whether a Bill is inconsistent with the Constitution. Once the Bill becomes law it is not possible to challenge its validity. Provided that a Bill is not deemed urgent, petitioners have a short time in which to scrutinise and challenge the constitutionality of a proposed law (one to two weeks);
- International treaties do not have an effect on Sri Lankan law unless they are incorporated into domestic statutes;
- Writs regulated by Articles 140 and 141 of the Constitution could used be to bring legal actions in the appellate courts to investigate and seek remedies for the infringements of disabled people's rights.

5. Disability Law in Sri Lanka

Frameworks

Early impetus for law and social policy reform came from pressure by external forces outside of the country. Since 2006 increasingly advocacy has come from a home-grown disability rights movement. Although Sri Lanka established the first education program for children with a disability in 1912, policy development and legal reforms related to disability concerns have

52 There already was a quota system in place in the late 1980's: *Public Administration Circular* No. 27/88, 1988.

been slow in coming to fruition.[53] The Sri Lankan government has developed a number of significant social policy documents which are likely to guide the development of the disability services sector and ongoing legislative reforms. In 2003, it introduced a social framework "The National Policy for Disability" to accompany that legislation. Unlike other countries there is no consolidated structure for the development of preferred service types and performance-based funding, nor is there any linkage to a philosophical framework to guide service development. The dominant model of community engagement for the delivery of services known as community based rehabilitation (CBR), which emphasizes local control and leadership of disability programs, by disabled people. In 1994, three UN organizations (ILO, UNESCO, and WHO) published a joint position paper and compromised on a new definition of CBR:[54]

Community-based rehabilitation (CBR) is a strategy within community development for the rehabilitation, equalization of opportunities and social integration of all people with disabilities. CBR is implemented through the combined efforts of disabled people themselves, their families and communities, and the appropriate health, education, vocational and social services (ILO et al., 1994).

This new definition stressed that CBR is a strategy based on a broad social model of disability. At its core is the pledge to build up DPO's and to facilitate human rights legal mobilisation. In other words, it is <u>impossible</u> to realise this model of CBR without the voices of disabled people individually and collectively being placed at the speaking centre of development, research, planning and implementation. The World Health Organisation (WHO) in fact identified education and training of disabled people as a key element of CBR.[55] DPO's supported in their capacity building, can act as a conduit throughout Sri Lanka to train disabled people in consciousness-raising about disability. CBR usually involves an effort to de-stigmatise persons with disabilities, often through promoting particular disabled persons as positive role models.

53 National Policy on Disability for Sri Lanka. (2003), Ministry of Social Welfare.

54 ILO, UNESCO, & WHO (1994). *Community-based rehabilitation for and with people with disabilities.* Joint Position Paper. Geneva, Switzerland.

55 World Health Organization [WHO]. (2003*). International Consultation to review communitybased rehabilitation*. Helsinki: Author.

CBR can ensure that disabled people, especially women and rural communities are at the vanguard of reforms.

The sources of disability law in Sri Lanka are twofold – case law (of which little consolidated work around this canon has been undertaken) and statute law. Statute law is mainly codified and the disability aspect can be examined in two forms. The first form involves the specific enactment of legislation for the incorporation of an individual organisation. An example of this type is the Special Educational Society (Incorporation) Act No. 3 of 1999. Whilst the objects of such organisations are chartered in the statutes legal incorporation is approved on the basis of a Bill conforming with the requirements of company law or the registration of non-government organisations and not with the Bill's philosophical congruence with disability best practices in law and social policy globally. Notably the relationship of these statutes to the overall policy directives and disability standards is disconnected and not monitored.

For reasons of space and complexity, this first form of law will not be extensively discussed in this paper. The second form, moves beyond individual instrumentalities to a disabled collectivity (minority group) and focuses on government policy, regulation and standards. Examples of this form include:

Mental Diseases Act No.27 of 1956, Workmen's Compensation Act No.19 of 1934, as amended No. 31 of 1957 and the Protection of the Rights of Persons with Disabilities Act No.28 of 1996 (Disability

Rights Act). Changes like the Disability Rights Act are part of the country's ongoing alignment with the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities (1993). In general, the orientation of statutes referencing disablement and specifically targeted disability laws tend to be heavily medicalised and protective. A small number of human rights and capacity building orientated laws came on the scene from 1996 onwards; these however often lack implementation and enforcement mechanisms.

The Protection of the Rights of Persons with Disabilities Act 1996

The Act for The Protection of the Rights of Persons with Disabilities Act No. 28 of 1996.[56] This came into effect on 24th October 1996. The Act principally provided for the establishment of a National Council for Persons with Disabilities charged with the promotion, advancement and protection of the rights of persons with disabilities in Sri Lanka. Until the UN Convention (CRPD) is incorporated into domestic law, the Disability Rights Act establishes the legal definition of disability in Sri Lanka.[57] Section 37 reads: -

…'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.

Despite the pretence of being concerned with rights, the Act is severely lacking in the provision of a codified statement of rights and a philosophical framework to support interpretation and generate the development of politics and law reform. Only Section 23 of the Act makes an explicit delineation as to which rights are recognised and protected under law:

23 (1) No person with a disability shall be discriminated against on the ground of such disability in recruitment for any employment or office or admission to any education institution.

(2) No person with a disability shall, on the ground of such disability, be subject to any liability, restriction or condition with regard to access to, or use of, any building or place which any other member of the public has access to or is entitled to use, whether on the payment of any fee or not.

Section 23 provides a narrow construction of rights – discrimination rights restricted to the arenas of employment and education. An additional right relates to public access to buildings or places. The Act however lacks specific mechanisms for the implementation and the enforcement

56 Published as a *Supplement to Part II of the Gazette of the Democratic Socialist Republic of Sri Lanka*, October 25, 1996.

57 This statement is not quite correct as the other definition used by the Ministry of Social Welfare can be found in the National Census of 2001 (Ministry of Social Welfare, 2003). Additionally the *Workman's Compensation Act* uses another definition as does the *Social Security Board Act*. How is a conflict of laws to be resolved?

of the rights ascribed in the legislation, especially the process for the bringing of individual or group complaints. Since 2007 there has been a Bill before the Sri Lankan Parliament that seeks to introduce enforcement mechanisms around disability discrimination.[58] Section 24 stipulates that where there is a contravention of Section 23 entitlements, individuals or their agents can petition the High Court, in their Province for "relief or redress". Very few cases have been brought under Section 24 and therefore the limits of the Act have not been fully tested.

Challenges using the Disability Rights Act

In 2000, the Public Interest Law Foundation[59] (PILF), an organisation normally concerned with environmental law, filed two writ applications in the Court of Appeal[60] arguing that the Ministry for Justice (MOJ) and the Colombo Municipal Council (CMC) failed to comply with the requirements of Section 23 of the Protection of the Rights of Persons with Disabilities No 28 of 1996 by not providing access to the courts and ensuring safe passage of persons with disabilities in Colombo. In response to the court application, the MOJ negotiated with the concerned parties and agreed to a plan to make all new court buildings accessible.[61] The CMC, in contrast, resisted conciliation and instead filed *locus standi* objections in court against the PILF. The Human Rights Commission later intervened in the application. On 28 April 2003 the CMC, agreed as part of terms of settlement with the PILF, to provide an accessible environment by 2010.[62] In 2003, a legislative amendment[63] was made to Section 4, subsection (3) was added to Section 23 of Disability Rights Act:

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58 This Bill will need to be congruent with the new "CRPD" once Sri Lanka becomes a signatory to the Convention.
59 Thanks to Sonali de Silva from the Public Interest Law Foundation for providing information on the two cases listed below.

60 *Public Interest Law Foundation v. The Municipal Council of Colombo*, CA 602/2000 and *Public Interest Law Foundation v The Ministry of Justice* CA 603/2000.

61 The PILF conducted a follow up visit to some court houses to see whether disability access had been provided and observed that the facilities were provided in some newly constructed courts. (eg: Gangodawila Courts). PILF is trying to find funds to undertake a compliance assessment.(email communication to author, 27/12/2011, Mihiri Gunewardene).

62 The PILF has not made a full assessment on the compliance by CMC due to the lack of sufficient funds. As of 2009 it appears that the CMC has not taken steps in some parts of the city of Colombo to provide disability access on roads that they were doing up. (e.g. Independence Avenue and Ward Place are two examples.) In other roads (e.g. Galle Road) disability access is provided. (email communication to author, 27/12/2011, Mihiri Gunewardene).
63 *Protection of the Rights of Persons with Disabilities (Amendment) Act*, No. 33 of 2003.

(3) The manner and mode of providing facilities to allow access by disabled persons to public buildings, public places and common services, shall be prescribed.

Not only is there an incorporation of a prescribed approach to access there is also an extension of entitlements to include access to "common services". On 14th November 2005, regulations on Access to Common Places and Services by Persons, with Disabilities Regulation No. 1 of 2005, were Gazetted to give effect to Section 23, more specifically Section 23(c), is a compilation of access standards and benchmarks. The purview of "common services" is narrowed down to mean in Section 10(a) public transportation services and facilities …" and 10 (b) public communications services and facilitates….".

In 2006 under Section 23 and 25 of the Disability Rights Act , additional regulations, the Disabled Persons (Accessibility) Accessibility Regulations, No.1 of 2006 were published in the Extraordinary Gazette. Section 2(1) stipulated a timeframe of three years to provide access facilities to public building, public places and places where common services. The Ministry of Science and Technology in March 2007 launched the Sri Lankan Standards (SLS ISO TR 9527:2006) in compliance with the regulation.[64]

Failure to meet the targets of the 2006 regulations in any significant way by 2009 resulted in a further Extraordinary Gazette notification No. 1619/24, dated 18/9/2009 which repealed Section 2(1) and substituted that section by extending the timeframe for access by eight years from the operation of the 2006 regulation, hence 2014 is the new set target date.

In 2009, advocacy group IDIRIYA in conjunction with Dr. Ajith Perera, a person with spinal injury filed a Fundamental Rights petition,[65] seeking an order to implement the accessibility regulations. Perera argued that although disability rights had been guaranteed under Section 23 of the Disability Rights Act and the Disabled Persons Accessibility Regulations No. 1 of 2005 these rights, were not enforced and neglected even in new buildings.

64 Peiris, Manjari. (2007). Design Guidelines in Place for Disabled-friendly Buildings, *Daily News*, 12 March 2007, p. 21

65 SC(FR): 221/2009.

The Supreme Court in an unanimous judgement on 27 April 2011 restated the Disability Rights Act and corresponding regulations, issuing orders that no persons should be discriminated on the ground of disability through a restriction of mobility in a manner which precludes or impedes them from gaining reasonable physical access to public building with facilities provided within such buildings, especially toilet facilities. Initially the Court ordered (SC (FR) 221/2009 dated 14th October 2009) that all new public buildings defined under the accessibility regulations 2006,[66] should "provide reasonable access in accordance with the design standards of regulations in force, to those with physical disability". The Court further ordered that all authorities should refrain from approving plans or issuing 'certificates of conformity' in respect of buildings which would violate the Court order. "*Failure to comply would draw punitive repercussions* under the laws set in" (emphasis added). The Court order directs that "you would be at liberty to file a motion, if there is a violation" and states that the commissioners of local government and officers of the UDA are equal partners and equally responsible for enforcing these orders. In 17th June 2013, Dr. Ajith Perera reactivated his FR petition to the Supreme Court to extend the existing order to include "reconstructions and renovations" of public buildings resulted in the reiteration of that compliance order.[67] Overall the rights enshrined in Section 23 (1) remain unrealized, especially in the area of access to education and the workforce.[68]

Mental Disability Law

The main legislation governing mental health and disability arising out of mental illness is a colonial law, namely the Mental Diseases Ordinance of No. 1 of 1873 (MDO) based on British lunacy laws. This Ordinance has not been repealed. The statute emphasises institutionalization through treatment and detention of those affected by mental illness. Section 5 (1), allows for compulsory detention "until the Minister's pleasure shall be known" with the possibility that

66 *Disabled Persons (Accessibility) Accessibility Regulations*, No.1 of 2006, 1,467/15.

67 The saga around attempts at getting the law enforced continues. On 17 June 2013, the Supreme Court issued an order to government agencies to ensure compliance with an earlier court order issued in April 2011 on the disabled or those with restricted ability have easy access to public places. The Supreme Court has further directed the Attorney General to ensure this is given its full effect by directing the authorities to take immediate steps to sensitize the private sector to take appropriate steps in compliance.

68 A Ministry of Social Welfare survey undertaken in 2003 indicates 16 % of disabled people are in employment. The incidence of poverty amongst households in receipts of disability payments is 52% above the national

the person with mental illness be removed to a mental *(sic)* hospital by the District Court when there is no relative or friend to care for them. For some patients, this is perhaps an issue when records have been misplaced or lost and relatives are not able to be contacted. The MDO is in conflict with the present day interpretation of mental disability which is rights based. Under Section 6, a relative may petition for the admittance of a person of 'unsound mind' and providing that a certificate is issued by two medical practitioners then the person named in the petition will be admitted to the hospital. The long title of the Mental Diseases Ordinance states that the provisions deal with "the care and custody of persons of unsound mind and their estates". People with mental disability in the MDO are characterised as not having deliberative capacity, incapable of improvement and generally as suspicious characters.

The Mental Disease Act No. 27 of 1956, based on the 1873 Ordinance regulates the custody, hospitalisation and incarceration of people with mental illness. Under this Act, the assessment of an "unsound mind' is undertaken by a civil court enquiry and is open to judicial appeal. The existing system of mental disability law and programs is vigorously protected and policed by the Sri Lankan College of Psychiatry who appear to hold to the position that mental health services delivery is the primary even sole domain of psychiatrists rather than shared amongst other professionals (e.g. psychologists, health or social workers).[63] The report of a Regional Meeting of Experts in 2004, World Health Organisation concluded that the reason for continued use of the Ordinance includes: low priority of mental health within the Health Ministry, Parliament and the public, few interest groups, non-governmental organisations or consumers devoted to supporting the rights of mentally ill individuals or providing average. Under s.39(1) of the *Wages Board Ordinance* (No.27 of 1941), the statute setting minimum wages in the country; the "non-abled bodied worker" [sic], whose impairment affects his capacity to earn the minimum rate, is if the Wages Commissioner thinks fit, to have a wage *less* than the minimum rate. More research is needed on the operation of this provision especially as to the assessment of productivity and the relationship to impairment by the employer and wages board. What are the implications of a productivity based wage system by stealth? Does this provision allow for employers and government to opt out of developing and implementing reasonable adjustment policies in the workplace to mitigate not just the impairment but also inaccessible environments that may hinder productivity?

[63] Clinical psychologists have really only been used as experts in court settings for the last decade. (de Zoysa, 2011). See also Campbell, 2011.

Psychiatric care, and a belief amongst some members of the psychiatric community that *legislation has little relevance* to their profession (emphasis added).[69]

The Experts Group after bemoaning apathy in the field of reform conclude that "enacting new legislation will require efforts to enhance the engagements amongst all relevant stakeholders, [and] a willingness of psychiatric to sacrifice some autonomy ....".[70]

Although mental illness is incorporated within the legal definition of "disabled person," under Section 37 of the Protection of the Rights of Persons with Disabilities No 28 of 1996 mental health law and policy have developed under a separate authority. In November 2005, the official Mental Health Policy of Sri Lanka 2005 – 2015[71] was Gazetted and incorporated six principles related to service provision which contains research ethics protecting persons with mental illness. The policy has an impressive rights based approach in its vision and principles. In its mission statement, it provides mental health services at primary, secondary and tertiary level, and ensures that mental health services will be linked to other sectors and further pledges to protect human rights and dignity of people with mental illness. The emphasis of the Mental Health Policy of Sri Lanka prioritizes the development of community based mental health services. Within the shift in policy, it is proposed that a new Mental Health Act giving attention to matters of codified rights, consent to treatment, treatment standards and the procedure for compulsory detention.[72]

There have been several attempts to introduce a new Mental Health Act, one in 2001 and the more recently in 2007. These attempts were aborted due to differences about the proposed Bill

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69 World Health Organisation [WHO], (2004). *A Systematic Approach to Developing and Implementing Mental Health Legislation*, Report of a Regional meeting of Experts, New Delhi India, 6 -8 December 2004. WHO Project ICP MNH 001.

70 World Health Organisation [WHO], (2004). *A Systematic Approach to Developing and Implementing Mental Health Legislation*, Report of a Regional meeting of Experts, New Delhi India, 6 -8 December 2004. WHO Project ICP MNH 001.

71 *Gazette Extraordinary of the Democratic Socialist Republic of Sri Lanka*, Part I: Section (I), No. 1418/33 – 11.11.2005.

72 Paragraph 7.

and lack of consensus among certain main stakeholders in the field of mental health. The Draft Mental Health Act[73] of 2007 is a significant improvement to the Ordinance. The Long Title of the Act stipulates that the legislation is to "protect the rights of persons with mental illness, provide for the care, treatment, continuing care, rehabilitation of persons with mental illness...." Its Preamble makes clear linkages with a human rights paradigm as well as the notion of social determinants of health. At the domestic level, particular recognition of Articles 11 and 12 of the Constitution of Sri Lanka are mentioned. Some of the salutary features of this draft Bill are the elimination of offensive terminology and replacement of terms in line with rights discourse, a focus on capacity to give consent and provisions and mechanisms to deal with promotion, prevention, rehabilitation is given, unlike the existing Ordinance which only deals with treatment/institutionalization. Other important rights of mental patients and users such as human dignity, privacy, protection of property, informed consent, freedom from exploitation and abuse are also addressed.

Social Insurance/ Security Law[74]

Social security systems are an important source of income support for workers who acquire a disability in the course of their employment. Additionally, a social security system provides a safety net for those with aged related disability and disabled people unable to work. Aside from the provision of a national health service, Sri Lanka as a developing economy has had difficulties in adopting statutory schemes for citizens ineligible for the various industry based schemes despite introducing the Poor Law Ordinance of 1939.[75] In 2003, a strategic framework[76] for health development was adopted by the government. There are a number of social security schemes organised around the government, formal and informal sectors which

73 Document produced by the Ministry of Health, dated January 22, 2007.

74 It is beyond the orientation of this Chapter to have a thoroughgoing discussion of social security law and programs in Sri Lanka. For an excellent overview see Chandraratna, 2003; ILO, 2008.

75 The *Poor Law Ordinance* No.30 of 1939 amended No. 3 of 1946. Space does not allow for discussion of the

*Samurdh*i (prosperity) program, *Samurdhi* is established under the *Samurdhi Authority of Sri Lanka Act* (No. 30 of 1995). *Samurdhi* the main cash transfer scheme to address chronic poverty and disability payments in particular, special payments to soldiers with disability and their dependents. For a history of this program, see (http://samurdhidept.gov.lk/Aboutus.html).

76 *Framework for Health Development in Sri Lanka* (2004 – 2015), April 2003, Ministry of Health Care and Nutrition.

are contributory.[77] These systems appear to be fragmented and do not link up with any comprehensive national strategy, especially related to disability and capacity building.

Under the Widowers, Widows and Orphans Pension Scheme[78] lifetime benefits are provided for an orphan with disability. In 2009, there were 23,000 children drawing disability pensions through these arrangements.[79] Due to concerns about rorting the system, changes to a pension recipient's life chances (marriage, employment or other income earning activities, death of the child), and the neglect and abuse of children with disability by guardians; the Department of Pensions signposted new amendments to the existing statutes to ensure benefits are for those "persons who are truly and totally incapacitated"[80] and issued interim policy decisions. Of note is the emphasis on assessing capability for employment and permanency of disability, residential arrangements and the rejection of applications from unmarried nondisabled women over 26 years of age.[81] In 2011, the Regulation on Payment of Disabled Orphans Pension,[82] provision was made for a disabled child to draw the pension after the death of the employee's spouse. The 2011 regulation provides greater scrutiny in regard to alternative sources of chattels and income to determine eligibility for a pension, financial management including appointments of guardians to assist in this regard, and a 5 yearly medical review by a medical board for those recipients not disabled from birth.

Government workers are covered by the mandatory defined benefits scheme, the Public Servants Pension Scheme, originally established in 1901, under the Ordinance No. 2 of 1947.

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77 The various schemes cover a third of the population, much more than other South Asian countries, equal to 54% of the working age population (ILO, 2008, p.19).

78 Section 13, *Widowers, and Orphan's Pensions Act* (No.24 of 1983) and s. 11 [new section 29A], *Widows' and Orphans' Pension Fund (Amendment) Act*, No.44 of 1981. Access to these provisions is thoroughly medicalised. The child is required to present to a medical board of 3 doctors who will determine whether the child has a physical or 'mental' disability that "renders him incapable of earning his livelihood". Whilst the there is provision for a lifelong pension, there is a built in disincentive toward rehabilitation and employment training should any gains result in the loss of the pension.

79 Pension Circular 1/2009, *Payment of Disabled Orphans' Pension – Re-amendment*, Department of Pensions, 7/01/2009, paragraph 1.1.

80 Pension Circular 1/2009, *Payment of Disabled Orphans' Pension – Re-amendment*, Department of Pensions, 7/01/2009, paragraph 2.1.

81 Pension Circular 1/2009, *Payment of Disabled Orphans' Pension – Re-amendment*, Department of Pensions, 7/01/2009, paragraph 3.2.3.

82 *Extraordinary Gazette*, 1719/3 – 2011, August 15, 2011 made under the *Widows and Orphans' Pension Fund Ordinance*, (No. 1 of 1898), amended by Act (No. 44 of 1981).

Since 2002, this scheme has been closed to new members. A Contributory Pension Fund (CPF) was established under the Management Service Circular No. 18 of 2003. Under this fund, all permanent employees in the public sector and provincial services are contributory members. Employees' contribution is 8% while the employers' contribution is 12%.[83]

The main schemes covering employees in the private sector are the Employees' Provident Fund Act No. 15 of 1958 and the Employees' Trust Fund Act No.46 of 1980. Benefits are in lump sum form rather than periodic payments. This benefits system raises concerns about the capacities of certain beneficiaries to manage their income over their lifetime rather than using benefits to pay for immediate, short term needs

and the existence of support and independent financial advice for planning. The Employees' Provident Fund Act No. 15 of 1958, amended to No.14 of 1992 is the largest social security scheme in Sri Lanka for workers in the formal sector. According to the EPF Act, an employee is required to contribute a minimum of 8% and the employer a minimum of 12% of the total salary of the employee monthly. In Section 23(c) benefits are paid when the employee ceases to be employed due to "permanent and total incapacity for work". The Employees' Trust Fund Act No.46 of 1980[84] has similar provisions for the termination of employment. Here coverage includes disablement due to injury or disease: Section 24 (1) and (2) cover

"permanent and total incapacity for work", "unfit for work any longer for that reason". No mention in either scheme is made of alternative pathways or the possibility of transfer to other industries.

For the informal sector where there is heightened vulnerability due to an inability to invest in savings, two schemes were introduced for farmers and fishing workers up till age 59. The Farmers' Pension and

83 *Public Servants' Provident Fund*, established in 1942 operated by the state, is for the benefit of certain nonpensionable employees of the government.

84 Extended to the University Grants Commission and Higher Education institutions by *Employees Trust Fund (Special Provisions) Act*, (No.19 of 1993).

Society Security Benefits Scheme Act No.12 of 1987 and the Fishermen's Pension and Social Security Benefit Scheme Act No.23 of 1990 are both voluntary contributory schemes that explicitly provide non means tested benefits in the event of disablement. There is the option with both schemes to take a lump sum or receive a monthly allowance.[85]

The Social Security Board Act No.17 of 1996 is a statutory regime of social insurance for self-employed workers using a defined contribution type benefit payable according to a prescribed schedule. The Act establishes a board that oversees a contributory social benefits scheme for self employed persons. There are six different schemes available depending upon income, with the *sahana* and *thilana* systems available to individuals who earn less than Rs. 36, 000 per annum (Reg 2(a)).[86] Under Section 3 (1) (b)

(c), benefits and/or lump sum payments are provided for "permanent partial disablement" (Section 11) and "permanent total disablement" (Section 12), although no definitions of these distinctions are given in the legislation. The Pensions and Social Security Scheme Regulations[87], 2006 made under Section 31 of the Social Security Board Act contains in Regs. 15 – 17, medical definitions of disablement that bear little association with environmental impacts as per the Protection of the Rights of Persons with Disabilities Act No. 28 of 1996 (Disability Rights Act) definitions. For instance, Reg 15 & 16 (permanent total disablement) incline towards impairments of both limbs, hand, eyes etc; whereas for partial disablement the emphasis is on singularity, that is one eye, foot, arms (Reg 17). The meaning of "permanency" is not defined in the regulation.[88] Maybe in recognition that when disabled people are gainfully employed that employment is likely to be self-employment; the Social Security Board (Amendment) Act No.3 3 of 1999, Section 7[89] enables a contributor who enters the fund before age 35, who is deemed by a medical practitioner to be "mentally retarded" *(sic),* to take up a pension at aged 40 years. There is no obvious link between these regulations and the National

85 There are reports that the scheme is financially unstable and has a stigma attached to it. (Withanage et al, 2005).See (ILO, 2008) for discussion of the low take up rate of this fund by the target population.

86 The poverty line in 2011 was SLR 39,228.The minimum wage set by the Wage Board is SLR6900.

87 *Pensions and Social Security Scheme Regulations,* 2006, 1464/5, 2006 *Extraordinary Gazette,* 25 September.

88 Exclusions are covered by *Pensions and Social Security Scheme Regulations, 2006,* Reg. 22, 23 and exempt inter alia attempted suicide and drug and alcohol influenced impairment.

89 Amended Section 9.

Disability Policy of Sri Lanka or the Disability Rights Act in terms of vocational development or capacities building.

Injured Employee Laws

Running parallel to public disability law is legislation establishing a workplace injury compensation system and *Rana Viru Seva*, an authority to assist soldiers and police officers with disabilities.

Civilian Injured Workers

The workplace injury compensation system is designed for able bodied men and women who succumb to an injury arising out of and in the course of their employment.[90] On face, value the Workmen's Compensation Ordinance No. 19 of 1934, as amended up to No. 10 of 2005 is gender neutral, however, often already on differential wages, women recipients of payments (on behalf of their injured spouse) are classed along with those regarded as having a legal disability (See Section 13 (1) (2)).The legislation is interesting because it contains two rather obtuse distinctions between "partial disablement" and "total disablement" squared with a ranked combination of injuries outlined in Schedule 1 of the legislation. In contrast with the Social Security Board Act 1996, Section 2(1) relates 'partial disablement' to be of a temporary nature and 'permanent disablement' relates to a reduction in earning capacity "in every employment which he (the employee) was capable of undertaking at that time". Within this legislation there is clear prejudice against women and those with mental disability, for Section 11(1) disallows direct payment of compensation. Instead the compensation is required to be deposited with the Commissioner administering the scheme who acts as a guardian.

The tables of maims[91] (under the 1960 revisions contained 14 injuries, whilst the 1990 version contained 35 categories and Schedule 3 of occupational diseases had 7 types in 1960 and 44 types in 1990. Of concern is that the Commissioner for Workers Compensation has all the power of a court (Section 35) and no civil court has jurisdiction over matters under the power

90 For reasons of limited writing space I have not made mention of the disability provisions under the country's pension (superannuation) plan. See *Employees' Trust Fund Act* (No.46 of 1980).

91 Compensation for specific injuries.

and control of the Commissioner. The exception is that appeals to the High Court are allowed on points of law and only then by the aggrieved party to the order (Section 48(1)(2)). Disabled people themselves have great difficulty being covered under existing worker's compensation arrangements which act as a disincentive for employers to hire disabled people as they are fully liable should there be an injury. Cases of medical negligence are rare in Sri Lanka, with the number of cases reports up to 2002 being less than ten.[92]

Armed Forces and Police

Members of the armed forces and police services are not covered under the usual workers compensation laws; rather the *Rana Viru Seva* Authority has responsibility to meet their needs in the event of disability. In addition, there is a complex system of pensions for both the armed forces and police related to agedbased retirement and not necessarily disablement.[93] In keeping with the parameters of this paper, the focus is on documenting disability related benefits.[94] For police officers there exists a number of Public Administration Circulars that provide grants of medical aids, compensation (according to a schedule of rank and loss of earning capacity[95]) depending upon the circumstances [causation][96] that provoked the injury or disability – 'terrorist activity,'[97] 'terrorist attack,'[98] an 'accident,'[94] or in consequence 'of atroc[99]ities committed by robbers, criminals, drug traffickers or underworld elements.'[100] Under the terms of the 2010

92 Fernando, R (2002). A Landmark Case of Medical Negligence in Sri Lanka, *Ceylon Medical Journal*, 47(4), pp.128 – 130.

93 See *Pensions Circular 9/2008*, issued 3/10/2008, Department of Pensions regarding the relationship between disability pensions co-existing along with a service pension.

94 The provision of land is sometimes made to officers with disability who are not in service.

95 *Extraordinary Gazette*, 1686/19, 2010, *Part 1: Section (I)-General Government Notification, Minutes of Pensions*, dated 29/12/2010.

96 Causation induces the moral imperative as the Sri Lankan State has had to look after its police officials who have acquired disability within the context of the country's often violent and bloody conflict. There is an emerging disability apartheid between State employed war disabled and the others (war victims, disability produced by other causes) and access to services, cash payments and other livelihood schemes.

97 *Public Administration Circular*, No. 21/88.(1988)

98 *Public Administration Circular*, No. 21/88. .(1988)

99 *Public Administration Circular*, No. 22/98. (1998).

100 *IG's Circular*, No. 1783/2004.

Extraordinary Gazette Minute on Pensions[101] recipients of a disability pension are not eligible for additional compensation, injury allowance or police compensation.

The Rana Viru Seva Authority Act No.54 of 1999 (Rana Viru Act) establishes an Authority that promotes the welfare of disabled members of the armed forces. The authority is charged with providing after care and rehabilitation (Section 4 (a)), the provision of housing (Section 4 (b)), and medical care (Section 4(c)).There is no definition of disability or philosophical statement about the approach to disablement or service delivery. However, Sections (d),(e) and (f) reflect a new approach to the management of disability away from the familiar passive and typical non-developmental orientation of much of the statutory regimes concerned with disability. Section 4(d) is an enabling clause, aimed at achieving greater access to education, especially higher education through the provision of scholarships and other assistance. There is an emphasis on achieving sustained employment (Section 4(e)) and the establishment of small business ventures (Section 4(f)). The realisation of the objectives of the *Rana Viru Seva Authority* will need advocacy and monitoring, not just for eligible recipients but also to assess the effect of the policy shift on other groups of disabled people, including community awareness as well as competition for restricted social protection measures.

5.6 A Disability Rights Bill and the Convention on the Rights of Persons with Disabilities?

A Disability Rights Bill, to relieve the inadequacies of the Disability Rights Act was first publicly mooted in the 2003 national policy. Although subsequent amendments have been made to the Disability Rights Act along the way, the Disability Rights Bill, Version (January 31, 2006) has only made it to the

Legal Draftsman's office. Should the Disability Rights Bill become law the Disability Rights Act would be repealed (Section 63). In the meantime international developments in the area of

101 *Extraordinary Gazette*, 1686/19, 2010, *Part 1: Section (I)-General Government Notification, Minutes of Pensions*, dated 29/12/2010.

international disability law have moved at a lightening pace resulting in the fastest ratified convention in United Nations history: the Convention on the Rights of Persons with Disabilities (CRPD) and the Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP). This Convention has not been ratified by the Sri Lankan government.

It is unclear what "adjustments" will be made to the proposed Disability Rights Bill (DRB) in the light of the Convention (CRPD). After this survey of existing disability legal regimes there are several areas that need clarification. In cases of inconsistency between definitions of disability in legislation which definition would prevail, Section 37 of the Disability Rights Act or another? Will the Disability Rights Act be deemed the lead legislation for interpreting others, or will the proposed Disability Rights Bill which will have the effect of repealing the Disability Rights Act perform that role? There may be merit in supporting multiple definitions of disability depending upon the field of its use. What criterion will be used to assess the validity of these different definitions?

5.7 Additional Case Law[102]

Until recently, case law has related predominantly to the status of profoundly deaf persons at law. A progressive decision in *Sapapathipillai v Tirumanchanam*[103] (1913), Ennis, J. ruled that deeds executed by a profoundly deaf person were held to be good. The case is interesting because the Justice revisits the views of both the Roman-Dutch and English law systems which were unfavourable about the capacity of deaf (and dumb) persons to make Wills or enter into contract.[104] Instead Ennis, J. draws a clear distinction between deafness as producing impairments, that is the inability to vocalise and the manner of communication impairment denoting lunacy or imbecility.[105] In contrast the case of *Aiya v Peniya*[106]

(1913) that "same person must be present in Court skilled to interpret between the deaf mute *(sic)* and the Court", however if that person also cannot understand what is going on due to

102 This section is underdeveloped and should be considered a work-in-progress as additional obscure cases come to light.

103 *Sapapathipillai v Tirumanchanam* 17*NLR*, 146, Ennis J, De Sampayo A. J.

104 *Id.* at p. 147

105 *Id.* at p. 148

106 *Aiya v Peniya* 21 *NLR*, 72, Shaw, J.

Deafness, they are instead dealt with under Chapter 32 of the Criminal Procedure Code No. 52 of 1980.

In a later case, *Joseph v. Fernando*[107][108] (1940), *Aiya* was not followed and instead Wijeyewardene, J. disputed the view that deaf persons who cannot be made to understand legal proceedings should not be tried, and instead argued that "a Magistrate trying a deaf and dumb *(sic)* accused should make all reasonable efforts to ascertain if there is any reliable person who is able to communicate with the accused by signs and make him understand the nature of the proceedings, in order to avail himself of the assistance of such a person". It is also desirable that there should be " ... some medical evidence as to the state of mind of a deaf and dumb accused so that the Court may consider the propriety of taking action under Chapter 33 of the Criminal Procedure Code"[103]

6. Legal Mobilisation and the Public Interest

Legal and social policy interpretation is not precise and definitive, but rather is contingently mapped onto wider social textures and dependent on divergent experiences with and beliefs about rights, as well as the "inclinations, tactical skills, and resources of the contending parties who mobilize judicial endowments".[109] Any realisation of legal mobilisation in Sri Lanka needs to be understood in the context of a backlash by government over the Supreme Court's supposed judicial activism, As a former Dean of

Law, the then Minister for Justice, Dr. G. L. Pieris stated that "it is very important for the Court to confine itself to the proper sphere and to not overreach itself and not to arrogate to itself the functions that belong to the Executive and the Legislative".[110]

Legal Mobilisation

Charles Epp (1996), in his study on the effect of the Canadian Charter of Rights and Freedoms 1982 concludes that whilst legislative reforms creates legal interests, statutes do not create

107 *Joseph v Fernando* 42 *NLR*, 93.

108 *NLR*, 93 at 94.

109 McCann, Michael (1994). *Rights at Work Pay Equity Reform and the Politics of Legal Mobilization*. Chicago: University of Chicago Press.

110 *The Island*, November 22nd, Pieris, quoted in Pinto – Jayawardena, 2006, p. 8

institutional resources to activate those rights.[111] He identified three types of resources that can shape access to the judiciary:

(1) organized group support from advocacy organizations,

(2) adequate funding and

(3) support of the legal profession.

Other studies of legal mobilization critically examine the reproduction and successes of rights advocacy with the understanding that "legal norms and discourses derive their meaning primarily through the practical forms of activity in which they are developed and expressed".[112] Assuming that disabled people and their allies can achieve access to information, and are aware of the mechanisms available or procedures to follow to obtain legal redress, the possibility exists to test the purview and enforceability of disability-related statute laws and constitutional protections, especially the Fundamental Rights (FR) provisions.

There is overwhelming cynicism about the utilization of law as a vehicle for social change. Although knowledge of the law and legal structures for minorities such as disabled people are important, legal competency and consciousness involves more than merely knowing about rights; it is, as Philippe Nonet puts it, " … an active and searching awareness of the opportunities offered by law for enhancing one's position in society".[113] The use of writs of *certeriorari* and *mandamus* under the jurisdiction of the Court of Appeal as the basis of a public interest claim, is one mechanism of engagement and is one of the few ways that individuals and NGO's can get access to government information.

There have been some significant hurdles which had to be overcome to open up this avenue of legal mobilisation and even then there are restrictions in using this mechanism for writs of

111 Epp, Charles. (1996). Do Bills of Rights Matter? The Canadian Charter of Rights and Freedoms, *American Political Science Review*, 90(4): pp. 765 – 779.

112 McCann, Michael (1994). *Rights at Work Pay Equity Reform and the Politics of Legal Mobilization*. Chicago: University of Chicago Press, pp. 261-62

113 Nonet, P. (1969). *Administrative Justice: Advocacy and Change in a Government Agency*, New York: Russell Sage Foundation, p. 8.

mandamus and *locus standi* petitions for FR cases. Disability itself may place an impediment to bringing a grievance to the attention of the courts. Therefore, disabled people individually and collectively need, to work with public advocacy organisations. For the legal and social policy mobilization to occur, all stakeholder sectors need to be fully cognizant of the multi-layered dynamics of disability consciousness. Developments in disability law and social policy initiated since 1996 cannot be effective in terms of emancipatory social change until education for justice occurs with teachers, municipal officers, practitioners, disabled people and social services personnel. It would appear that limited training and development activities have been undertaken regarding recent developments in the reconceptualisation of disablement and the public law interest implications with legal mobilization and reform agencies. Collective advocacy training is therefore required for individuals and their families.[114] The law itself requires transformation to allow access to justice for minorities. In this respect, unlike Sri Lanka, the Indian Court has made access to justice a primary concern of the legal system.[115]

Freedom of Information

In Sri Lanka, legal mobilization cannot be considered independently of the vexed questions of rights to information and the rules of *locus standi* (a principle about "who" can bring a petition to the courts, the right to be heard). The foregoing discussion applies to all people, and in this instance, the situation of people with disabilities in terms of barriers to information and judicial access are magnified.

There are no freedom of information laws in Sri Lanka. An opposite norm of assumed secrecy exists to the extent that the Law Reform Commission of Sri Lanka Report on Freedom of Information of 1996 stated that "the current administrative policy appears to be that all information in the possession of the government is secret unless there is good reason to allow public access".[116] Lack of access to information, including official documents on governmental policies such as social security initiatives, access regulations, medical records, legal aid and

114 Hess, R, E. Clapper, H. Gibson. (2001). Empowerment Effects of Teaching Leadership skills to adults with a serious mental illness and their families, *Psychiatric Rehabilitation Journal*, 24: pp. 257 – 265; Stringfellow, J. (2000). The relationship of participation in a collective advocacy programme to the attitudes towards authority of consumers of mental health services, *Dissertation Abstracts International*, 61 (03), 1700. (UMI No. AAT 9965694).

115 Gomez, Mario. (1998*). Emerging Trends in Public Law*, Colombo: Vijitha Yapa Publishers, pp. 42-47.

116 Law Reform Commission (LRC). (1996). *Report on Freedom of Information*, 20 November 1996, Colombo.

education, affects the enjoyment of political, economic and social rights. In March 2010 the Urban Development Authority (UDA) agreed to provide public access to certain documents related to public utilities, urban development and environmental assessments. We know that Sri Lankans with disability have limited knowledge about the existence of services provided by the Department of Social Welfare.[117] In my own capacity as a researcher, it was hard to find out where to obtain information such as public policy documents and then be granted access to materials and finding laws and draft Bills.[118] Additionally, Thomas Faunce (2005), notes in a recent workshop held at Galle around reforming mental health legislation, people with disabilities did not figure highly and argued that "as much as possible (mentally ill research subjects) should be involved in the development of human rights modules related to their protection in clinical trials".[119]

Visvalingam and Others v. Liyanage and Others[120] was the first FR *c*ase that challenged the Court to imply a right to information as part of the guarantee of freedom of expression.[121] The Court held that the right to freedom of expression does include the right to receive information of one's choice. In *Fernando v. The Sri Lanka Broadcasting Corporation and Others*.[122] The Court stated: "… that information is the staple food of thought, and that the right to information, *simpliciter*, is a corollary of the freedom of thought guaranteed by Article 10 (of the Constitution)."[123] This authority could be used to initiate a petition for FR violation under Article 10 of the Constitution arguing that various authorities were remiss in providing information in an expeditious, transparent accessible manner to disabled people.

Locus standi – the Right to be Heard

117 National Policy on Disability for Sri Lanka (2003), Ministry of Social Welfare, p. 23.

118 See also Pinto-Jayawardena & De Almeida Guneratne, *Habeas Corpus in Sri Lanka:Theory and Practice of the Great Writ in Extraordianary Times*: (Colombo: Law & Society Trust, 2011)

119 Faunce, Thomas. (2005). Collaborative Research Trials: A Strategy for Fostering Mental Health Protections in Developing Nations, *International Journal of Law & Psychiatry*, 28: p.180.

120 *Visvalingam and Others v. Liyanage and Others* 2 Sri L.R. 123 [1984]; *Visvalingam v. Liyanage* F.D.R. (2) 529.

121 See Article 14

122 *Fernando v. The Sri Lanka Broadcasting Corporation and Others* 1 Sri L.R. 157 [1996].

123 Above at 179.

Locus standi rules in Sri Lanka are narrowly construed. Until 2003 the authority for FR *locus standi* cases was *Somarawathie v Weerasinghe.*[124] Amerasinghe, J. stated that other than an aggrieved person

(and their attorney) "no other person has a right to apply to the Supreme Court for relief or redress",[120] and later in commenting on the possibility that the Constitution itself might abridge, restrict or deny the

rights of citizens, he said "I can only give effect to the intention of the makers of the Constitution, however inexpedient, or unjust or immoral it may seem".[125] This case was distinguished in the decision of *Sriyani Silva v Iddamalgoda and others*.[126] In this case involving a petition filed by the wife of a man who died in custody, the Court reasoned, in response to the argument that only the deceased could submit a petition (an improbability at the best of times), that "a right must have a remedy … recognised by the maxim *ubi jus ibi idem remedium* – there is no right without a remedy". In allowing for the wife of the deceased to have *locus standi*, the Court concluded "a strict literal construction should not be resorted to where it produce[s] such an absurd result". This case not only paves the way for third party disability litigation over fundamental rights breaches but also petitions on behalf of a disabled person who has perished as a result of neglect or abuse in institutional care.

However, under public law which covers the majority of statutes discussed in this paper, *locus standi* rules are more broadly framed. In *Environmental Foundation Limited v Ratnasari Wickramanayake*[127], known as the "Zoo Case", Justice Ranaraja expanded the principle of *locus standi* by making a distinction between two types of public interest petitioners. The first petitioner is one who can show a "genuine interest" in the matter. The other category of petitioner is one who acts out of a social ethic "a public spirited person". To ensure that laws are applied to all. This authority then paves the way for NGO's to have *locus standi* in applications

124 *Somarawathie v Weerasinghe and Others,* 2 *Sri L. R.* 121. [1990].

[120] *Id*, at p. 124

125 *Id*, at p. 128

126 *Sriyani Silva (Wife of Jagath Kumara-Diseased) v. Iddamalgoda, Officer-In-Charge, Police Station, Payagala and Others*, 1 *Sri L. R.* 14 [2003].

127 *Environmental Foundation Limited v Ratnasari Wickramanayake,* C.A. App. No. 137/96.

before the courts in matters related to the implementation of disability laws such as was undertaken by the Public Interest Law Foundation in 2000.[128] *Remedies?*

Creativity plus persuasion is the essence of good lawyering. Finding new and novel ways to engage with existing precedents and statutes is paramount to making inroads into areas in the lives of disabled people that appear to be caught in a legal vacuum. With the increased access to judgements abroad it is possible to study different approaches to argumentation. For instance in Australia attempts were made to extend the use of company law, in particular the *principle of fiduciary duty*, as a mechanism to argue a breach of the duty of *loco parentis* by State institutions that had custody over children. These children were subsequently abused whilst in 'care'.[129] This final section of the paper provides some thoughts around the usage and testing of strategies of legal engagement.

Confinement or detention

In March 29, 2009 edition of *The Sunday Leader* a spotlight piece "*Living Hell; Ashanthi's Story*",[130][131] told the story of a 26-year-old who had been forced into marriage, literally imprisoned in her home whilst overseas, harassed by the Mirihana Police and then was duped into being admitted to Angoda mental

hospital under the guise of getting a 'free' scan for a head injury. There are many people like Ashanthi[132] who should not be in mental health institutions – some of these people have been forgotten (files have been lost or relatives have died) whilst others have simply 'disappeared' in

128 *Public Interest Law Foundation v. The Municipal Council of Colombo*, CA 602/2000 and *Public Interest Law Foundation v The Ministry of Justice* CA 603/2000

129 Batley, Paul. (1996). The State's Fiduciary Duty to the Stolen Children, *Australian Journal of Human Rights*, 2(2): pp.177-94; Hammond, T. (1998). The 'Stolen Generation' - Finding a Fiduciary Duty, E LAW : *Murdoch University Electronic Journal of Law*, 5(2): www.murdoch.edu.au/elaw/issues/v5n2/hammond52nf.html; Howe, Adrian. (1997). Family Relationships, Fiduciary Law and Civil Incest Suits: Re-framing the Injury of Incestuous Assault, *The Australian Feminist Law Journal*, 8: pp.59 - 80.

130 Eye, Hawke. (2009) 'Living Hell Ashanthi's Story', *The Sunday Leader* (newspaper), March 29, Retrieved

131 .12.2011.http://www.thesundayleader.lk/20090329/spotlight-1.htm.

132 The article discusses several attempts by the Institute of Human Rights and the group Women in Need to enforce various court orders.

the system or died under mysterious circumstances, as it is difficult to access admission and patient history records.

The writ of *habeas corpus*[133] is a valid mechanism to adopt to seek an investigation or heightened inquiry into the detention of a person with disability in a hospital, home or residential services, especially in the absence of transparent and actionable grievance procedures and a multidisciplinary assessment and review mental health teams. In Australia, in 1979, this rarely used writ was successfully galvanised to compel the Health Commission of Victoria to show why Anne McDonald, an 18 year old with severe physical and speech disability who had been living in an institution from just after birth had been detained against her will.[134] Upon the court's judgement, Ms. McDonald was released from the institution and in subsequent years successfully read for a Bachelor's degree.[135]

In the Sri Lankan decision of *Rasammah v. Major General Perera*[136], it was determined that courts had a wide discretion to determine the stage a 'detainee' should be produced in court. This judgment is significant as there maybe issues in locating a disabled inmate including contestations around the

'availability' and capacity of the resident to be produced in court.[137] The scope of *habeas corpus* was further strengthened in *Juwanis v. Lathif*[138] where it was held that even when an authority denies the detention of a person, this denial does not prevent the Court of Appeal to refer the matter to the Magistrates Court for further enquiry. These mechanisms can be somewhat slow

133 In Sri Lanka this writ has been used as remedy to locate and 'resolve' concerns about individuals who have 'disappeared' or been detained by the police or security forces. See Pinto-Jayawardena, K & J. De Almeida Guneratne (2011).

134 *The Queen and the Health Commission of Victoria, George Lipton and Dennis McGinn, ex parte Anne McDonald,* Unreported Victoria Supreme Court [1979].

135 Dwyer, J. (1996). Access to justice for people with severe communication impairment, *The Australian Journal of Administrative Law*, 3(2): 73-119. A duplication copy of this can be found at: http://members.optusnet.com.au/~dealcc/DEALPages/Dwyerarticle.html.

136 [1982] 1 SriL.R. 30.

137 Some residents indeed maybe drugged or health deprived to the extent that they may not be fully appraised to present their competencies in a court setting.

138 [1988] 2 SriL.R. 185.

and tedious, but are ultimately about getting an agenda for the person's cause/case and also to provide an opportunity to highlight the issues more broadly.[139]

Guardianship issues

Some mental hospital inmates cannot leave as they have no next of kin or 'friend' to reside with. In a Florida Supreme Court (USA) case, concerning Terri Schiavo, a woman with brain injury in a persistent vegetative state, a writ *quo warranto* was used to compel her husband Michael Schiavo[140] to explain what authority he maintained as guardian as part of a 7 year battle over guardianship of an incapacitated life. Scrutiny of guardianship under this type of writ may provide greater scrutiny of Section 5(1) and Section 6 powers of the Mental Diseases Ordinance especially where there are concerns about the unscrupulous interference of a spouse or family member in the process of involuntary admission to a facility and any guardianship decisions made therein. In regard to guardianship abuses related to the Disabled Orphans' Pension, a writ *quo warranto* may also induce beneficial scrutiny.

Delays in determinations

Based on the strategy adopted in *Rosalie Whiley v. Hon. Richard Scott*,[141] a Florida Supreme Court case, where in a writ *quo warranto*, the advocacy organisation Disability Rights Florida argued *locus standi* on the basis of their protective advocacy role. Governor Richard Scott instituted a freeze in rule-making which negatively impacted on the lives of disabled Floridans. The case was successful and overturned the freeze. There are equivalent advocacy groups in Sri Lanka. Under Article 12(4) of the 1978 Constitution we can argue not only a FR cause of action, but disabled people could be viewed as a

'protected class' where there should be heightened scrutiny. In *Whiley*, the issue concerned a delay in rule-making that had arbitrary effects in the lives of disabled people. In Sri Lanka the

139 The Donald case – changed the shape of the ways that hospitals did business including their accountability to patients.

140 Michael Schiavo had petitioned the courts to have Terri Schiavo life-prolonging procedures or life support treatment removed. See http://www.miami.edu/index.php/ethics/projects/schiavo

141 No. SC11-592, Florida Supreme Court, 16 August 2011. Florida Governor Richard Scott exceeded his power when freezing agency rulemaking through an executive order earlier this year. The court, in a 5-2 ruling, agreed with a disabled woman on food stamps who had argued that rulemaking is a legislative province. Scott created an office within his administration from which all state agencies had to seek permission to make or change rules.

Disability Rights Bill has been delayed in the Legal Draftsman's office since late 2006, is also arguably causing arbitrary effects, creating uncertainty about disabled people's and industry statutory obligations and, rights and responsibilities.

Enforcement of laws

In this paper I have persistently argued that mechanisms for the monitoring and enforcement of disability laws and statutory instruments are weak, if not non-existent in certain statutes. Declarations aside, the challenge is to find ways to use the law to call civil servants, commercial enterprises and government Ministers to accountability and transparency. In furtherance of the Supreme Court decision (FR 221/2009) a writ of *quo warranto* could be engaged to pursue the issuing of planning/building Certificates of Conformity, where there is a belief that such issuing is beyond authority in delegation and ascertainment. In addition the testing of consistency in the application of access regulations and the Sri Lankan Standards can be harvested using a writ *certiorari* to assess uniformity of access decisions. The paper has also pointed to a fragmentation in the statutory development of disability laws, especially the lack of congruence with the Disability Rights Act and the conformity with the UN Convention (when it is eventually ratified). Applying best practice, any incorporation Bills (for the establishment social services and NGO's, including companies) needs to be assessed for FR and Disability Rights Act alignment.

It is has been noted that Section 23(1) (2) of the Disability Rights Act provides for non-discrimination in education and employment and free access to common services and buildings. Section 24 enables petitions to the High Court, for relief or redress when there is deprivation. Combined with the *Rana Viru Act*, Section 4(d) that promotes access to higher education for disabled soldiers and police, a writ of *mandamus* could be utilised to access the veracity and implementation of the University Grants Commission (UGC)[142] regarding applications for university admission and access adjustments.

Finally the 1978 Constitution itself requires clarification regarding the fundamental rights of disabled people. Article 12(3) reads:

142 In accordance with the *Universities Act* (No. 16 of 1978).

No person shall, on the grounds of race, religion, language, caste, sex or any one of such grounds, be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of his own religion.

Under Article 3(3) disability is not a protected ground (attribute) in terms of access to common places and freedom of movement.[143] In Article 3(4), disability is narrated in terms of "special provisions ... for the advancement". This may not the same as a protected ground. A Supreme Court determination needs to ascertain whether equality claims are weakened or differentiated for disabled people advising of the full extent of the equalising measures.

7. Conclusion

This paper has provided a broad overview of legal responses to disability rights and entitlements in Sri Lanka. Globalisation and the increased internationalisation of geodisability knowledge as well as corresponding international regulation mean that Sri Lanka as an international player and developing nation has little choice but to conform to new universal legal regimes. An outstanding concern arising from the paper is whether social policy and legislative infrastructures are suitability resource equipped and trained to undertake the enormous task ahead of promoting legal cultures that enhance disabled peoples quality of life in ways congruent with other citizens. Much of the current arrangements are patchy and lacking co-ordination across the various government ministries and reactive to internal and external pressures. Furthermore, there is no legislatively entrenched philosophical framework that underpins legal development in the area of disability and that can act as a benchmark for service delivery and the statutory incorporation of NGO's, nor does government and the courts seem inclined to enforce laws through the carrying out of stiff penalties.

Capacity building among government officials and disabled people are paramount to give effect to the aspirations contained within disability laws. This includes development of strategic responses to disability standards in the various laws and enforcement mechanisms that need to be implemented to ensure that these laws carry weight. Knowledge of disability law by disabled people, attorneys, government officials and members of the public remains an ongoing change.

143 See also Article 14

Further audits of existing statutes and case laws are required to extend our knowledge of the new field of disability jurisprudence.[144] Finally this paper has identified two existing areas that remain under explored. The testing of existing public laws through public interest litigation has been identified as an area of law available to legal activists. Outside the regime of ordinary law, the Fundamental Rights provisions of the 1978 Constitution await a disability rights case to assess whether disabled people have their rights safeguarded by the highest law of the land.

144 I recommend the establishment of an accessible information clearing house at the UOC as a repository for disability legal research.

OUTSOURCING IN SRI LANKA: SECTORS THAT EMPLOYEE CONTRACT LABOUR AND MERITS AND DEMERITS OF OUTSOURCING

OUTSOURCING IN SRI LANKA

The most commonly outsourced streams of business include:

- IT outsourcing
- Legal outsourcing
- Content Development
- Web Design and Maintenance
- Recruitment
- Logistics
- Manufacturing
- Technical/Customer Support

Why do organizations outsource their business process?

The key factors which have led to a growing trend of outsourcing are

- Lack of expert-labor in some portions of the business process
- Availability of cheaper labor, whilst not comprising on the quality of output
- Ability and feasibility to concentrate on the other crucial business process

These factors have specifically contributed to most of the outsourced partners across different locations in the world. Expertise in communication capabilities, technical expertise and favorable financial packages are the most important advantages of outsourcing to India.

Advantages and Disadvantages of Outsourcing

Outsourcing most commonly known as offshoring has pros and cons to it. Most of the time, the advantages of outsourcing overshadow the disadvantages of outsourcing.

The Advantages of Outsourcing

- **Swiftness and Expertise:** Most of the times tasks are outsourced to vendors who specialize in their field. The outsourced vendors also have specific equipment and technical expertise, most of the times better than the ones at the outsourcing organization. Effectively the tasks can be completed faster and with better quality output
- **Concentrating on core process rather than the supporting ones:** Outsourcing the supporting processes gives the organization more time to strengthen their core business process
- **Risk-sharing:** one of the most crucial factors determining the outcome of a campaign is risk-analysis. Outsourcing certain components of your business process helps the organization to shift certain responsibilities to the outsourced vendor. Since the outsourced vendor is a specialist, they plan your risk-mitigating factors better
- **Reduced Operational and Recruitment costs:** Outsourcing eludes the need to hire individuals in-house; hence recruitment and operational costs can be minimized to a great extent. This is one of the prime advantages of offshore outsourcing

The Disadvantages of Outsourcing

- **Risk of exposing confidential data:** When an organization outsources HR, Payroll and Recruitment services, it involves a risk if exposing confidential company information to a third-party
- **Synchronizing the deliverables:** In case you do not choose a right partner for outsourcing, some of the common problem areas include stretched delivery time frames, sub-standard quality output and inappropriate categorization of responsibilities. At times it is easier to regulate these factors inside an organization rather than with an outsourced partner
- **Hidden costs:** Although outsourcing most of the times is cost-effective at times the hidden costs involved in signing a contract while signing a contract across international boundaries may pose a serious threat
- **Lack of customer focus:** An outsourced vendor may be catering to the expertise-needs of multiple organizations at a time. In such situations vendors may lack complete focus on your organization’s tasks

With all these pros and cons of outsourcing to be considered before actually approaching a service provider, it is always advisable to specifically determine the importance of the tasks which are to be outsourced. It is always beneficial for an organization to consider the advantages and disadvantages of offshoring before actually outsourcing it.

Sri Lanka

Offshoring Professional Services
A Development Opportunity[1]

August 2005
SASFP

[1]Retrieved from: http://siteresources.worldbank.org/INTEDEVELOPMENT/Resources/Offshoring-in-Sri-Lanka.doc., visited on 4/12/2015

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Acknowledgements

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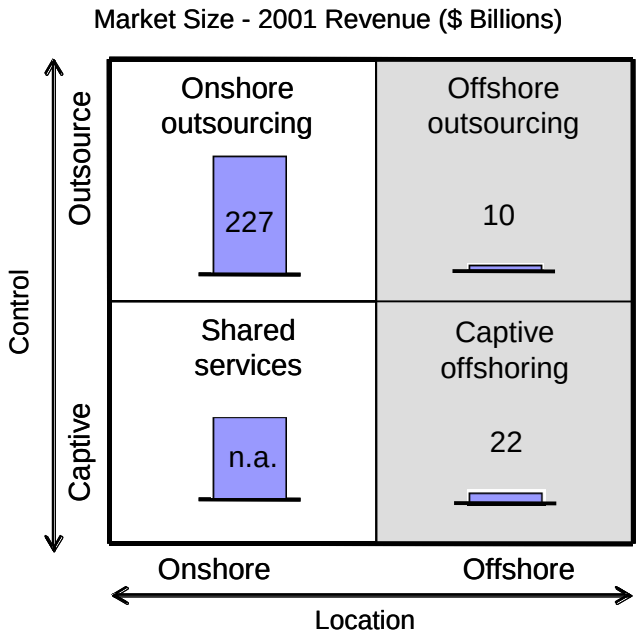
A. What is Professional Services Offshoring?

Outsourcing[3] occurs when one company delegates responsibility for performing a function or series of tasks to another company. When the second company is based in another country, outsourcing becomes offshoring. Offshoring was previously concentrated in the manufacturing sector as firms in developed countries offshored production tasks to developing countries in an effort to reduce costs and minimize expensive capital asset investments. The recent dramatic improvements in information technology (IT) and decreasing costs of data transmission have extended this concept to the tradability of services and popularized professional services offshoring as an alternative for firms looking to streamline costs, improve customer service and focus their resources on enhancing their core competencies. Services offshoring now encompasses a wide array of export-oriented services spanning the entire value chain.

Figure 1 : Offshoring a US$30 billion Market



Source: Gartner, IDC, Aberdeen Group, UBS Warburg, Nasscom, US-import-export Data McKinsey Global Institute

Figure 1 highlights the four main segments of the outsourcing market. Once a company chooses a particular service to outsource, it faces two key choices. The first choice involves choosing between an offshore or onshore location, while the second choice looks at whether the actual provider should be a captive unit of the firm or an outside party. The matrix on the left provides the actual sizes of each of these market segments in 2001.[4] This paper focuses on the offshored services (the shaded part of the figure) since it analyzes the specific development potential for Sri Lanka as a lower cost high quality service provider to firms based in foreign countries.

The size of the global offshoring market in 2001 was around the US$32 billion mark and growing rapidly. However, captive offshoring is more than twice as large as offshore outsourcing. This is largely because firms like to maintain control of their operations especially those concerned with sensitive proprietary information. Many firms do not want to reveal inside information about their strategies and processes, particularly those whose products rely on large R&D expenditures, patent protection and original intellectual property rights. Other firms also find the contract procedures involved in hiring an outside party to be more complicated than those required to set up a subsidiary operation.

[3] Sometimes also referred to as Business Process Outsourcing or BPO.

[4] McKinsey Global Institute: *The Emerging Global Labor Market: Part III – How Supply and Demand for Offshore Talent Meet* (San Francisco, June 2005), p.15

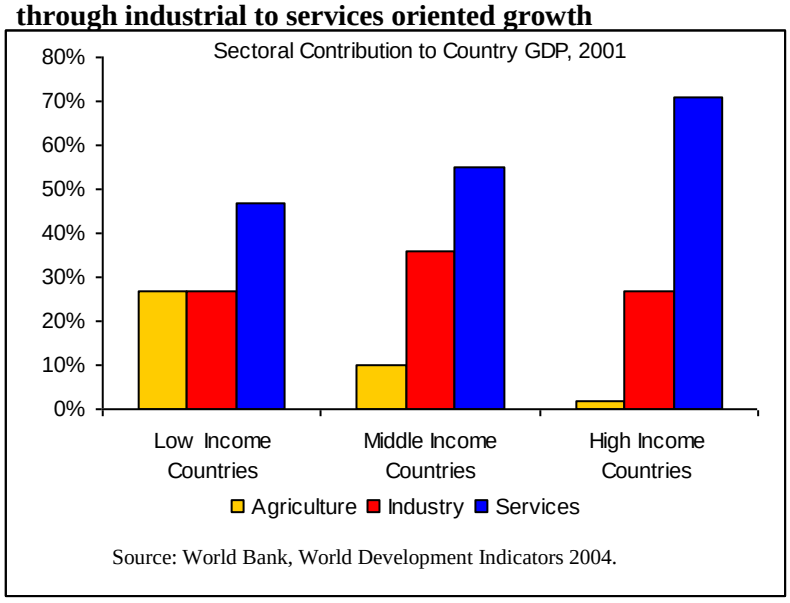
B. How Can Services Offshoring Reduce Poverty?

Services as a Stimulant of Growth

Economic growth is a critical factor in poverty reduction and services provide a key engine for this type of growth. In countries that have grown quickly and have been able to sustain high growth rates over long periods, services have been responsible for much of that growth, generally growing much faster than other sectors of the economy. Even in countries that experienced a rapid growth of manufactured exports there was also a parallel and rapid growth in services. The service sectors, from finance and accounting to IT and advertising, also provide valuable inputs that the manufacturing sector needs to be able to compete effectively in global markets in terms of quality, flexibility and reliability. The GDPs of high income countries derive a substantially higher percentage of value added from the services sector as figure 2 below illustrates.

Services trade enables developing countries to potentially leapfrog the industrial development stage. The economic models of the past assumed that countries grew by creating an agricultural surplus and borrowing to invest in manufacturing capital. Only when countries went through the industrial stage of development could they consider a focus on services, as domestic demand for such services was still nascent and services trade was non existent. The communications revolution of the last decade now permits lower income countries to leapfrog that stage of development and directly focus on expanding the service sectors of their economies. The technology itself does not depend on first building a solid industrial base: mobile telephones don't rely on an extensive network of landlines. And countries that have not yet invested heavily in old technologies can simply choose to by-pass it. Sri Lanka now has more mobile phone subscribers than those with landlines.

Figure 2: Developed economies transition from agricultural through industrial to services oriented growth

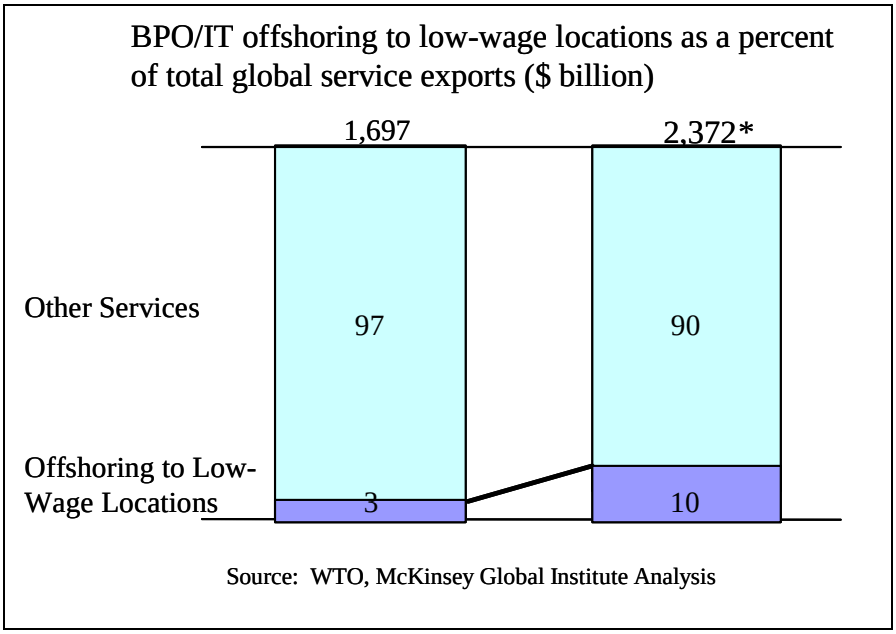


Source: World Bank, World Development Indicators 2004.

The global market for offshoring is growing at 30 percent per annum. While world trade has been expanding at a rate of 6.9 percent annually for both services and manufacturing over the last twenty years, the offshoring of services to developing countries, although still small in absolute terms, has been growing at a much faster rate. McKinsey projects a annual growth rate of 30 percent from 2003 to 2008 which would raise the offshore market's share of services trade from 3 percent to 10 percent during this five year period.[5]

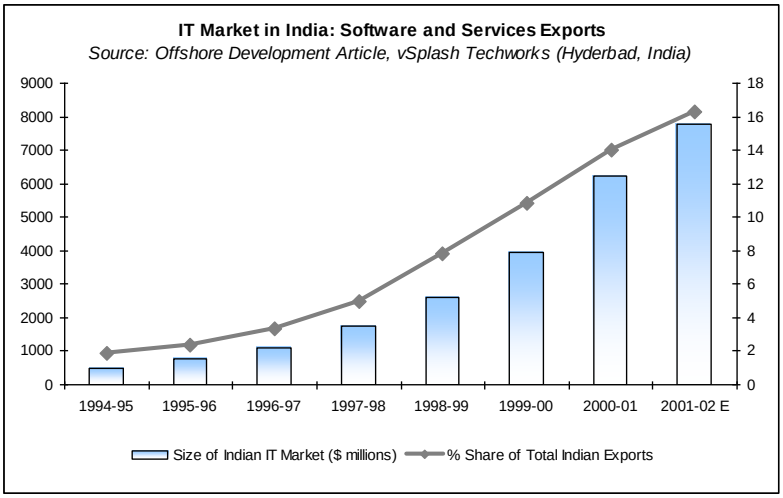
[5] ibid., p.19.

Figure 3: Offshoring a rapidly growing segment of services trade (2003-2008)



The contribution of services offshoring to the GDPs of provider countries has increased substantially over the last few years. As a pioneer and leader within the offshoring market, India has benefited tremendously from growth in this area while growth has exceeded all expectations. "In the fiscal year that ended March 2003, India's IT industry revenue was $12 billion, and $9.5 billion of this was from offshored IT projects and services".[6] It is predicted that the country's IT-enabled services exports will reach $20 billion by 2007 and make up over half of all Indian IT exports.[7] International Data Corporation has predicted that the global IT-enabled services market will account for revenues of US$1.2 trillion by 2006. For small countries like Sri Lanka, the contribution of outsourcing as a percentage of GDP could be particularly pronounced despite the relatively smaller dollar value of the industry.

Figure 4: Offshored services growing at an exponential rate



[6] Kim, Won: "On the Offshore Outsourcing of IT Projects: Status and Issues". In *Journal of Object Technology,* Vol. 3, No. 3 (2004), p.21.
[7] Mauritius Board of Investment: *Study on the Potential of Business Process Outsourcing in Mauritius*, 2003, p.17.

The percentage of the total workforce engaged in services is expanding at a rapid pace. "While the share of workers employed in service activities is about 30 percent in developing countries as a group, it has reached 53 percent in some developing economies (the informal sector comprises a large portion of this figure in the case of many developing countries) and hovers at around 70 percent in most developed countries."[8] In the US, for example, 83% of the US non-farm employment was in services, with only 11% in manufacturing during the fourth quarter of 2003. Additionally, the expansion of jobs was focused in the services sector with more than 97% of the jobs added to US payroll being service related during the 1990s.[9] In Sri Lanka, services account for 44 percent of employment and more than 55 percent of GDP.

Services offshoring expands employment opportunities in developing countries. In terms of job creation, the growth in offshoring to India has created a significant number of jobs. IT-enabled services are projected to employ up to 1.1 million people by 2008 and 3.3 million by 2015 and in the software services industry alone, direct job creation is forecast to reach 2.2 million by 2008.[10] There is also evidence that as many IT related jobs are relatively well paid, they generate a further 3 jobs in the rest of the economy a highly desirable impact that does not come from low-end manufacturing jobs.

Women are considerably advantaged by offshoring opportunities. The ability to complete more responsibilities from remote locations that might be located in or closer to their homes has allowed more women to enter the offshoring workforce. For instance, 49 percent of Wipro's (a large Indian offshoring company) workforce is female, while ICICI OneSource's workforce is 60 percent female."[11] With female education and literacy at par with that of males in Sri Lanka, the country is well positioned to take advantage of this potential.

Offshoring, especially captive offshoring, provides a significant contribution to FDI. In turn, FDI is often directly linked to economic growth because of the increased income sources and jobs generated which subsequently reduces poverty. FDI also generates several indirect benefits that increase productivity of the recipient economy through the adoption of managerial and technical best practices from foreign countries.[12]In recent years, there has been a documented shift of FDI towards the services sector. The world's inward stock of FDI in services quadrupled between 1990 and 2002 while the share of services in the world's total FDI stock rose from 25% in the 1970s to about 60% in 2002.

Services accounted for about 85 percent of outward FDI stock for developing countries, in 2001. FDI flows in services between developing countries themselves are growing even more rapidly that those between developed and developing countries. "By 2010, more than one-third of the FDI in developing countries will originate in other developing countries with India, China, Brazil, and South Africa being among the main players."[13]

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[8] UNCTAD, *Trade in Services and Development Implications,* New York and Geneva, March 2005, p.2.
[9] R. Dossani and M. Kenney, "The Next Wave of Globalization? Exploring the Relocation of Service Provision to India". Working Paper 156, pp.3-4.
[10] UNCTAD, *E-Commerce and Development Report 2003,* New York and Geneva, 2003, p.138.
[11] ibid., p.138.
[12] World Bank, "Foreign Direct Investment and Poverty Reduction", Policy Research Working Paper, p.4.
[13] UNCTAD, *Trade in Services and Development Implications,* New York and Geneva, March 2005, p.3.

Offshoring's Positive Spillover Effects

While FDI stimulates productivity improvements in general, services outsourcing has several specific characteristics that create unique spillover benefits and positive externalities for developing economies. These defining features differentiate services outsourcing from the traditional fields of manufacturing and goods outsourcing.

Incentives are created for education. While outsourced manufacturing relies on a cheap, low-skilled workforce, services outsourcing relies on a well educated and highly skilled workforce. The employment of a relatively skilled labor force in services trade increases the return to education and, thus the incentives to acquire skills that are marketable in the global economy. This is likely to become one of the crucial issues for long-term growth. Thus services offshoring has the potential to mitigate Sri Lanka's perennial problem of educated unemployed youth.

The quality of exported services improves which benefits domestic consumers, especially manufactured goods exporters, of the same services as well. For instance, call centers in developing countries that are established to cater for the US market are also being operated round the clock to provide services to local customers. The same is happening in Sri Lanka with the recently established HSBC call-center providing local services to the whole of Sri Lanka.

Technology and knowledge transfer results. Services exports and outsourcing requires technical sophistication. For example, it is necessary to have dependable and cheap communication links with the rest of the world. Repeated and frequent interactions with foreign firms and, especially, their direct presence, also increases knowledge transfers. This is not limited to technical knowledge but includes business standards and know-how which are critical for integration of national economies into the global economy and factor prominently in the long-run growth implications for any developing country.

Improvements in human capital. Export-oriented zones have been shown to improve the quality of human capital and the productivity of the local workforce in domestic economies "if foreign investors engage in substantial training and if the workplace encourages learning by doing, as in Singapore and the Philippines. Furthermore, learning can also occur at the managerial and supervisory level, thus potentially fostering local entrepreneurship. This is important since firms in developing countries often lack the production and marketing know-how required to enter world markets."[14]

The processes tend to be more environmentally friendly. Services exports and outsourcing do not create many of the negative externalities associated with manufactured goods, such as environmental pollution and lower labor standards. The effects of this type of environmental degradation are usually ignored since it is hard to quantify these negative externalities and the actual consequences are only revealed over a long period of time.

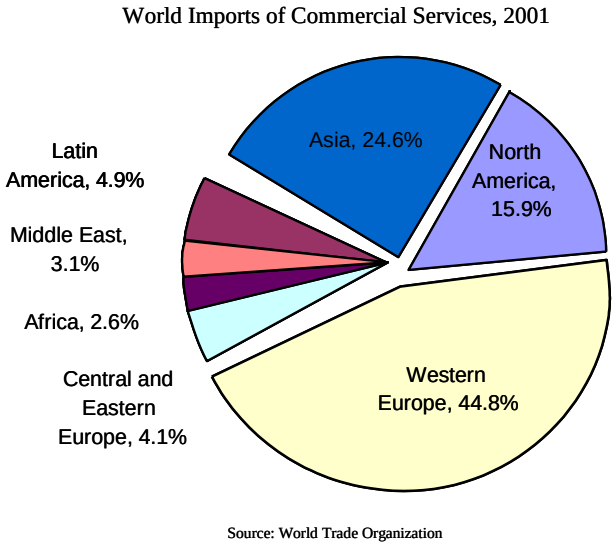
[14] International Labor Office, *Employment and Social Policy in Respect of Export Processing Zones (EPZs)*, Geneva, 2003, p. 13.

C. Describing the Services Offshoring Market

Who Demands Outsourced Services?

Developed countries provide a large proportion of the demand for business services. The United States alone accounts for 13.3% of worldwide commercial services imports.[15] The planned use of offshore outsourcing among corporate decision-makers in the United States rose by a factor of six between 2001 and 2003. A similar trend appeared in the data from a 2004 survey of the top 500 European firms where the responding companies had already offshored about 20,000 jobs and 44 percent of all those surveyed said that they intended to increased this number in the near future.[16]

Figure 5 : Europe, Asia and North America dominate services imports

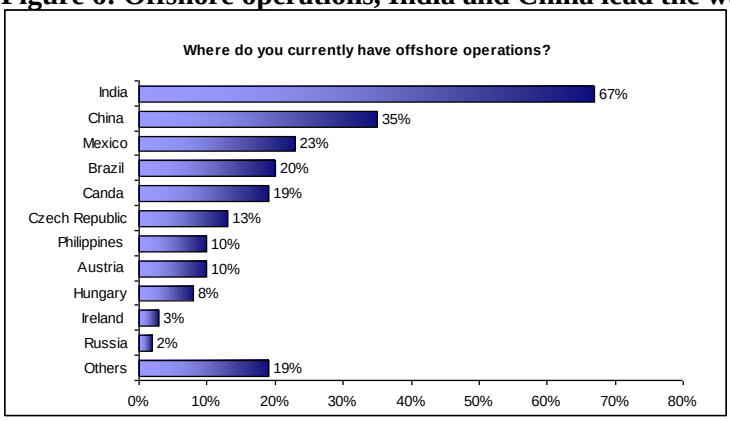


Source: World Trade Organization

Who Supplies Outsourced Services?

On the provider side, India has emerged as the leader in the international offshoring market with a market share of up to 80 percent due to its English-speaking skilled workforce and salaries that are up to 80 percent lower than those in developed countries.[17] However, as a larger number of firms look to diversify their service sources to prevent dependence on a single provider, more countries are competing to gain a bigger share of the expanding market. Other popular locations for offshoring in Asia include China and the Philippines. Geographical proximity certainly contributes to the choice of offshoring destinations, particularly when the functions being outsourced increase in complexity. In these cases, Eastern Europe is a particularly attractive option for Western European firms while some North American enterprises choose to outsource to Mexico. This indicates the creation of specific niche markets in the services outsourcing arena which can allow countries aiming to provide outsourcing services to concentrate their marketing efforts on relevant regions.

Figure 6: Offshore operations, India and China lead the way



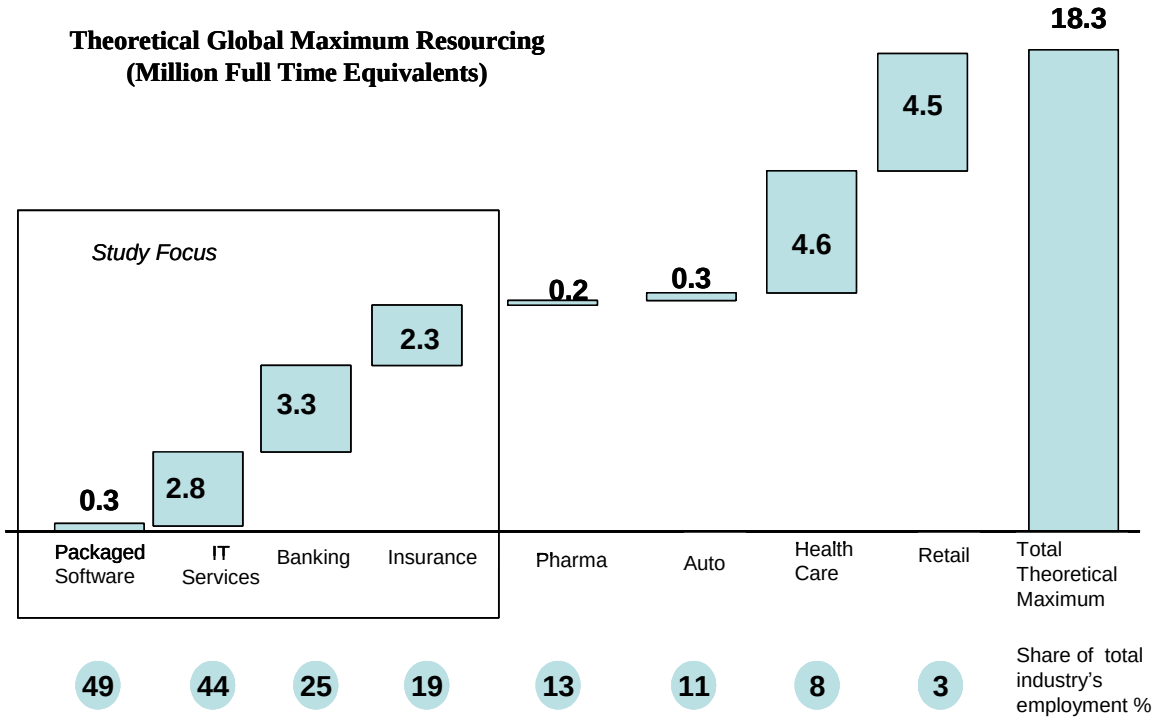
Source: A. T. Kearney, Making Offshore Decisions

[15] United States Government Accountability Office, *International Trade: Current Government Data Provide Limited Insight into Offshoring of Services*, Washington, D.C., 2004, p.7.
[16] UNCTAD, *World Investment Report 2004*, Geneva and New York, 2004, p.153.
[17] UNCTAD, *E-Commerce and Development Report 2003*, New York and Geneva, 2003, p.

Offshored Services Market Segmentation

The range of business processes being outsourced is continually expanding. Business processes can generally be classified vertically by sector (e.g., manufacturing, retail, financial services, etc.) or horizontally by the types of tasks and functions performed. A recent McKinsey study provided the theoretical maximum global resourcing in eight major sectors of the global economy. The findings indicate that up to 11% of worldwide service employment could theoretically be performed remotely.

Figure 7 : More than 18 million jobs are likely to go offshore



Source: McKinsey Global Institute Analysis

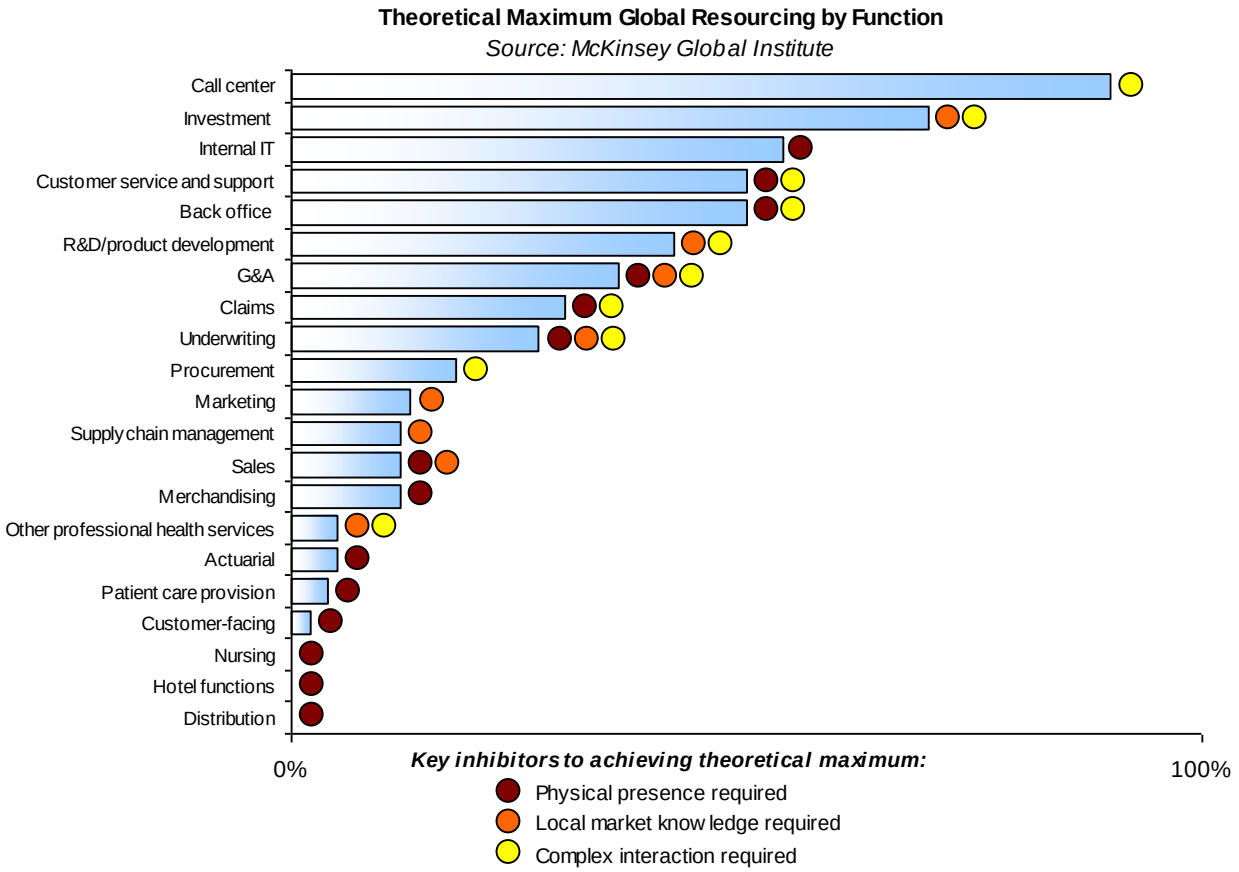
The study also projects that the offshore employment in each of the eight sectors analyzed will double by 2008. In 2003, 565,000 services jobs in the eight sectors studies were performed in low-wage countries for clients based in developed countries. This number is expected to surpass 1.2 million by the year 2008. While the retail and health care sectors show reduced growth potential due to the high amount of complex customer facing functions involved and physical proximity constraints, the study estimates that the packaged software and IT services industries "will offshore 18 percent and 13 percent of their high-wage employment demand, respectively, by 2008".[18]

The offshoring market can also be segmented by function. In general, back office functions that require a decreased amount of customer contact have the most potential to be performed in a remote location. The popularity of call centers, IT service, and back-office functions as outsourcing opportunities further supports this data.[19] Most professional services offshoring clients require university degrees but the skill level still varies across the range of functions that are typically outsourced. While R&D responsibilities

[18] McKinsey Global Institute: *The Emerging Global Labor Market: Part I – The Demand for Offshore Talent in Services*, (San Francisco, June 2005), p.24.
[19] ibid., p. 38.

require an extremely highly skilled pool of labor, common corporate functions require less specialized industry knowledge.[20]

Figure 8 : Call centers - the first but not the only business that will be offshored



As the figure above illustrates, a market segmentation can quickly illustrate which are the most promising areas for offshored services. In addition to developing a local call center industry which is beginning to take shape, Sri Lanka can also consider developing niche areas such as back office functions and customer service and support functions. An easy way to do this is to start with the companies that are currently manufacturing in Sri Lanka and offer to take over other parts of their value chain.

A review of Sri Lanka's potential vis-à-vis the drivers for services offshoring and potential strategies to take advantage of this global trend are presented in the following sections.

[20] McKinsey Global Institue, *Offshoring: Is It a Win-Win Game?*, (San Francisco, August 2003), p.6.

D. Sri Lanka and the Drivers for Services Offshoring Growth

Why do companies offshore? What makes a particular location attractive for offshoring operations? And what can Sri Lanka do to brand itself as an offshoring hub? This section attempts to shed light on these questions.

Why do companies offshore?

The primary reason firms engage in offshore processing is to reduce labor costs. Due to increased competitive pressures, companies are constantly seeking ways to minimize costs. "With revenues largely stagnant since 2000, firms are under intense pressure to cut costs while retaining service levels."[21] Since salaries comprise a significant portion of variable costs, offshoring of business processes can provide sizeable savings to firms in developed countries. The findings of a technology research firm indicate that organizations that offshore accounting and customer service functions to China can possibly save 30 to 50 percent in labor costs when compared to executing those same processes in Tokyo, London, or Chicago. To give a specific industry example, a leading e-business software company in the United States was reportedly able to achieve 40 to 45 percent lower costs per overseas employee by outsourcing to programmers in India who earn as little as one third of what their counterparts receive in the United States.[22]

Firms can also reduce capital costs through a successful offshoring strategy. In the case of professional services, an industry study conducted for the United States shows that, of the approximately $1.45-$1.47 of value derived from every dollar spent offshore, US firms receive $1.12-$1.14, while supply firms receive 33 cents of value.[23]

Firms can increase productivity and competitiveness through various channels. Outsourcing generic business processes allows firms to focus on their core competencies and increase innovation initiatives. This often enables firms to expand their operations and broaden their customer base. "For instance, tax authorities in high-cost countries can at present afford to check only a small number of tax declarations every year; by shifting some work to lower cost locations, they could raise the audit ratio significantly and improve their intake."[24] Firms can also offer a wider range of services offered at a faster rate than if they managed all operations in-house. By offshoring certain business processes, multinational companies can operate on a round-the-clock schedule which can accelerate the delivery of work products, improve customer satisfaction, and reduce costs.

Organizational restructuring to achieve greater operational efficiencies is another consideration when resorting to outsourcing as a business strategy. Process performance is often improved because the service providers in developing countries often have very specialized experience in performing the unique operations that they are hired to execute. In some instances, outsourcing also presents an opportunity for better risk management and diversification which can reduce firm liabilities and direct responsibilities.

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[21] R. Dossani and M. Kenney, "The Next Wave of Globalization? Exploring the Relocation of Service Provision to India". Working Paper 156, p.10.
[22] United States Government Accountability Office, *International Trade: Current Government Data Provide Limited Insight into Offshoring of Services*, Washington, D.C., 2004.
[23] UNCTAD, *Trade in Services and Development Implications,* New York and Geneva, March 2005.
[24] UNCTAD, *World Investment Report 2004,* Geneva and New York, 2004.

While benefiting from the advantages offered by outsourcing, companies must also be able to manage the inherent risks. A strong internal governance system is a necessity in order to ensure effective monitoring of the deployment of resources between offshore and local provision of services. Additionally, this is crucial to maintaining high quality standards despite the geographical barriers that are a reality of offshoring. Companies that feature highly unionized work forces must also be careful to balance the political opposition that might accompany any decision to offshore certain service functions. Aside from handling this domestic risk, the outsourcing firm must also consider the geopolitical risk in the chosen offshore location.

What makes a particular location attractive for offshoring?

What does it take to attract offshoring operations? In 2004, A.T.Kearney constructed an Offshore Location Attractiveness Index to evaluate countries around the world. The index consists of three major categories including financial structure, people skills and availability, and business environment. Since cost advantage was determined to be the primary driver of offshoring decisions, financial structure was assigned 40% of the total weight, while people skills and business environment each accounted for 30% of the remaining weight.[25]

Table 1 : Offshoring Attractiveness Index

Category	Sub-Category	Key Factors
Financial Structure (40%)	Compensation Costs	Average wages and median compensation costs for relevant positions
	Infrastructure Costs	Electricity and telecommunications costs
	Real Estate Costs	Office rents per square meter
	Regulatory Costs	Corporate tax rate and quantification of other regulatory costs
People Skills and Availability (30%)	Workforce availability	Population and total workforce
	Labor Force Quality	Literacy rates and English-speaking ability Proportion of population pursuing tertiary education Education expenditure as a % of GDP Availability of information skills
	Reputation	Existing IT and BPO market size Quality rankings
Business Environment (30%)	Infrastructure	Connectivity, availability of telecommunications, electricity, transportation
	Regulatory Policies	Security of intellectual property and piracy rates Barriers to doing business
	Economic Stability	Fluctuation of exchange rates
	Political Stability	Corruption and governance

Source: Adapted from A.T. Kearney's Offshore Location Attractiveness Index

[25] A.T.Kearney, *Making Offshore Decisions,* 2004, p.5.

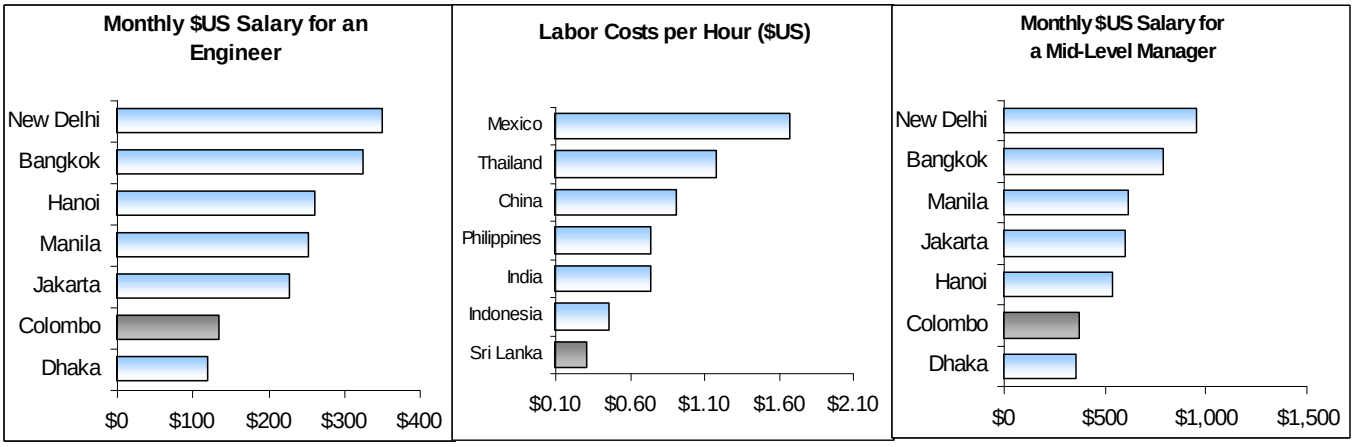
There are several factors to consider in determining how strong any given country is in each of these categories. Although this paper uses the same categories and weights as defined through A.T.Kearney's Offshore Location Attractiveness Index, some modifications have been made to sub-categories and metrics in order to benchmark Sri Lanka against its regional competitors with available data. A summary table of the criteria used to evaluate Sri Lanka's potential in comparison to other countries providing offshore services follows. The remainder of this section reviews:

- The cost structure
- The quality and availability of labor
- The business environment

The Cost Structure

Sri Lanka boasts some of the cheapest labor costs in the region. Since worker compensation constitutes a large portion of the variable costs borne by offshoring firms, this is a key determinant of an offshoring location's attractiveness. A comparison of labor costs per hour against some of Sri Lanka's competitors in the provision of offshoring services indicates Sri Lanka's relative attractiveness in this area. Labor costs per hour are significantly lower than those in other developing countries. Apart from looking at general labor costs, it is particularly important to study the wage rates for the respective occupations and functional responsibilities that might be outsourced.

Figure 9 : Sri Lanka's Labor costs remain competitive



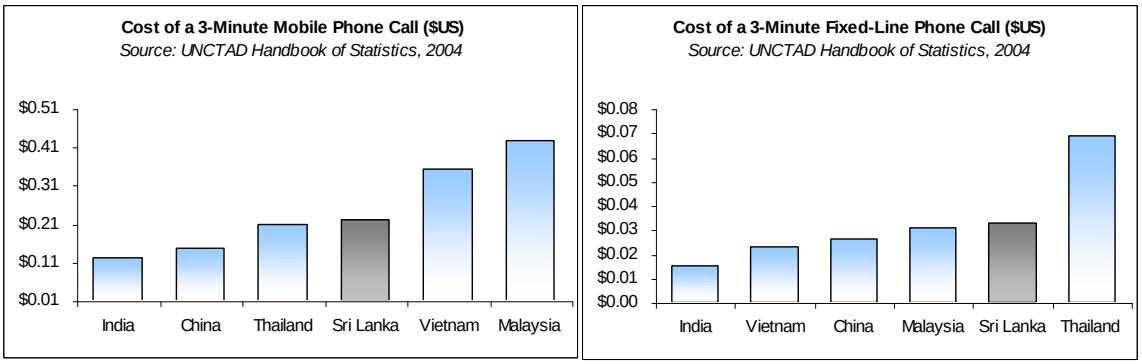
Source: Bangladesh Board of Investment, 2004

Source: Economist Online Country Briefings Economic Data 2004

Source: Bangladesh Board of Investment, 2004

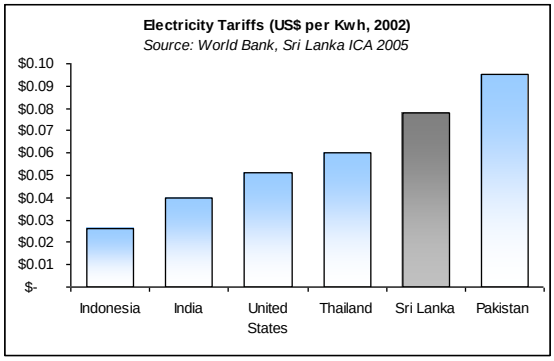
The island continues to suffer from relatively high telephone charges. Although wages comprise the bulk of variable costs incurred by foreign firms, other infrastructure and business start-up costs must also be considered. In the area of telecommunications costs, Sri Lanka does not appear to have a distinct advantage. The cost of a 3-minute fixed line phone call in Sri Lanka is almost double the cost in India, a country that specializes in call center services. Mobile costs are also significantly higher than those in India but competitive when compared with other countries in the region.

Figure 10 : High call charges represent an unfinished telecom reform agenda



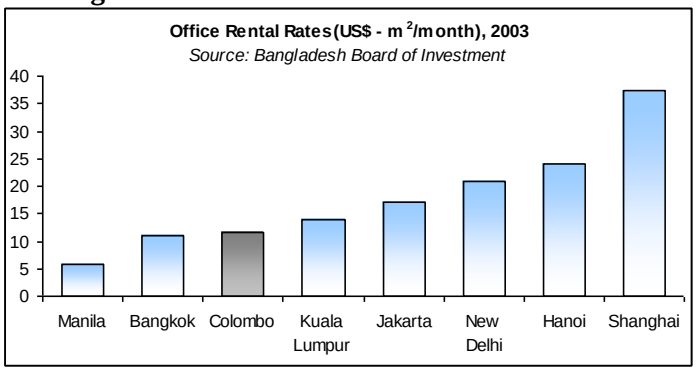
Sri Lankan businesses pay some of the highest electricity costs in the world. High electricity prices are charged to industries and businesses in order to cross-subsidize residential customers resulting in electricity tariffs that are high in comparison with most other countries. [26] In addition to this, because of unreliable supply, additional costs are incurred to acquire and operate expensive generators. This often inhibits firms from investing productively in their core businesses.[27]

Figure 11: Electricity tariffs a constraint



Office rents in Colombo are low, on average, when compared with other major Asian cities. While the average monthly cost per square meter is only $11.60 in Colombo, comparable costs in New Delhi range between $15.45 and $26.15. Office space in Shanghai, another major offshoring destination, costs nearly three times as much compared to Colombo.

Figure 12: Office rents remain reasonable



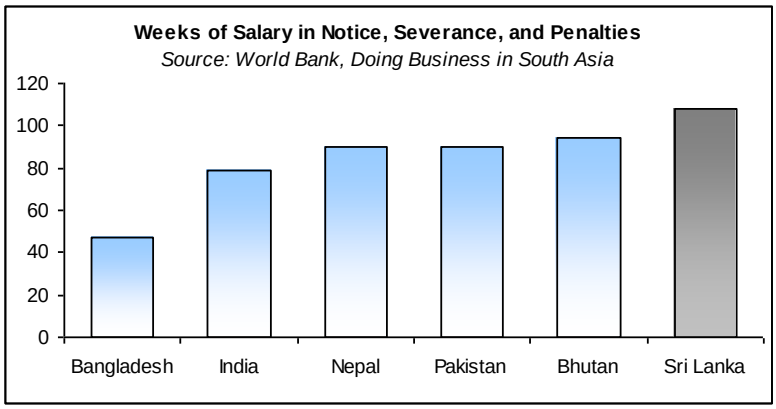
Sri Lanka shows a pronounced weakness in the area of regulatory costs. The corporate income tax rate in the country is on the high end in relation to other countries in the region. However, in many cases, this comparison is not particularly significant since several governments offer substantial tax breaks to specific firms engaged in export service providing.

Perhaps the most significant cost arises from rigid labor regulations. South Asia has the highest firing costs in comparison with other countries in the region. Only in Sierra Leone are companies forced to pay higher severance payments to dismiss redundant workers and lengthy court battles in Sri Lanka can often result in

[26] World Bank, *Sri Lanka: Improving the Rural and Urban Investment Climate,* 2005, p.20.
[27] ibid., p.19.

substantive legal expenses and inefficient use of resources.[28] The Sri Lankan system also places undue discretionary powers in the hands of the labor commissioner, who has traditionally been prone to base severance payments on the ability of the employer to pay – thus effectively penalizing multinationals with deep pockets, the very firms that the country is trying to attract with an outsourcing strategy.

Figure 13: High severance payments inhibit investors

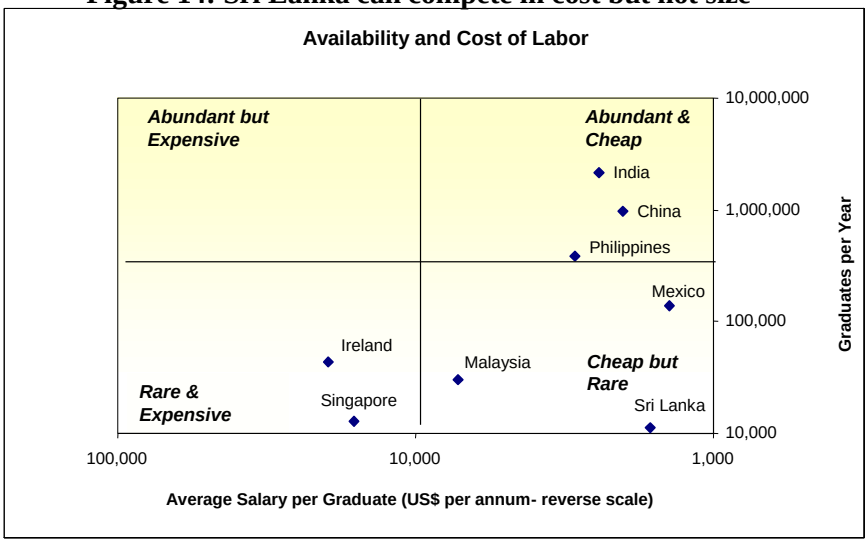


Labor quality and availability

Offshoring companies are looking for large numbers of highly skilled and educated workers, particularly those trained in technical fields. It is not enough to have a low-cost wage structure. Several studies assess the attractiveness of a particular country as an outsourcing location by comparing the relative cost against the quality and size of the labor force. The strong presence of these two factors is primarily what contributes to India's and China's positions as the leading outsourcing destinations.

Due to its small size, Sri Lanka does not have the population size that China and India benefit from. While China and India have labor force sizes of 778.1 million and 472 million respectively[29], Sri Lanka's total population itself is below 19 million people and the country's labor force stands at 7 million. The large pool of Indian workers in various densely populated cities allows foreign companies to attain greater savings by taking advantage of the economies of scale that result from concentrating activities in fewer locations. While the operations of certain processing or call centers in developed nations might be scattered in a number of places due to shallow local labor pools, large cities in developing nations

Figure 14: Sri Lanka can compete in cost but not size



[28] World Bank, *Doing Business in South Asia: What to Reform and Who to Learn From*, 2005, p.2 and 2006 p24.
[29] CIA World Factbook, March 2005 (www.nationmaster.com)

provide large workforces that allow for significant expansion in a single area. Mumbai, Delhi, and Bangalore, for example, have 5 million inhabitants while other cities like Chennai, Hyderabad, and Kolkota feature similarly large pools of workers. From a quantitative standpoint, while the median size of a call center is 1000 employees in India, the average size of a similar center in the US is under 400, with many centers housing only between 150 and 300 employees.[30]

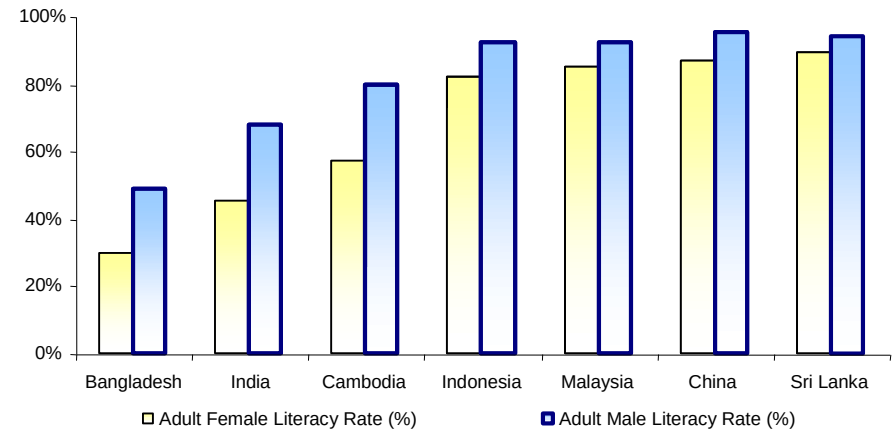
India leads all markets in the number of university graduates that are produced each year (more than 2 million) because of its large population and numerous educational institutions. Additionally, it ranks on the low end of the average salary spectrum which is why it has become a particularly attractive offshoring location. In comparison, Sri Lanka has a much smaller number of annual graduates who work at a relatively low wage despite their high skill level. [31]

Sri Lanka's comparative advantage is in the quality and not the quantity of its labor force. Since professional services provision requires educated workers with English-speaking ability and often technical skills as well, it focuses on a specific section of the labor force rather than including a country's total working population. A successful outsourcing strategy for Sri Lanka would therefore focus on niche markets rather than trying to compete directly with generic services that are being offered in India and elsewhere.

Despite high literacy rates, English has been neglected as a medium of instruction. In terms of literacy, the country ranks far ahead of many countries competing for a share of the offshored services market in the area of adult literacy. Sri Lanka's colonial past has also endowed the country with a large English-speaking middle-class, as well as a strong legal and accounting profession based on the British system and a cultural affinity for all things English. Unfortunately, the use of English as a medium of instruction was gradually dropped during the 1970s and 1980s as a rising tide of nationalism swept the country and the younger generation is struggling to catch up. Government must address this issue when considering education policy reforms.

Figure 15: Sri Lanka High Adult Literacy Levels (2000)

Source: World Bank Development Indicators Database



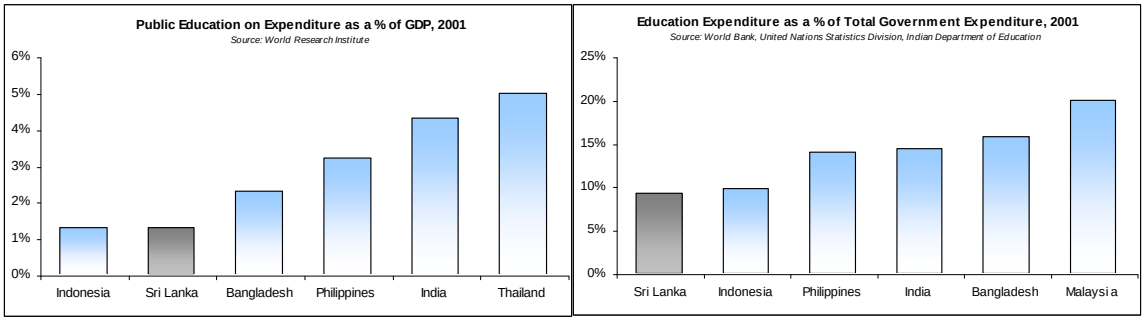
[30] R. Dossani and M. Kenney, "The Next Wave of Globalization? Exploring the Relocation of Service Provision to India". Working Paper 156.

[31] A study on the potential of BPO in Mauritius done by the Mauritian BOI in July 2003 that cited a NASSCOM survey as the source while data for Sri Lanka number of graduates is from 2002 as presented on the Sri Lankan University Grants Commission website and average wage is the annualized wage for a Sri Lankan engineer based on data from Bangladesh Board of Investment study.

Tertiary education remains limited in Sri Lanka. The types of higher education opportunities available are a key factor in developing a skilled workforce. One of the fundamental policy objectives of the Sri Lankan government is to provide universal access to primary and secondary education.[32] From an offshoring standpoint, however, firms will be particularly interested in the percentage of the population that has pursued studies beyond secondary schooling. Sri Lanka's tertiary education system includes universities, professional and other courses, and technical education, with the overall tertiary education enrollment rate at 11%. This number slightly exceeds the South Asian average of 10% and grew from an average of 8% in 1997, largely due to the expansion of public universities and an increase in private tertiary institutions and courses. [33]

Government continues to under-invest in the education system compared to some of its neighbors. The country's education sector was initially given a high priority in the 1930s and 1940s with policy makers recognizing the positive social returns from a heavy investment in human capital.[34] Nevertheless, in recent years, other Asian countries have surpassed Sri Lanka in their support of the education sector. Government spending on education as a percentage of overall government spending and as a percentage of national income is relatively low and is even less than the South Asian regional average in both cases.[35] Additionally, the amount of resources devoted specifically to university education in Sri Lanka is extremely low, at only 1.58% of total government expenditure and 0.42% of GNP in 2003.[36]

Figure 16: Sri Lanka is under investing in education



Technical education has been neglected. Despite Sri Lanka's early recognition of the contribution of education to economic and social development, the country now lags behind several of its regional competitors. In China, for example, radio and television universities have been created alongside traditional schools in order to meet the huge demand for technical education.[37] Likewise, India "has one of the most developed educational systems in the world. In addition to its college system, which produces hundreds of thousands of graduates a year, India has two prestigious institutions that turn out its premier graduates. The seven IITs produce 3,500 graduates a year while the four Indian Institutes of Management produce 2,000 students with MBAs trained in the American case study format." 1/3 of college graduates speak more than two languages fluently, some speak 6.[38]

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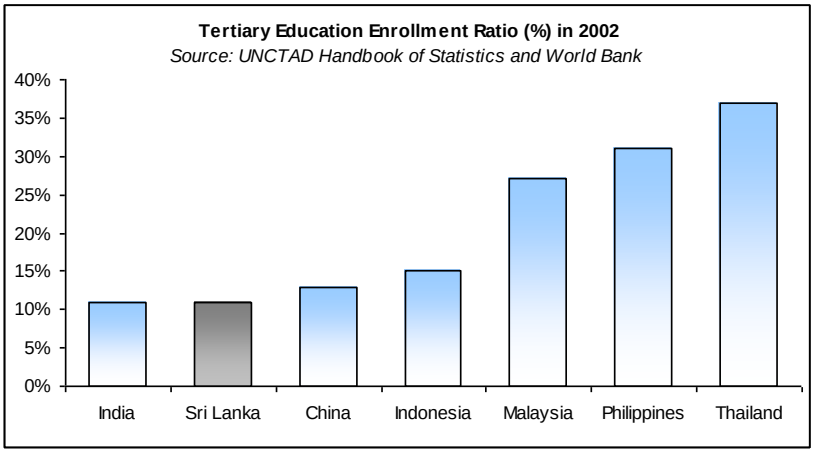
[32] World Bank, *Treasures of the Education System in Sri Lanka: Restoring Performance, Expanding Opportunities and Enhancing Prospects*, 2005, pp.1-2.
[33] ibid., p.8.
[34] World Bank, *Treasures of the Education System in Sri Lanka: Restoring Performance, Expanding Opportunities and Enhancing Prospects*, 2005, p.1.
[35] ibid., p.34.
[36] Sri Lanka University Grants Commission website (www.ugc.ac.lk)
[37] T. Furniss. *China: The Next Big Wave in Offshore Outsourcing,*, 2003, www.bpo-outsourcing.com.
[38] T. Furniss and M. Janssen. *Offshore Outsourcing Part 1: The Brand of India*, www.outsourcing-asia.com.

The strong emphasis placed on mathematics and science in school curricula coupled with English proficiency has created an Indian labor force that is ideally positioned to engage in even the more technical market segments of offshore service providing. The Indian government has also taken substantial steps to promote growth of this phenomenon. In partnership with local IT industry participants, the government formed the Indian Institute of Information Technology (IIIT) in 1998 in an attempt to further increase the IT workforce in India. In addition to demonstrating the importance of the education system in determining offshoring success, this also illustrates an effective collaboration between the government and industry which is essential to branding a country as an attractive offshore destination.[39]

Figure 17: Tertiary enrollment needs to be expanded



Sri Lanka has taken a few similar steps in the correct direction, albeit on a much smaller scale. Although the 15 universities in the country might not yield an extremely high output of graduates, other institutions in the tertiary sector are providing a boost in the available number of Sri Lankan skilled workers. For example, the department of Technical Education and Training oversees programs in 36 technical colleges offering vocational training programs for 54,000 young people in 2004. There are also various other apprenticeship and training authorities that have been created under the direction of the Tertiary and Vocational Education Commission. Other institutions churning out large numbers of qualified workers annually include the Sri Lanka Institute of Information Technology, the Institute of Chartered Accountants in Sri Lanka, the Sri Lanka branch of the Chartered Institute of Management Accountants, the National Institute of Business Management, and the Institute of Bankers of Sri Lanka.[40]

In addition to possessing the required technical skills, a workforce with cultural familiarity is another critical requirement for a country attempting to provide outsourcing services. In addition to being able to speak the required language, however, knowledge of various idioms and colloquialisms will also be essential for tasks that involve customer interaction and customer relationship management. This is why neighboring markets sometimes provide a greater potential for developing offshoring relationships since cultural similarities might be more prevalent within closer geographical regions.

The Business Environment

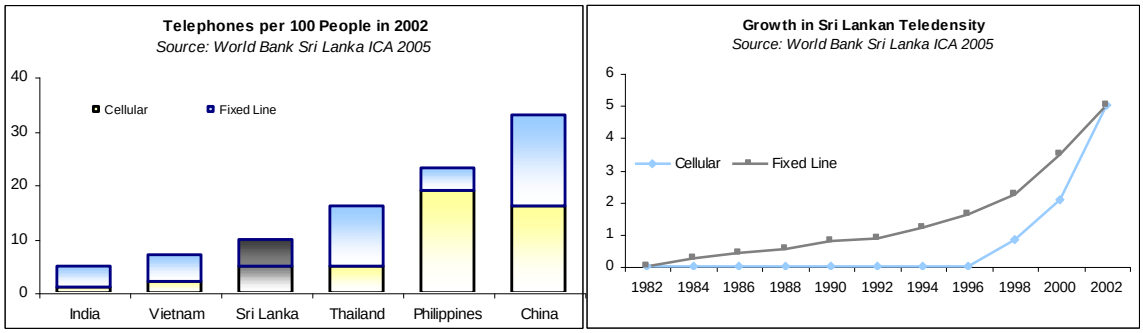
In selecting potential investment locations, entrepreneurs look for a stable political and macroeconomic environment. Providing such an environment remains challenging in the Sri Lankan context. Such issues are, however, beyond the scope of this paper. This section focuses on the improvements in global competitiveness that Sri Lanka can achieve while working towards a permanent settlement to the ongoing ethnic crisis.

[39] *Outsourcing to India – Why?*, www.savitr.com
[40] Central Bank of Sri Lanka, *2004 Annual Report*.

Increased offshoring depends on cheap and reliable telecommunications and IT infrastructure. Deregulation of these industries catalyzes their development and competitiveness at an early stage. Some cite the reform and deregulation of the communications infrastructure in India as the most significant policy reform for the information technology enable services sector. "Beginning in the early 1990's, India liberalized its public monopoly telecommunications system and permitted Indian private providers to begin offshoring services. "They could select their specializations, which ranged from providing niche services such as backbone and network management to full-service integrated voice and data operations. For larger cities, the result has been the creation of a telecommunications network with quality and cost levels approaching that of developed countries. Recently this service is being extended to second-tier cities, i.e., those with a population in excess of one million persons."[41]

Telecommunications remains one of the fastest-growing sectors in Sri Lanka, largely due to privatization of the industry. Sri Lanka began reforming this sector several years ahead of neighboring countries and started privatizing the sector in 1996. Since then, teledensity in the fixed line sector has grown rapidly while the mobile sector, subject to private competition from day one, has experienced even more rapid growth.[42]

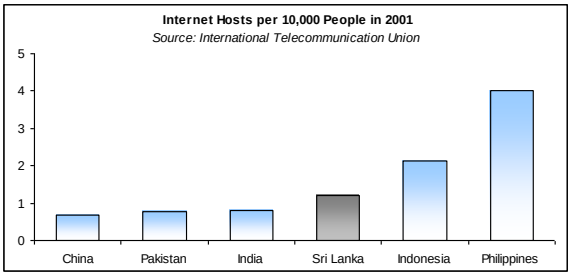
Figure 18: Rapid take-off in the telecommunications industry



Unfortunately, telecom regulation has not kept pace with privatization. The unfinished telecom reform agenda has left the country with a poorly regulated sector that has not been able to promote rapid expansion of a high-bandwidth data network. Sri Lanka should extend growth of the telecoms industry to the use of the Internet since this is one area where Sri Lanka lags behind some of its competitors. In 2002, Sri Lanka had 123 internet hosts per million people while the comparable figures for Malaysia and the Philippines were 3,550 and 480 respectively.[43]

Since high speed data transmission is also a regular requirement for offshore service providing, countries aiming to succeed in this are should have developed internet facilities. Access to broadband is also highly desirable although widespread broadband penetration is not common in several of Asia's developing countries. Sri Lanka lags behind many of its competitors in the availability of Internet hosts and as a result, does not boast as many Internet users as many other Asian countries. A notable step in the right direction is the recent establishment of the national ICT Agency which is committed to

Figure 19: Internet access remains a constraint

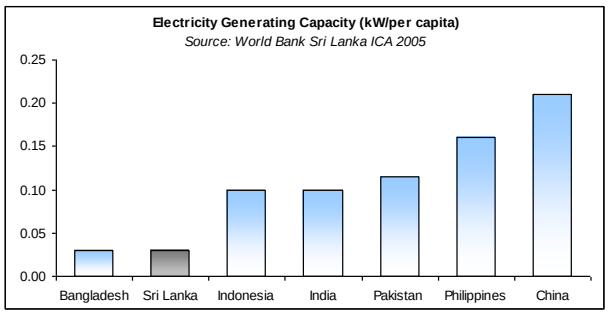


[41] ibid., p.
[42] World Bank, *Sri Lanka: Improving the Rural and Urban Investment Climate*, 2005, p.22.
[43] ibid., p.23.

expanding internet access and is spearheading the roll out of a high-speed network on a least-cost subsidy basis to the island's under-served areas.

Electricity supply and availability, is also a key challenge for Sri Lanka. Since the Ceylon Electricity Board sells electricity below the cost of supply, there is little incentive to expand access to the national grid. "Moreover, delays in implementing the plan for expanding least-cost generation capacity, and reliance on ad hoc purchases of emergency power, have resulted in the rapidly growing demand outstripping supply."[44] Rolling blackouts were a common occurrence in the early 2000s and resulted in many independent businesses resorting to expensive private generators.

Figure 20: Electricity shortages hamper ICT growth



A well developed physical infrastructure system is also desirable but while certain utility and transportation infrastructure deficiencies in India have presented problems, several corporations have developed private solutions to these problems. For example, some companies operating out of India resort to multiple back-up power supplies and use private buses to shuttle employees to work and avoid the absenteeism that often arises due to the poor transportation alternatives available. While these added outlays do add up, these costs appear to be manageable in the context of the overall savings generated.[45]

The Sri Lanka transportation system is an area of pronounced weakness in the country's business environment. Despite the island's large network relative to both its population and its land area, the majority of the roads are in poor condition and an insufficient amount is devoted to the upkeep of existing roads and road rehabilitation.[46] Although this might be a greater problem for manufacturing firms where a large number of goods have to be transported on a daily basis, it can also have a substantial impact on service firms due to the resulting absenteeism among employees. The unreliability of public transportation also contributes to this problem. Since reliability and promptness are key requirements for a firm providing offshoring services, this might prove to be a serious constraint for Sri Lanka if resources are not devoted towards improving the road network.

Government policies regarding the security of intellectual property will also affect a country's potential to attract outsourcing clients. The IT industry in countries with advanced IT developments is extremely protective of intellectual property rights and will want to operate in an environment where workers are taught to respect such rights.[47] Most countries in the Asian region face significant challenges in establishing strong intellectual property protection to fight rampant piracy and several commentaries on the Sri Lankan IT sector also cite this as a problem. Annual software piracy losses in several other Asian countries that are popular offshoring destinations exceed $100 million, such as China ($3,565M), India ($519M), Indonesia ($183M), Thailand ($183M), and Malaysia ($134M).[48] Although several intellectual

[44] ibid., p.20.
[45] ibid., p.
[46] ibid., p.21.
[47] Kim, Won: "On the Offshore Outsourcing of IT Projects: Status and Issues". In *Journal of Object Technology*, Vol. 3, No. 3 (2004), p.
[48] BSA and IDC, *Second Annual Global Software Piracy Study*, May 2005, p.6.

property agreements have been signed in the last few years, enforcement and public awareness regarding intellectual property rights still pose significant challenges to the government.[49]

There are several risks that companies take when outsourcing to foreign countries. Therefore, the overall investment climate should be one that mitigates these risks. Since political and macroeconomic risk factor into the decision-making process, countries with a greater degree of stability in these arenas will be more attractive investment prospects. As demonstrated in a recent investment climate survey of Sri Lanka, the country performs quite well in comparison with other South Asian countries on the measure of governance. Aside from more pronounced political instability due to the ongoing civil unrest, Sri Lanka ranks higher in the other areas of governance. The country also outperforms other lower middle income countries.[50]

Providing incentives in order to promote the win-win nature of offshoring agreements is also an integral part of the process. While the service providers offer low costs and high quality which are desirable features, governments in countries exporting offshore services also play a role in creating a supportive environment for this industry through their approach to taxation and their encouragement of foreign investment. In India, for example, some policies promoting exports include allowing 100 percent ownership by foreign firms of their Indian subsidiaries, along with the duty-free import of equipment to be used in exporting industries and the elimination of taxation of exported products and services. [51] Singapore is another prime example of a country that remains a favored destination for regional service functions despite high costs because of its pro-business tax and regulatory environment.[52]

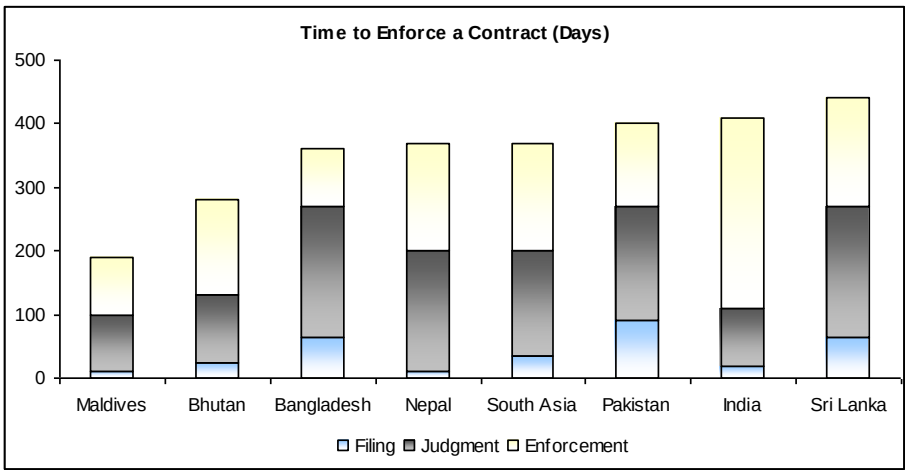
One noteworthy innovation in India has been the creation of an autonomous organization called Software Technology Parks of India (STPI) which was set up by the Ministry of Information Technology in order to promote computer software exporting. "The STP scheme supports the development and export of computer software using data communication links or in the form of physical media; it also encourages professional services. "Companies in these parks are exempt from import duties and corporate taxes during the first five years of operation. In recognition of the many benefits of IT-enabled services such as employment potential, generation of new direct or indirect investment, foreign exchange earnings, skills and technology transfer, development potential for remote/rural areas, and increased competitiveness, many State Governments have planned to establish entire IT parks for such services." [53]

On the other hand, in Sri Lanka there are several regulatory barriers to conducting business that must be addressed if the country is to become a thriving offshore location. The Commissioner of Labor has ultimate discretion regarding termination of employment and to date, has never consented to non-voluntary dismissal.[54] Moreover, the size of mandated severance payments are often made on the basis of ability to pay – which penalizes the wealthiest multinationals, the very companies that Sri Lankan governments would like to attract. This situation results in labor market rigidity which is a deterrent to FDI. Other hindrances to companies trying to do business in Sri Lanka include the exceptionally long time it takes to enforce contracts in the country along with the lengthy process required to register property in the country. At 440 days, the time it takes between filing and enforcement of contracts in Sri Lanka exceeds that of all other South Asian countries. A cumbersome law for property registration

[49] US Treasury Online Document Library, *National Trade Estimate Report for Sri Lanka*, 2004 (www.ustr.gov)
[50] World Bank, *Sri Lanka: Improving the Rural and Urban Investment Climate*, 2005, p.16.
[51] ibid., p.
[52] A.T.Kearney, *Making Offshore Decisions*, p,
[53] International Trade Centre, *Offshore Back Office Operations: Supplying Support Services to Global Markets*, Geneva, 2000, p.
[54] World Bank Working Paper, *Doing Business in South Asia: What to Reform and Who to Learn From*, p.16.

requires 8 procedures which ultimately costs 63 days in processing time and 5.1% of the property's value.[55]

Figure 21: Legal delays continue to stifle ICT offshoring



Source: World Bank Doing Business Database

Summary of Sri Lanka's Comparative Position

Sri Lanka's main strengths as a potential offshoring destination lie in the relatively low wage and cost structure. Even highly skilled and well-qualified workers are paid low salaries relative to other Asian countries. Despite its small size, the country turns out a significant number of technically qualified individuals especially in IT, accounting and business management.

There are some weaknesses that the island can never overcome, most importantly its size. However, other weakness such as the neglect of English and science, the limited number of graduates, and rigid labor practices can and must be overcome by concerted government and private sector action. There is tremendous scope for improving the business environment, improving contract enforcement and promoting a modern streamlined government to business interface as well as improving the state of the country's basic infrastructure. The following table provides a summary of Sri Lanka's comparative position in the various categories discussed above.

Table 2 : How Attractive is Sri Lanka as an Offshoring Destination?

Financial Structure		***People Skills/Availability***		***Business Environment***	
Compensation Costs	●	Labor Availability	◔	Infrastructure	◔
Infrastructure Costs	◔	Labor Quality	◑	Regulatory Policies	◔
Real Estate Costs	◑	Reputation	◔	Stability	◔
Regulatory Costs	◔				
Factor Rating (1-4)	**3.5**	**Factor Rating (1-3)**	**0.75**	**Factor Rating (1-3)**	**0.75**

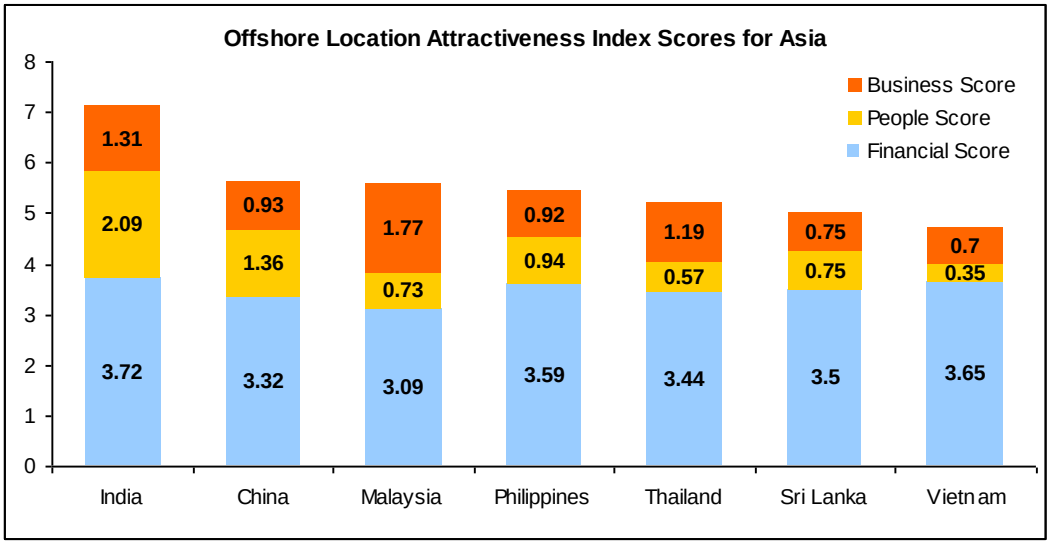
Source: Authors' estimates

[55] ibid., p.17.

The figure below presents the summary of this assessment of Sri Lanka as an offshoring destination for IT and professional services. It compares Sri Lanka's data with that of other countries in Asia. The figure illustrates that Sri Lanka performs relatively well in terms of pure financial costs i.e. the cost of labor, rent and other input costs. This is good news, as for many companies, this is the primary driver for offshoring initiatives. However, there is clearly potential to improve the islands people skills and business environment.

Reputation is also an important factor in attracting offshoring investments since the quality of work that is produced and the resulting client satisfaction are extremely important. Firms need to know that service providers will function with flexibility, reliability, and promptness. Indian service providers, for example, substantiate their claims of producing high quality work by pointing to their CMM Level 5, Six Sigma, ISO 9000 and BS 7799 certifications. [56] India has essentially created a value proposition for itself as a leader in the IT software, IT outsourcing, remote development and services arena. The world looks towards India as a leader in the field and the country can prove its abilities with its vendor sophistication "with more than 200 companies being quality accredited and serving the needs of over 255 Fortune 500 companies."

Figure 22: Sri Lanka – some way to go to challenge India and China



Source: Adapted from A.T.Kearney, *Making Offshore Decisions*, 2004

With regard to reputation and worldwide recognition, some of Sri Lanka's neighboring competitors have already developed brand names and broadly marketed their strong comparative advantages in certain sectors of the global offshoring services market. For example, India has established its position as a leader in software development based on an early start and extensive IT experience while the Philippines has leveraged its large American-style speaking population and rapid telecommunication and technological advances to develop a prominent call center industry. Sri Lanka, on the other hand, has yet to establish itself as a high-caliber services offshoring location. The existing offshored market size is relatively small and extensive quality rankings have not been conducted as in India.

However, offshore manufacturing already exists in Sri Lanka and has been particularly successful within the garments industry which has developed as a response to quota protection. Although the export of professional services features several characteristics that are quite different from those involved in

[56] T. Furniss and M. Janssen. *Offshore Outsourcing Part 1: The Brand of India*, www.outsourcing-asia.com.

manufacturing offshoring, the existence of this market could potentially provide insight when considering the relevant policy reforms to address in order to spur industry growth. This existing market might help in terms of establishing a reputation as a popular offshoring destination even though Sri Lanka's export service providing market is still in a relatively infant stage.

Increasingly, there are factors that offset the advantages of India's reputation since certain Indian cities are now experiencing congestion, rising wages, staff turnover and other costs, with firms facing an increased risk of losing proprietary knowledge to competitors. These negative effects give additional hope for countries like Sri Lanka that have not yet developed these types of mature offshoring markets. This first mover advantage will prove to be a comparative advantage as firms look for additional locations to disperse their service outsourcing requirements. As the head of an Indian company looking to start up offshoring ventures in Sri Lanka put it recently, "why try and enter a crowded marketplace in India where I could be the 24th or 25th company in my area when I can establish in Sri Lanka and be number one or two".

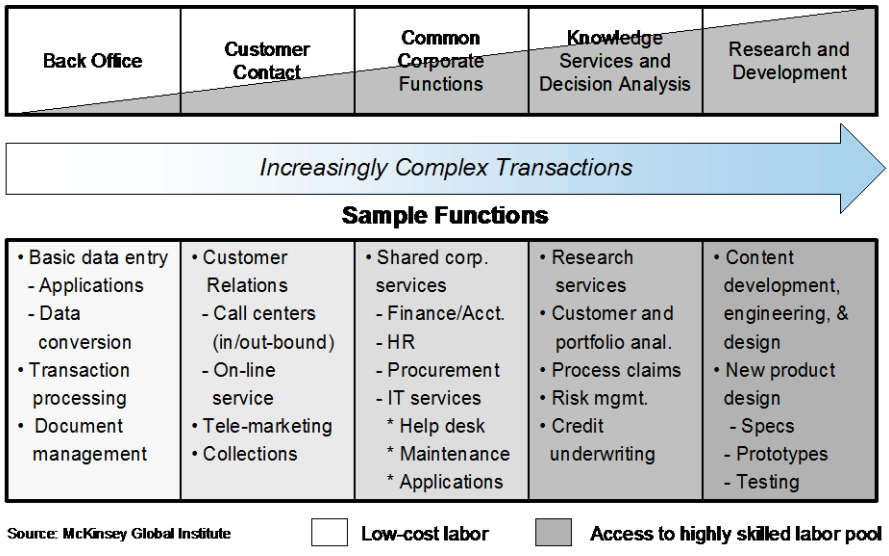
E. Conclusions and Policy Recommendations

Potential Target Markets

While India and China have been able to establish a presence in multiple industries because of their expansive labor force, quickly growing economies and solid education system, other countries have built niche markets to complement their capabilities. Some examples of this include the Philippines' specialization in call centers, medical transcription, and animation, Singapore's focus on data processing for financing companies, and Ireland's position as a hub for European shared services.[57] Sri Lanka would fare better by similarly focusing on a specific segment of the market. The figure below summarizes the main offshoring opportunities across a single organization: from back office, to customer contact, to common corporate functions, to knowledge services and decision analysis, and research and development. These are the basic areas in which Sri Lanka can develop a niche.

Back office processes add less value due to their decreased risk and complexity and therefore occupy the lower end of the skill spectrum. These activities that do not spur innovation and increased knowledge transfer, thereby decreasing some of the potential spillover effects of services offshoring. Therefore, although Sri Lanka should not completely overlook this segment, back office service provision is not an area that deserves a focused market development strategy. For developing countries providing offshored services in general, moving up along this chain of value added is critical to fostering internal development and innovation.

Figure 23: Offshoring Opportunities Across The Organization



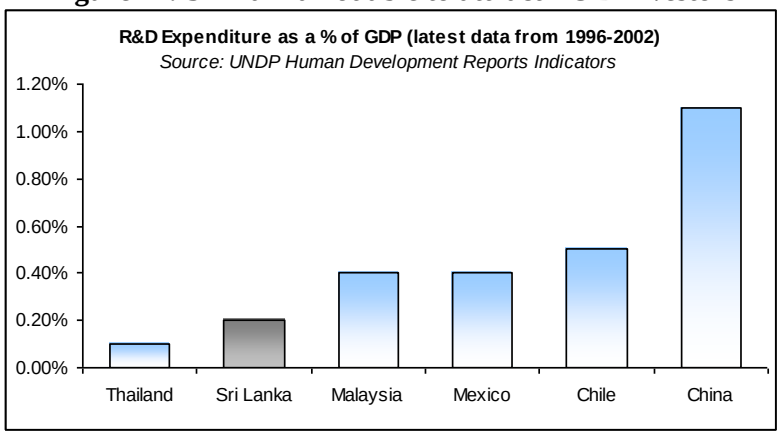
With regard to the customer contact segment of the market, Sri Lanka does not have a vast pool of human resources and therefore cannot offer the economies of scale that countries like India and the Philippines can. Additionally, Sri Lanka does not have a comparative advantage in telecommunications costs or in the quality of its supporting telecommunications infrastructure. Average call costs in Sri Lanka are currently twice those in India. Developing a niche for Sri Lanka in this particular arena would require a significant amount of investment to address these weaknesses and would also require competing with the well established markets in both India and the Philippines.

For the time being, Sri Lanka does not yet have the ability to focus on the knowledge services and research and development market segments. Firms looking to offshore services are likely to look at more

[57] Mauritius Board of Investment: *Study on the Potential of Business Process Outsourcing in Mauritius*, 2003.

established markets for increasingly complex services. Additionally, they will be attracted to markets that invest a greater amount of money in these particular areas whereas Sri Lanka does not rank very high in terms of R&D expenditure.

Figure 24: Sri Lanka not able to attract R&D investors



Sri Lanka's potential ICT offshoring niche lies in developing common corporate functions. Sri Lanka turns out a large number of accountants and IT professionals who pursue certificates outside of the public university system and compete against neighboring countries in this area. Additionally, the HR segment of the market is projected to grow at a particularly rapid pace in the coming years[58] and this provides a significant opportunity for future market expansion in Sri Lanka. The functions involved in this market segment are more aligned with Sri Lanka's current capabilities than those required at the more extreme ends of the value chain.

Moreover, shared corporate functions are required by firms in all types of industries and therefore Sri Lanka would be able to market its capabilities to a wide range of clients. This might potentially include some of the companies who currently outsource their manufacturing responsibilities to Sri Lanka, as well as their customers and suppliers. There is a substantial opportunity to create partnerships and develop relationships for future provision of services even in segments that are higher in the value chain once Sri Lanka gains a reputation for quality and reliability.

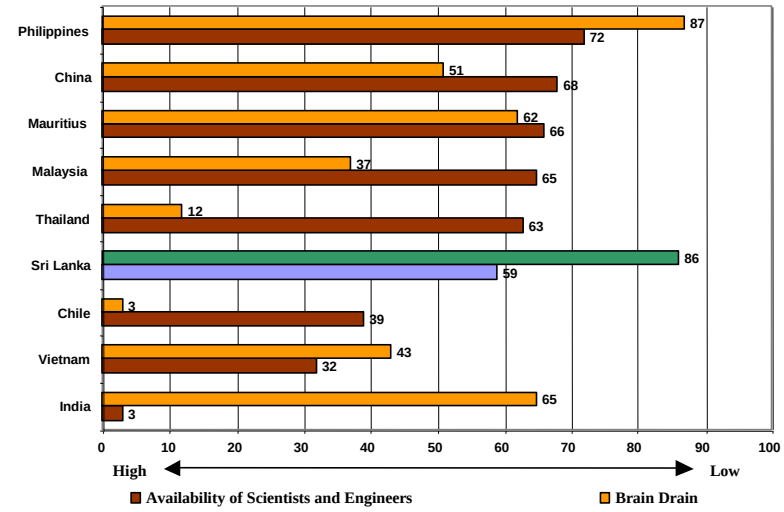
Sri Lanka should specifically leverage its geographic position close to the Indian subcontinent. The first wave of outsourcing of the 1980s and 1990s was focused on relatively few countries. Multinationals are now taking stock of their operations and putting increased focus on disaster recovery and business continuity. In this regard, Sri Lanka can be a safe haven for companies wishing to backup their operations in the sub-continent and further afield. As one economist puts it, "Sri Lanka has the opportunity to be to India what Hong Kong is to China". India could also be a potential source for increased training and lead to the creation of profitable joint ventures for Sri Lanka.

[58] ibid., p.12.

Creating the Brain Gain

Sri Lanka might also get a boost in reputation by leveraging a large overseas population as a network for outsourcing. The country has traditionally suffered from a significant brain drain that accelerated since the conflict began in 1983. It is estimated that more than one million Sri Lankans from a labor force of seven million are working overseas with a similar number permanently established abroad. India and China have both shown that FDI is often spurred on by diaspora communities who have a good knowledge of the country and are able to identify quickly investment opportunities. A study conducted at the University of Washington between 2001 and 2002 on the factors that shape the global outsourcing decisions of SMEs in America found that personal connections play an important role in determining the choice of a particular country as an offshore destination. "This personal connection factor suggests that a country's overseas diaspora can be an important competitive advantage and that countries that have sizeable overseas populations should consider national strategies aimed at capitalizing on this asset."[59] The repeated referral to the idea of brain drain in Sri Lanka can thus be potentially repositioned in such a way as to create a "brain gain" effect where overseas diaspora create a channel for developing Sri Lanka's offshore service industry reputation. There are several ways that government can get a virtual circle going e.g. promoting dual citizenship, compiling a database of expatriate Sri Lankan ICT professionals and mobilizing its embassies to support such an effort.

Figure 25: Sri Lanka's brain drain has taken its toll



Source: World Economic Forum, 2004

Enterprise Level Strategies

At a general level, local enterprises wanting to provide services to foreign firms must make a concerted effort to market their unique strengths and develop focused business plans with clearly set goals for long-term growth. Firms should take a proactive approach towards finding partners locally as well as internationally to expand both their funding resources and client base. Sri Lankan companies should also try to achieve this goal through establishing strong links with overseas diaspora networks and foreign universities, particularly those with large Sri Lankan communities. Other issues to tackle include

- ***Financial Structure:*** Since costs are a critical factor in a foreign firm's choice of offshoring location, it is extremely important that Sri Lanka firms provide services at rates that are comparable to or more attractive than those in competing markets. Firms should research the cost structures of competitors along with the menu of services provided and constantly aim to provide higher quality services at the lowest cost possible. Regular innovation and tailoring of services to

[59] *Looking Beyond India: Factors that Shape Global Outsourcing Decisions of SMEs in America*

specific client needs is necessary to ensure client satisfaction but it is important to achieve this as efficiently as possible so as to retain a noticeable cost advantage.

- ***People Skills and Availability:*** In order to ensure that employees can meet customer service demands and keep up with new techniques and innovations, firms should initiate in-house or on-site training programs with a continuous focus on improving performance and the quality of services provided to ensure sustained customer satisfaction.

- ***Business Environment:*** Since communication with clients in remote areas is a defining feature of offshore service providing, local firms must ensure that they have well developed information and communications technology systems. Unreliable ICT infrastructure hinders the ability of firms to provide services promptly, reliably, and efficiently. Companies should make detailed assessments of ICT requirements and address any resulting gaps as quickly as possible. Firms should also engage in conversations with public authorities in relevant sectors to highlight key areas where they need government support and ensure that there is an ongoing dialogue regarding promotion of this sector.

Government Policy Framework and Suggested Reforms

The Sri Lankan government could play a useful role in creating awareness for both locals and potential international clients regarding the opportunities within the country's professional services industry. The Board of Investment is well-placed to play such a role. Government can also work to promote the benefits of working for a captive offshoring firm or for a Sri Lankan firm providing offshore services and overcome the traditional bias for public sector employment. Likewise, awareness must be extended internationally since Sri Lanka has not yet established itself as an offshore service providing powerhouse. Although this initiative must be led by the private sector, government can work with private companies using the BOI and its network of embassies overseas to promote a Sri Lankan role in international service provision. Maintaining a constant dialogue with the relevant stakeholders will play a key role in developing the Sri Lankan offshore services market. Other possible policy initiatives could include:

- ***Tax Incentives:*** Several governments aiming to support export providing industries have provided extensive tax breaks to firms engaged in the export industry or suspended the collection of various types of license fees. The Indian government, for example, India's Ministry of Finance exempted IT-enabled services from income taxes in September of 2000. Many export processing zones in various countries in Asia also offer similar financial incentives to encourage increased FDI.

- ***People Skills and Availability:*** The Sri Lanka government must refocus efforts on education with resources specifically devoted to developing shared service skills and IT abilities of graduating students. The curricula of universities and schools should be revised to endow students with the specific skills that offshoring firms demand. Several Indian universities have been developed through strong government support in recent years in order to achieve this objective while educational reforms in several countries now promote studies in technical fields.

- ***Incentives for Training***: This is critical for achieving success in services exporting because of the constant innovation that is required. However, individual firms might not have enough motivation to invest the necessary resources into such programs and therefore, the government should create incentives for these firms to provide workers with suitable training programs that enhance the quality of the services provided by the country.

SRI LANKAN CASE LAWS:

ANDERSON

v.

HUSNY

SUPREME COURT OF SRI LANKA

Fernando, J., Dheeraratne, J. and Gunasekera, J.

(2001) 1 Sri LR 168

Facts: The applicant workman (the applicant) was employed by the appellant - employer (the employer) from 1993 to 1997 on annual contracts renewable entirely at the discretion of the employer. In 1997 the employer informed the applicant in writing that he was placed on probation for a period of 3 months for evaluation of his performance of the specific duties assigned to him, scheduled to end on 30.9.1997. That period was extended until 31.10.1997 as the applicant was alleged to have delayed in completing the work assigned to him. By letter dated 6.10.1997 the employer terminated the applicant's services on the ground that he had failed to show progress in his performance. Before the Labour Tribunal, the employer filed answer inter alia, stating that the applicant had failed to comply with instructions given while he was on probation and since no improvement was shown his services were terminated. The applicant in his replication neither admitted nor denied the employer's averments that he had been placed on probation, which he had accepted, nor did he dispute the receipt, authenticity or contents of the supporting documents produced.

Issue: The question before the Labour Tribunal at the commencement of proceedings was not whether the employer could impose probation after four successive annual contracts but a limited question, viz., who should begin on the available material, subject to a decision at the end of the case, whether or not the imposition of probation was justified?

Held: 1. Upon proof that termination took place during probation, the burden is on the employee to establish unjustifiable termination, and the employee must establish at least a prima facie case of mala fide before the employer is called upon to adduce evidence as to his reasons for

dismissal; and the employer does not have to show that the dismissal was, objectively, justified.

2. The applicant would have failed if neither party adduced evidence. Therefore, the burden was on the applicant to begin.

Per Fernando, J.*: "While it is true that the Tribunal is not bound by the Evidence Ordinance, that enactment contains certain basic principles of justice and fairness relevant to adjudication by any tribunal. One common principle is found in section 102, that the burden of proof lies on that person who would fail if no evidence at all were given on either side. There is no good reason for departing from that principle."*

Reasoning: The question of law which I have to decide in this appeal is whether in the Labour Tribunal the burden lies on an applicant to begin and lead evidence where he has failed to deny the employer's plea (in the answer) that he was dismissed while on probation.

The Applicant-Respondent-Respondent "(the Applicant)" applied to the Labour Tribunal on 22.10.97, averring that he had been employed by the Employer-Petitioner-Appellant "(the Employer)" as a "Grants Programme Accounts Specialist" from 1.7.93 and that his services has been wrongfully terminated by letter dated 6.10.97. By his answer dated 21.11.97 the Employer pleaded that the Applicant had been employed on successive yearly contracts. Seven documents were annexed to the answer.

(a) The first was a detailed contract dated 26.6.93 signed by both parties, effective 1.7.93, which stated: *"The post will be on a yearly renewable contract basis and such renewal will solely depend on the satisfactory performance of the duties entrusted to you."*
(b) This was followed by another (undated) detailed contract, also signed by parties, which provided: "your appointment is for a period of one year from 1.7.94 and' shall automatically terminate on 30.6.95 unless sooner determined . . . or renewed for a further period . . . Such renewal is entirely at the discretion of the (Employer) and unless so renewed . . . your employment . . . will terminate on 30.6.95."
(c) After that the Employer issued two renewal letters dated 1.7.95 and 1.7.96, each extending the contract for a further period of one year, "all other terms and conditions mentioned in the said contract (remaining) unchanged."

(d) Thereafter the Employer informed the Applicant by letter dated 17.7.97: "**. . .** you will be placed on a probation period of 3 months effective 1.7.97 - 30. 9.97 to enable the Management to evaluate the improvement in the performance of the specific duties assigned to you in your capacity as Grants Programme Accounts Specialist. Depending on your performance during the probation period, it would be decided whether your employment contract should be extended for a further period of one year. This, it was averred, was "due to poor performance and refusal to perform duties assigned" to him.

(e) Finally, on 30.9.97 the Employer wrote: "Your probation period is scheduled to end on 30.9.97. However, I must extend your probation period one more month until 31.10.97. The reason for this extension is that you have not yet completed the reconciliation of the grant disbursement data. Part of the delay is due to illness and your computer breakdown. However, we must have the grant disbursement data reconciled and completely reviewed before we can review your probationary status. One more month should be sufficient for this." Less than a week later, by letter dated 6.10.97 the Employer terminated the Applicant's services, with one month's salary in lieu of notice, giving as the reason that: "**. . .** you have failed to show progress in your performance during the probation period and have also refused to adhere to instructions and requests made by the Management pertaining to your work performance." On 11.2.98 the Employer filed a further answer, averring that: "Since the Applicant's performance and attitude to work was unsatisfactory, he was issued another contact but was offered work on probationary basis on 1.7.97 which he accepted, and his initial period of three months' probation was extended by a further month as his performance during probation had not improved and because he had failed on numerous occasions to carry out instructions given to him."

While the Applicant was on probation, and since no improvement was seen in his performance and/or conduct, his services at the project were terminated by letter dated 6.10.97"

The Applicant filed a replication dated 12.2.98. He referred to one matter extraneous to the present dispute, but failed either to deny the Employer's averments that he had been placed on probation (and the reasons therefor) which he had accepted, and that he had been terminated during probation, or to dispute the receipt, the authenticity or the contents of any of the documents produced. No application was made to amend that replication. When the application

was taken up for inquiry the Tribunal had to decide which party should begin. The President observed that the Employer's plea that the Applicant was a probationer "goes to the root of jurisdiction of the Labour Tribunal" and "challenges the jurisdiction of the Labour Tribunal that "this question of probation (was) a mixed question of fact and law;" that the factual position could be determined only after the witnesses gave evidence; and that therefore he was not inclined to accept the position of either party as to the status of the Applicant. Having regard to section 31 C(1) of the industrial Disputes Act - which provides that "it shall be the duty of the Tribunal to make all such inquiries into (an) application and hear all such evidence as the Tribunal may consider necessary" he held that the Employer must begin and lead evidence. The Employer filed an appeal as well as an application in revision in the High Court of the Western Province. The parties agreed that the order made in the revision application would apply to both proceedings.

The High Court held that what was averred by the Employer are facts that should be considered after an inquiry on whatsoever the material that is placed before the Tribunal. The real question that arises **. . .** is as to who should begin." That was a matter of procedure, and was therefore governed by section 31C (2), which empowered a Labour Tribunal to lay down the procedure to be observed by it in the conduct of an inquiry. Citing section 31 C (1) too, the High Court affirmed the order of the Labour Tribunal. In the course of the proceedings in the High Court, the Applicant produced certain documents which could have been, but were not, produced in the Labour Tribunal. I have not taken those into consideration in deciding this appeal because the correctness of the Labour Tribunal order must be determined in the light of the material which was available to it.

This Court granted special leave to appeal on the question "whether the learned judge of the High Court was in error in overlooking the fact that the (Applicant) was a probationer in deciding whether the procedure adopted by the President of the Labour Tribunal was appropriate in the circumstances."

Although in the past the view has sometimes been expressed that an employer had an unfettered right to dismiss a probationer, almost at will, the better view is that even a probationer can challenge his dismissal, albeit on limited grounds.

"What then is the principal difference between confirmed and probationary employment? In the former, the burden lies on the employer to justify termination; and he must do so by reference to objective standards. In the latter, upon proof that termination took place during probation, the burden is on the employee to establish unjustifiable termination, and the employee must establish at least a prima-facie case of *mala facie before the employer is called upon to adduce evidence as to his reasons for dismissal; and the employer does not have to show that the dismissal was, objectively, justified."*

Both Counsel agreed with those observations. Learned Counsel for the Applicant conceded that if an Employee admitted that he was dismissed while on probation, then the burden would be on him to begin. Learned Counsel for the Employer conceded that if an Applicant denied probation, the Employer would have to begin. However, in this case there was no express admission or denial of probation. The Industrial Disputes Regulations provide for an applicant to file a response to the Employer's answer. While I agree that, in general, the failure to file a replication in the Labour Tribunal, ought not to be treated as an admission of averments in the answer, the position would be different where a replication was filed without denying relevant averments. Although strict rules of pleading do not apply In Labour Tribunal proceedings, pleadings are necessary, and do serve an important purpose - to identify the matters really in issue between the parties, thus enabling, on the one hand, each party to know with a reasonable degree of certainty the case which he has to meet, and, on the other hand, the Tribunal to inquire into the real dispute without unnecessary delay, inconvenience and expense.

The question which I have to decide is not whether the Applicant was indeed a probationer - because of a binding admission as to probation, or upon an interpretation of the documents produced, or for some other reason - but a much more limited one: who should begin? (And, I must add, that is a question which does not affect the jurisdiction of the Tribunal).

Undoubtedly, sections 31(C) (1) and (2) do give the Tribunal some discretion as to procedure. However, that discretion must be exercised not arbitrarily, but reasonably, with some degree of uniformity, and in a principled manner: with the overriding objective of ensuring a fair and expeditious inquiry. While it is true that the Tribunal is not bound by the Evidence Ordinance, that enactment contains certain basic principles of justice and fairness relevant to adjudication by any tribunal. One common sense principle is found in section 102: that the burden of proof lies

on that person who would fail if no evidence at all were given on either side. There was no good reason for departing from that principle. Let me add that that principle is the foundation of the cursus curiae in the Labour Tribunal where termination (of confirmed employment) is not admitted. In such cases the applicant must begin. Why? Because if no evidence at all were given on either side, on the material available to the Tribunal, it is the applicant who would fail.

When the Tribunal was called upon to give its ruling in this case, it was faced with the Employer's un-contradicted averments as to dismissal during probation, as well as documents to the same effect, whose authenticity and contents had not been questioned. If neither party had then adduced evidence, the Tribunal could not have held - on the then available material - that the Applicant was not on probation when dismissed, or that prima facie the dismissal was males fide. Accordingly, the Applicant would have failed. Therefore, the burden was on him to begin, and the Labour Tribunal and the High Court should have so ruled.

Therefore appeals allowed and orders of the Labour Tribunal and the High Court were set aside. The Applicant will begin and lead evidence. The parties will bear their own costs.

CEYLON MERCANTILE UNION
v.
CEYLON FERTILIZER CORPORATION
SUPREME COURT

Samarakoon, C.J., Wanasundera, J. and Wimalaratne, J

SLR - 1985 Vol.1- P401

Facts: The Ceylon Mercantile Union (appellant) made an application to the Labour Tribunal on behalf of 502 of its members alleging that the Ceylon Fertilizer Corporation (1st respondent) had unjustly terminated the services of the said 502 workers and asked for their reinstatement with back wages or in the alternative compensation and gratuity. The applicant Union named the Hunupitiya Labour Co-operative Society as the 2nd respondent as it alleged that wages were paid to the workmen by the respondent through the 2nd respondent.

Issue: The crucial question was whether the Fertilizer Corporation (the 1st respondent was the employer of these workmen?

The President of the Labour held that the 2nd respondent had acted as, agent for the supply of labour and that the workmen were employees of the 1st respondent corporation and ordered their reinstatement together with 6 months' wages or in lieu one year's wages. The Court of Appeal, on an appeal being preferred to it, held that the respondent was not the employer of the workmen. The applicant Union appealed to the Supreme Court.

Held: (Samarakoon, CJ dissenting)
Although there was a written contract between the 2nd respondent Society and the 1st respondent Corporation for the supply of labour services in practice the Society acted as a mere conduit for the transmission of the payment of wages to the workmen. This was the only nexus between the Society and the workmen.

Not a single workman was a member of-the 2nd respondent Society. The workmen had much greater contact and involvement with the 1st respondent Corporation than with the 2nd respondent Society. It is unlikely that any respectable enterprise would have depended on casual labour for its essential work involving such a large number of employees without having some permanent arrangement. It was the first respondent who calculated and determined the wages and advances of the workmen, assigned the work and supervised and controlled its execution. These factors are sufficient to-spell a contract of service between the workmen and the 1st respondent. The test of control and the test of integration the workmen being'- intrinsic to the working of the Corporation, support this conclusion.

The contention of the respondent is that it is not an "employer" as defined by section 48 of the Industrial Disputes Act (Cap. 131). *That definitions as follows:*
‘‘Employer" means any person who employees or on whose behalf arty other Person employs any workman and includes'-a' body' employers (whether such body is a firm, company, corporation or trade union) and any 06 'who on behalf of any other person ers employs workman.
This deals with three types of persons:-
(i) Any persons who` employs a workman,

(ii) Any person on whose behalf any other person employs any workman, and
(iii) Any person who on behalf of any other person employs any workman.

This definition read with the definition of "workman" in the same section postulates a contract. It is now settled law that an applicant must establish a contract of service with the employer. Carson *Cumberbatch & Co., Ltd. v. Nandasena* (1) and *Shaw Wallace & Hedges td., v. Palmerston Tea Co Ltd*. (2) Counsel for the appellant based his case entirely on the first limb set out above. What is a contract of service? Various tests have been formulated and applied to discover a contract- of service. In *Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance* (3) McKenna, J,: stated that- a contract of, service exists -if. The following conditions are fulfilled:-

(i) The servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master.
(ii) He agrees expressly or impliedly that in the performance of that service he will 'be subject to the other's control in a sufficient degree to make the other the master.
(iii) The other provisions of-the contract are consistent with its being a contract of service."
Lord Tankerton who delivered the -judgment -judgment of the House of Lords *in Short v. J. & W. Henderson Ltd* (4) recapitulated the four indicia of a contract of service as follows
(a) The master's power of selection of his servant
(b) The payment of wages or other remuneration.
(c) The master's right to control the method of doing the work.
(d) The master's right of suspension' or dismissal.
These are by no means conclusive:' Condition (iii) set out by McKenna, J. indicates that they are not even definitive. Other factors not named can affect the issue and it is well to keep in mind that in-the vast field of industrial relations such factors can vary from industry to industry and be of such diversity that it is not possible to make the list of conditions exhaustive. In-this context. Justice Rodrigo's quotation from the judgment of Fisher, J. (who in turn quoted P. S. Atiyah, Vicarious Liability in the Law of Torts 1967, p. 38) bears repetition:

"In my judgment, it is really not possible; in Mr. Atiyah's words to lay down

". . . a number of conditions which are both necessary to; and sufficient: for, the existence of ... (a contract, of service). The most that `can profitably be done is to examine all the' possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones. The plain fact is that in a large number of cases the court can only perform a balancing operation, weighing up the factors which point in one direction and balancing them against those pointing in t he opposite direction. In the nature of things it is not to be expected that this operation can be performed with scientific accuracy.' "

Reasoning: Whether the necessary conditions have been satisfied to establish a contract of service?

The first condition is the payment of a wage agreed to between employer and worker. There is no such agreement: On the other hand the agreement by the appellant is to pay the Society the scheduled rate. The Society pays the labour a lower rate keeping a rake off for' itself. This is in pursuance of an agreement between the Society and the labourer. Furthermore this contractor agreed not only to pay a stipulated sum to the welfare fund in respect "of each employee of 'the'! Contractor" but also to comply with all laws, rules and regulations relating to employment of labour the first condition has not been satisfied.

Counsel for the appellant made much of the element of control which is the second condition: "Control by itself is not always conclusive" (Atiyah ibid p. 38). There is no doubt that the respondent assigned the work to the labourers and stipulated the proportions for mixing and aIso indicated the mode of distribution. This had necessarily to be done if its business was to be properly conducted. Apart from this the respondent could' do nothing else. Disciplinary action was in the hands of 'the Society. When a labourer was inefficient the Society was asked not to send the particular labourer for work. In case of misconduct the Society was asked to take action: The letter R 16 to the Society is revealing. It states that some labourers had been detected demanding gratification in respect of loading of lorries it' states "several complaints have been received of not only demanding of such gratification but threats made to owners of lorries so (sic) do not agree to make such gratifications. I have brought this to your notice by my letter of

9.4.1974 and on several other occasions. But I regret to state that this matter has not been rectified by the Corporation (sic). I would therefore request that steps be taken-to safeguard the good name, of the Corporation by seeing that the service to-the clients of the Corporation be carried out without disruption." Clearly disciplinary control was not in the hands of the respondent. It could not take action necessary to safeguard its own reputation. It had to look to the Society for such action. When labourers refused to work "half way and 'gone back" it was the Society that was surcharged the loss incurred by way of warehouse charges (R 10). Allotment of labour for various ships was done by the Society and not the respondent (R 11). The Society appointed its own' Supervisors who kept a record of the labour supplied. It was the Society that chose the labourers to be sent for work. Overall control especially disciplinary, control was in the Society and not the respondent.

There are other factors which militate against a finding that this was a contract of service with the respondents. A fund for-the welfare of the labourers was maintained by the Society. This was a term of the contract and money for this purpose was paid by the respondent to the Society is respect of each labourer. All negotiations on behalf of the labour were conducted, and all claims for enhancement of rates were made, by the Society with the respondent. Two labourers were put on the check roll by the. Respondent’s Manager but they were accounted in the check roll as the Society's labourers. The Society was so informed and their rates were paid direct to the Society in terms of the agreement. Furthermore there is no guarantee of employment or continuity of work.

In view of the above l am of the opinion that there was no contract of service with the respondent. Rodrigo, J. has cited the case of Construction Industry Training Board y. Labour Force Ltd. (5). That case decided that there was no contract of service between the worker and the Construction Industry Training Board. Cooke, J. added - "I think` that there is much to be said for the view that, where A contracts with B to render services exclusively to C, the contract is not a contract for services, but a contract sui generis, a different type of contract from either of the familiar two." (p.. 225). We are not considering such a situation in this case. Two other matters need comment. The President, Labour Tribunal expressed the view that these 502 labourers were "intrinsic to the working"' of the Corporation and therefore an "integral part of the organisation". I can only repeat the comment of McKenna, J. in reference to the dictum of

Denning, L. J. who said that the test of being a servant "depends-on whether. the person is part and parcel of the organisation. His comment was as follows :

"This raises more questions than l know how to answer. What is meant by being part and parcel of an organisation'? Are all persons who answer this description servants? If only some are servants what distinguishes them from the others if it is not their submission to orders? Though I cannot answer these questions I can at least invoke the dictum to support my opinion that control is not everything.

The President, Labour Tribunal also observed that the only conclusion he can come to is that the Society acted more as an agent for the supply of labour and not as an- independent contractor It is not question of pore or less. It is a question as to whether it was or was not. An agent merely brings the two together and leaves all the other terms of the contract to the two - the labourer and the would be employer. He collects h agency commission and-that is ail. His part of the work ends there The position in this case is just the contrary. The Society far from being passive, actively engaged in working and putting into practice the terms of its contract R 6. I am therefore unable to agree that the Society was merely an agent and thus dismiss the appeal with costs.

WANASUNDERA, J.

Issue: Was the Fertilizer Corporation, the 1st respondent, the employer of these workmen ?

Reasoning: The President of the Labour Tribunal, after a full inquiry in a carefully considered order, stated that the only conclusion he could come to was that the 2nd respondent. Had acted as an agent for the supply of labour Applying the generally accepted criteria, he concluded that the evidence clearly pointed to. The existence of an employer-employee relationship between the workmen and the 1st respondent.

In appeal the Court of Appeal reversed the findings of the Labour Tribunal. The Court of Appeal said that the President; when he applied the generally accepted criteria for determining the relationship between employer and employee, had not adequately considered the oral and documentary evidence, which indicated a contrary state of affairs. The Court of Appeal added that the control or supervision test applied by the President was not relevant in this case; as none of the workers had been interviewed nor a letter of appointment given to them by the 1 st

respondent. Their names were also not found in the books relating to the permanent staff, of the 1st respondent. Mr. Mustapha for the appellant has canvassed these views before us.

The Judgment of the Court of Appeal had discussed at length both the oral and documentary evidence relating to the contract R6 between the 1 st respondent and the 2nd respondent. "for the supply of labour services". Undoubtedly this contract embodies features consistent with a contract to supply labour services. But evidence had been adduced before the President, without objection, showing that in actual practice the 1 st respondent had dealt with these workmen in a way inconsistent with and at variance with the tenor of this agreement. The complaint against the 1st respondent is that it had. tried, as far as it was possible, to distance itself from its employees by formulating a contract in-this form to evade its due responsibilities and liabilities, under the labour laws of the country.

While due regard should be given to R 6, its terms and conditions cannot be. conclusive of this matter. For, in the case before us, the fact in issue is not so much the interpretation of R6 or the relationship between the Fertilizer Corporation and the Labour Co-operative Society, which no doubt are relevant to our inquiry, but primarily the relationship of the members of the applicant Union to the' Corporation. We are here called upon to examine not a bilateral agreement but a tripartite situation.

Now these workmen-using the word in a neutral sense-were not signatories to R6, nor was. any of them a, member of the Labour Co-operative Society. They are therefore entitled to claim that they be considered as an independent third party in this matter. The evidence shows that their only nexus with the Labour Co-operative Society was that 'the payments due to them from the Fertilizer Corporation were paid to them through the Labour Co-operative Society Apart from that, they do not appear to have any other connection With the Labour Co-operative Society. The evidence also’ shows that the Labour Co-operative Society has not claimed them as its workers but had sought to disown them at every stage. Two of the workmen have stated that, when, they had 'approached the Labour Co-operative Society, for advances and increase in salary, the Co-operative Society had denied responsibility for them and directed them to the Fertilizer Corporation for relief. 'The 2nd respondent on the other hand; while exercising a real control and supervision over these workmen; 'had taken pains to see that its acts in relation on them- were given the appearance; of being in conformity to R 6. The, Labour Co-operative Society, the. 2nd

respondent, has also declined to participate in these proceedings and has chosen not to have its position ``clarified or explained either in relation to the workers or the Fertilizer Corporation'.

Let us now turn to the relationship of the workers with the Fertilizer Corporation., The President, Labour Tribunal, found as a fact that notwithstanding the contract (R6), most of the workers had been working for the 1st respondent prior to the formation of the Labour Co-operative' Society, the 2nd Respondent, and since then there have been-even some instances of direct recruitment of some workmen by the 1st respondent. Such recruits have not even been members of. The 2nd respondent at that time, but; after recruitment the 1st respondent would inform the 2nd respondent of such, recruitment. The President also found that the 1 st respondent had exercised the right of determination of wages, the assignment of work, the exercise of supervision and control in the execution of work, disciplinary control, and the payment of advances and compensation. Even the final termination of their services, it is alleged, was by the 1st respondent and the 2nd respondent had no hand in the matter.

Clearly the manner in which the 1st respondent has dealt with the workmen is more in line, as the President says, with, the Labour Co-operative Society being in the nature of a mere agent to supply labour, while the 1st respondent itself became the employer of such labour: Two other factors reinforce this view, namely, that not a single workman- concerned in this case' is a' member of this Labour Co-operative Society and the only nexus between these workmen and the Labour Co-operative Society was the making of payments by the 1st respondent to the'' workmen through the Labour Co-operative Society. It would appear that these workmen had much greater contact and involvement with the 1st respondent 'than with the 2nd respondent.

The other factor is that these 'workmen were intrinsic to the functioning of the Corporation and would have normally constituted its work force. When this Corporation began work in :1964 its turnover had been about -3 - 4 tons of fertilizer. From about the beginning of 1970 its work expanded rapidly and in 1975 it was handling about 50,000 tons of 'fertilizer. Its main work involved loading, unloading, mixing, bagging, and the distribution of the fertilizer: This was hard physical work involving unskilled labour. The permanent staff consisted of only 161 employees, of whom about 100 consisted of the drivers, welders, turners, motor-mechanics, electricians etc., and there remained only, a handful' of permanent employees to do the large amount of unskilled physical `labour. More than 300 labourers are required daily for such work. It is therefore

unlikely that any respectable industrial enterprise would normally have depended on casual labour for; any -appreciable period of time for this type of essential work involving such a large number' of employees without having some permanent arrangement.

Mr. Mark Fernando's main submission was that the President had wrongly applied the 'control test, because such a test should not' be applied. unless there is a contract in existence between the parties. He relied on the judgment of Tennakoon, J., in Carson Cumberbatch & Co., Ltd. v. Nandasena (supra). If Mr. Fernando means that the control test should only be applied where a prior contractual relationship of employer and employee between the parties is already in, existence, then this would be to beg the, question. Such an argument; apart from being tautologous, also ignores the implications contained in. the definition of. the word workman' which refers to a contract "in any capacity expressed or implied, oral or in writing leaving it open to imply a contract from- the circumstances of a, case need for an, antecedent agreement therefore would have the effect-of nullifying this definition.

The facts in the present case do not point to a contract of service between the appellant and the workmen. The kind of arrangement referred to under which these workmen had worked for the Corporation appears to me to be a contract suite. As for the, arrangement under which the workmen worked for the Society, the Society apart from paying the workmen when sent for work appears to have had no control over the work done by them in the Corporation warehouses. The evidence is not satisfactory as to the terms of any contract they had with the Society. Though in the Agreement there is a reference to the workmen as, servants of the Society; the `Agreement is one between the, Society and the Corporation and the workmen were not parties to the Agreement. They were not even members of the Society. All that is: clear is that the workmen had some kind of arrangement with the Society to do work for a third party, the Corporation. It is not a question of, the Society lending the services of its employees to the .Corporation, because the workmen, according to the evidence, had not rendered their services to the Society. Since the sot issue for determination is whether the appellant is the employer of these workmen we need not pronounce on the character of the relationship of the workmen involved with the Society in all the circumstances of the case."

Reasoning: The court held that the respondents did not act as employment agency because the worker had a written agreement with the respondents to work for them and to be paid for it The Court said it is plain that when the workman agreed to work on a particular site at a particular rate of pay, he was agreeing so to, do with the respondents as principals. That in my judgment is sufficient to dispose of the view that the respondents were merely acting 'for the workman as an employment agency:' They were contracting with the workmen as principals.'"

The court also held that the workman was paid by the respondents at the rate agreed between him and them, and the profits of the respondents were derived from the difference between the sums they paid to the workman and the sums which they received from the contractor.

The workman had the most tenuous contact with the 2nd respondent and in truth and in fact it was the 1st respondent who calculated- and determined the wages and advances to the workmen and not the 2nd respondent which acted as a mere conduit for the transmission of the payment. The 2nd respondent, as the President says, had merely undertaken to supply labour and not to perform any specific services. It is in this context that the President compared the work of the Labour Co-operative Society to the old Kangany system and held that the 2nd respondent functioned only, as an agent for the supply of labour. Further, in the Labour Force Case, it was specifically agreed between the parties that the workman was engaged by the-Labour Force. There was a certificate signed by the workman to the effect that he was engaged by the Labour Force on a Sub-Contract Basis. That was a most significant item of evidence and we have nothing like hat in the present case. In the light of these facts, the limited supervision that was enjoyed by the contractor in that case was found insufficient to spell a contract of service between the workmen and the contractor. But in the case before us the governing factors are quite different: In that case the Court faced the situation of being confronted with the express terms of contract. That did not preclude the Court from inquiring into the true nature of the-contract this is how the Court approached the matter:

"The tribunal was asked, to consider the nature of the contracts entered into by a large and indeterminate group of workmen in the industry. It was entitled as J sees to me, to use its own knowledge of, the undoubted fact that many of the workmen in the industry are self-employed. The tribunal referred to the declaration signed by the workman in which he purports to certify

that he is employed on a sub-contract basis. Quite rightly, in my judgment, the tribunal held that this did not preclude it from enquiring into the true nature of the contractual relationship.,"
Later the Court Said :

"In my view, the fact that the parties have in express terms sought to make a contract of a particular kind, while it does not bind the courts to hold that they have succeeded, is a factor which can be considered in determining the true nature of the contract:.
Both for the above reasons and in view of the existence of contractual relations of the workmen with both the 1st respondent and the 2nd respondent, I think the President was right in examining all possible factors, including the control test as bearing on the relationship between the parties.
The Court of Appeal has examined the material and has sought to come to its own independent conclusion which is at variance with the findings of the President. The Court of Appeal give the following justification for this exercise.

"The generally accepted criteria for determining the relationship of employer and workman as mentioned in the passage referred to earlier in the order of the President has not been balanced against oral evidence indicating the contrary or against the documentary evidence referred to or considered in their totality notwithstanding a bare statement in the order that the totality of evidence was being considered.

The balancing operation contemplated by the Court of Appeal is the balancing of all the possible factors that may have a bearing in resolving the issue of employment. The Court of Appeal in the above passage was no doubt having in mind the following expert from Fisher, J's judgement in the Labour Force Case which it quoted with approval :

"In my judgement, it is really not possible, in Mr. Atiyah's words to lay down:
.....a number of conditions which are both necessary to, and sufficient for the existence of ..... (a contract of service). The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the 'relationship between the parties concerned. Clearly not: all of these factors will be -relevant" in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case; be treated as the determining ones. The plain fact is that in a large number of cases the Court can only perform a

balancing operation; weighing up the factors which point in one direction and balancing them against those pointing in the opposite direction. In the nature of things it is not to be expected that this operation can be performed with scientific accuracy.

There is nothing in the order of the President to show that he has not considered all the relevant factors -pro and con,' nor in any way failed to evaluate the documentary evidence. On the other hand, what the Court of Appeal has done is to give undue stress to the provisions of the bilateral agreement R6 to which these' workmen ere not parties while ignoring the actual conduct of the 1st respondent in its relations with the workmen.

I am unable to say that the President has been, unreasonable either in` the approach he had adopted or in regard to his findings on what are essentially questions of fact. The two other matters the question of termination and the computation of, compensation - mentioned by Mr. Fernando had not been in issue between the parties at any stage until it was mentioned before us.

In the result, I would allow this appeal with Costs both here and in the Court of Appeal and restore the order. of -the President,. labour Tribunal: The -workmen could be entitled, to back wages until- the date of reinstatement .or !in the alternative until the date of payment of compensation.

WIMALARATNE ,J.

I have had the benefit of reading the judgments prepared by the Chief Justice and by Wanasundera, J., where the facts are set out.

Wanasundera, J. after discussing the manner in which the workmen have been dealt with by the Fertilizer Corporation concludes that the function of the, Hunupitiya Labour Society was to act; as mere agents to supply, labour to the Corporation, whilst the Corporation became the employer of the labour so supplied.

The Chief Justice, is unable Jo agree that the-Society was merely an agent for the reason that the Society was actively engaged in working and putting into practice the terms of its contract R6 with the Corporation. Implicit in the judgment of the Chief Justice is the conclusion that the Society and not the Corporation is the employer of these workmen.

The instant case is similar to a situation where a contractor regularly brings labour to the employer's workplace to perform work in the regular course of the business of the employer, and

the employer directs how the work is to be performed and even calls upon the contractor not to employ particular persons from among the workforce. In that situation my view is that there is no contract of employment between the contractor and the workmen. This situation is different to one where a person enters into a contract with another to construct a building and that other (the contractor) employs labour for the purpose. In that case it may not be difficult to establish the employer-employee relationship between the contractor and the workmen, since the employment of the workmen is on behalf of the contractor, and not on behalf of the person with whom the contractor and contracted to build.

On the question as to whether a contract of service exists between the Corporation and the workmen, the chief Justice takes the view that, the evidence hows that there is no. such contract; mainly because-(a) q f; the absence of any agreement regarding the payment of wages between the Corporation and the workmen whilst there is on the other hand, an agreement between the Corporation and the Society as embodied in document R6 ; and (b) the overall control, especially disciplinary control, was not in the hands of the Corporation, but in the hands of the Society.
Wanasundera, J. takes the view that on the facts of this case the relationship of employer and employee between the Corporation and the workmen has been established not only by an application of the test of "control", but also by the test of "integration", that is that the workmen were intrinsic to the working of the Corporation.

I am in agreement with the views of Wanasundera, J. The payment of wages by the Society was only, a physical act of handing over the wages in the capacity of agent of the Corporation. One . has to remember that it was the Corporation, and not the Society that determined the wages of each category of workers - check roll as well as piece-rate workers. As regards control of work, even the Chief Justice has no doubt that it was the Corporation that assigned the work, stipulated the proportions of mixing and indicated the mode of distribution. What appears to have influenced the Chief Justice is that disciplinary control was in the hands of the Society. There is, however a strong finding of fact by the President that "it is absolutely clear that the supervision and control of the workmen were exercised not by the 2nd respondent (the Society) but by the 1st respondent (the Corporation)." I cannot see sufficient reason to disturb that finding of fact.
The Court of Appeal has erred, in my view, on two other matters. They are :

(a) that too much reliance has been placed on the agreement R6, which was an agreement between the Corporation and the Society, to which the workmen were not parties. It is doubtful whether they were even aware of the existence of R6. The existence of such an agreement cannot act to their detriment if the facts establish a relationship of employer and employee between the Corporation and themselves.

(b) the fact that "none of the workmen had been interviewed prior to appointment, nor was a letter of appointment given to them or the name of any person entered- in the Corporation books -permanent staff". A common law contract of maintained for the service can to be implied even without any or 111 of these circumstances.

R.N.P.R. Bandara,

Vs.

Commercial Bank of Ceylon PLC,

EP/ HC/AMP/LT/APP//404/2014

Judge: Dr. Sumudu Premachandra HCJ

The Applicant Appellant (herein after sometimes called as the Applicant), employee, of this case has filed an appeal against the order of the learned President of Labour Tribunal of Ampara -LT 44 (herein after sometimes called as the Learned L.T President) dated 01st July 2014. The Applicant in his appeal states while correctly holding that the Applicant was an employee of the

Respondent Bank and his termination of service was unjustified but the Learned L.T. President has proceeded wrongfully and unlawfully to award compensation in lieu of reinstatement of Applicant with back wages. Being aggrieved to said part of the order, the Applicant prefers this appeal. The Applicant states that said part of the order is bad in law since the termination was held as unjustified and as a rule the Applicant entitled for reinstatement. He further states that learned L.T. President has failed to give any reason for not awarding reinstatement of the Applicant. The Applicant therefore seeks to vary that part of order and sought an order the Respondent Bank to pay compensation to the applicant and reinstatement of the Applicant with back wages calculated on the basis of the salary.

1] While the Applicant dissatisfied with said part of the order, the RespondentAppellant (herein after sometimes called as the Respondent Bank,) Commercial Bank PLC has also dissatisfied with impugned order entirely, has filed a cross appeal. The Respondent Bank states that the Learned L.T. President has failed to, assess and evaluate the evidence in an overall manner and erred in law holding the Applicant was an employee of the Respondent Bank. Inter alias, the Respondent avers the applicant never was an employee of the Respondent and was an employee of a Carekleen (Pvt) Ltd thus the learned L.T. President has erred in holding that the Respondent terminated the service of the Applicant. The Respondent further submits that the learned L.T. President has erred in calculation of compensation without any evidence of actual losses from the Applicant.

2] When this matter argued before me the parties agreed to hear the appeal and cross appeal as whole and accept single judgment for both appeals. I now consider facts before me.

3] I have carefully considered the written submissions placed before me by both parties with much appreciation. I have also scrutinised the substantive evidence placed before the learned L.T. President of Ampara.

4] At the inception of this case, the parties informed this court that there was a case pending in the similar nature in Supreme Court namely SC/SP/LA/92/2014. But the outcome of that case has not been informed to this court. It is said by the Respondent that leave to appeal has been refused yet there is no copy of such order tendered to this court. Therefore, I consider the Judgment instant case on merits.

5] The crux of the case is relied on whether the Applicant is an employee of the

Respondent Bank or was he an Outsourced Employee of the Bank? Can an Outsourced employee treat as an Employee of the Respondent Bank? If so has he got any legal rights? In the Tribunal that learned L.T. President has concluded that the Applicant is a worker of Respondent Bank and CareKeleen

(Pvt) Ltd who supplied the workers to the Respondent Bank including the Applicant. In the sense it is decided by the Tribunal that Carekleen is a supplier of labourers who works as an Agent of the Respondent Bank. The Agreement between Carekleen and the respondent bank was tendered at trial as R11. It contains nine (9) clauses. But none of clause did not clarify what is the

consideration to be passed between Carekleen and he Respondent Bank in lieu of supplying Outsourced Employees. Carekleen is not a charitable institution to supply workers free of charge to such a renowned bank in Sri Lanka. The Agreement has been done without consideration, in that event, it is seen this Agreement was a pseudo and was drafted to bypass labour laws.

6] The learned President Counsel for the Respondent Bank contends that the Applicant was not an employee of the Respondent, but of Carekleen (Pvt) Ltd and the Bank had outsourced certain functions to Carekleen (Pvt) Ltd. Since the Applicant was an employee of Carekleen there was no termination by the Respondent. Thus he contends that the application of Applicant should fail but the learned L.T. President held otherwise.

7] I now consider the law on Employer-Employee relationship. The judgment of

His lordship T S. Fernando J in ***Ratnasabapathy v. Asilin Nona*** 61 N.L.R. 548, it was held that whether a workman is casual or a regular employee is a question of fact to be decided on evidence. Similarly I hold that the Applicant of this case is an out sourced worker or employee of the Respondent Bank is a question of fact need to be decided on available evidence. I am mindful in

Superintendent Of Pussella State Plantation, Parakaduwa V Sri Lanka Nidahas Sevaka Sangamaya his lordship G .P .S. DE SILVA C. J, [1997] 1 SLR 108, held that *"the mere label is not sufficient to classify a workman as a casual employee,* ***if the real character of his employment is that of a permanent employee.***

In ***Hatton National Bank V Pereira*** **[**1996] 2 SLR 231His lorrdship G. P S. DE SILVA, C.J. discussed about the burden in appeal to overturn a Tribunal decision as *"in order to set aside the determination of facts by the tribunal that the termination was unjustified the* ***appellant must satisfy that there was no legal evidence to support the conclusions*** *of fact or that the finding is irrational or perverse. This is a heavy burden".* [Emphasis is added]

9] In line with the above principles, I now analyze the evidence. At the trial before the Tribunal, the Applicant Nadeeka Prasad Bandara and one Trade

Unionist Anura Lalith Ranaweera had given evidence on behalf of the Applicant. On behalf of the Respondent Bank Human Resource Manager of Carekleen gave evidence. They marked documents R1 to R22. Through the Applicant's evidence, the Applicant marked several

documents. A1 is the Applicant's Commercial Bank (the Respondent) passbook. It shows that his wages were deposited directly to the Applicant's Bank account which was maintained in Respondent's Bank in Ampara Branch. This position was revealed by Respondent's Carekleen witness under cross examination. A2 is photograph and A3 a paper cutting of a Savings Campaign. That depicts the Applicant in the Respondent's bank employee attire. A4 is importantly suggests that the Applicant was a Staff member of 2010. He has posed a picture with other staff members including the Manager, highest member of the Ampara branch. These documents and evidence of the Applicant tally with that the Applicant worked as an Office Assistant of the branch. Then, A 8 shows that Carekleen informed the termination of bank service. But the facts of this letter were disputed by the Applicant. A12 and A 13 are details of Respondent's Bank Annual Report 2011. According to A12 it shows the Respondent Bank has two categories of service, i.e. Full Time Employees and Outsourced Employees (A12 (a). But it is seen the Service Analysis of the Employees as at December 31 there were no Office Assistants or other minor staff were recruited since 10 years (A12 (b). Thus, it is seen that the Respondent Bank adopted a different method of employing Office Assistants and get their services labelling as Outsourced Employees. In A13, it is clear that the Respondent Bank has not taken or recruited any Office Assistants. Ironically, in A14, the Collective Agreement No. 27 of 2010, clause 15 has referred to Office Assistants' promotions and first schedule of the Agreement shows the salary scale of Office

Assistants according to their grade. In clause 33, Definition covers "an employee covered and bound by this Agreement". There are categories of services. That means Office Assistants are covered by this Agreement. Hence, the Office Assistants are labelled as Outsourced Employees is misnomer. It is clear that they are real employees of the Respondent Bank. The Bank has not cleared this proposition in their evidence and they only called Human Resources Manager of the Carekleen. In this scenario, it is evident that Carekleen is only the facilitator to find Office Assistants, and it works as the Contractor and the Agent of the Respondent Bank. Evidence shows that when outsourced employees are needed, the interviews were held and employees were selected by the Bank and the Carekleen has no say about the selection. After selection the Carekleen has no control over employees. The Carekleen's witness admitted that the applicant's work was supervised by the Bank, Bank provided the Applicant's salary, allowances, EPF, ETF. When the chain of causation is considered, the end user of the Applicant is the Respondent Bank

and during his tenure as Office Assistant, the Applicant has only rendered his services to the Respondent. Though pay slips (R4, 5, 6) show that salary is paid by Carekleen but it clearly shows work place of the Applicant is Commercial Bank Ampara. In ***Ceylon Mercantile Union v Ceylon Fertilizer Corporation*** [1985] 1 SLR 401, the Court has discussed similar nature of situation. While agreeing with the finding of his lordship Justice Wanasundara, his lordship Justice Wimalaratne enunciated that "*the payment of wages by the Society was only, a physical act of handing over the wages in the capacity of agent of the Corporation. One has to remember that it was the Corporation, and not the Society that determined the wages of each category of workers - check roll as well as piece-rate workers. As regards control of work, even the Chief Justice has no doubt that it was the Corporation that assigned the work, stipulated the proportions of mixing and indicated the mode of distribution. What appears to have influenced the Chief Justice is that disciplinary control was in the hands of the Society. There is, however a strong finding of fact by the President that "it is absolutely clear that the supervision and control of the workmen were exercised not by the 2nd respondent (the Society) but by the 1st respondent (the Corporation)." I cannot see sufficient reason to disturb that finding of fact."* In this case it was not revealed who has the disciplinary control over the employee but the service was terminated on the instruction of the Respondent Bank by the Carekleen and it tacitly shows that control was with the Bank. In accordance with R 11(Contract between Bank and Carekleen), it shows that was composed to bypass and evade the responsibilities of the Bank which is an unfair labour practise as correctly observed by the learned L.T. President and it suppresses the statutory remedies of Industrial Dispute Act R11 is totally hostile to the Applicant. Hence this practise must be discouraged and disregarded. Therefore the Applicant does not bind by R11. The Applicant was interviewed and selected by Bank officials and Training was given by them. The Applicant's work place was at Ampara branch. The working hours tally with the Banking hours and working tools, place to sit and other facilities were provided by the Respondent Bank. On top of that the work was given and supervised by the Bank Officers. He assisted the daily operation of the bank. The Applicant was a one of wheel of banking machinery although his position was very low but falls under definition of "banking business" of section 86 of the Banking Act No.30 of 1988. I am mindful of as Her Ladyship Eva Wanasundara J observed in ***Kosgolle Gedara Greeta Shirani Wanigasinghe Vs Hector***

Kobbekaduwa Agrarian Research and Training Institute **S.C. Appeal No. 73/2014 (Unreported, dated 02.09.2015)** *"All the workers in any institution work for the employer. The employer has employed each and every person having allocated some part of the work of the employer. Let it be the Chief Executive Officer, let it be a clerk or a peon or even a sanitation labourer, they are employed under the employer. The employer trusts that they will do their part of the work properly."* In instant case that the Applicant has not only made tea for bankers but also he posted letters on behalf of bank to their customers and bank to bank, thus surely he was a part of day to day business of the Respondent Bank. This situation cannot be taken isolation and can be said as he was integral to the business of the Bank. In contrast, that CareKleen did not get any service from the Applicant. Therefore I cannot say that the applicant is not in "banking business".

11] The Respondent main contention relies on that the Respondent was not employer of the Applicant. It is true that there was no direct service contract with the Respondent Bank. But Evidence shows that there was implied service contract between the parties. In ***Brook Street Bureau (UK) Ltd v Dacas*** [2004], Royal Courts of Justice, United kingdom observed similar situation and held inter alias, "*It is plain that increasing numbers of people, both those who do the work and those who pay for the work done, find themselves in situations of the kind described by Professor Freedland and faced with the problems identified by him. The specific legal question in this case is whether the applicant works under a contract of service (express or implied) when (a) the applicant has entered into a written agreement, expressed to be a contract for services and not a contract of service, with an employment agency; and (b) the employment agency has entered into an express contract with its client (i.e. the end-user of work done by the applicant) for the provision of "agency staff", including the applicant; but (c)* ***no formal contract of any kind has ever been expressly entered into between the applicant and the end-user, in whose premises the applicant works regularly, exclusively and for reward until dismissal takes place on the initiative of the end-***

user*.(Para 11)"* . In this case it is crystal clear that the Applicant is the worker and the end-user is the Respondent Bank which is the employer. [Emphasis is mine]

12] In ***Brook Street Bureau (UK) Ltd v Dacas*** case (supra) English Court identifies **Implied Contract of Service.** In paragraph 16 of said judgment says that **"***The statutory definition of a*

contract of employment as a "contract of service" expressly includes an "implied" contract. This should not be overlooked. I think that it has been. Like other simple contracts, a contract of service does not have to be in any particular form. ***Depending on the evidence in the case, a contract of service may be implied-*** *that is, deduced - as a necessary inference from the* ***conduct of the parties and from the circumstances*** ***surrounding the parties and the work done.*** *As already indicated, the overall situation under consideration is shaped by the triangular format used for the organization of the work: the applicant, the employment agency and the enduser are all involved. Each participant in the triangular situation may have an express contract with either one of, or with each of, the other two parties."*[Emphasis Added]. It is seen, to determine the issue, true nature of relationship between respective parties must be identified. Though the applicant has no contract with the Respondent Bank, the learned LT President has correctly held that there was implied contract of service between the Applicant and the Respondent Bank.

13] In line with above notions, it is my considered view that the learned L.T. President has not erred in law for finding that the Respondent Bank is the employer of the Applicant. The findings of the learned L.T. President that the Respondent is the employer is well founded with the adduced evidence in the trial. I further hold that Outsourced Employee is a form of workman comes within the definition of Industrial Dispute Act (as amended) and no one can circumvent labour laws under the shelter of Outsourced Employee. It is seen it would be a bad practice and curtail of labour rights if court thinks that Outsourced Employees are out of the purview and definition of Industrial

Dispute Act. Why I say so is under ***De Silva v The Associated Newspapers of Ceylon Ltd*** 1978/9 (2) SLR 173 the servant has been defined in line with the control test and discretion of the employer and in instant case the Applicant's total control was with the Respondent bank. Thus, the Applicant cannot sue and get redress against the Carekleen as it had no control over the Applicant. Say for instance, if Carekleen was sued by the Applicant then, they can raise a defense under "control test" they are not the employer of the Applicant. If so rights of the Applicant left with nowhere. Thus, Outsourced Employees rights cannot be denied just simply they do not have an express contract with the end user, in this case Respondent Bank. I therefore cannot see any reason to disturb the finding of learned L.T. President is wrong and unlawful in relation to Employer-Employee aspect.

14] I therefore hold that the cross appeal of the Respondent Appellant should invariably fail. Thus **EP/ HC/AMP/LT/APP//405/2014 appeal is dismissed with cost.**

15] I now decide whether the Applicant's appeal has merits to succeed. The learned counsel for the Applicant stresses that learned President of Labour Tribunal has erred in law while holding termination was unjustified but failing to reinstate the Applicant with back wages. He says as a rule the Applicant entitled for reinstatement. I am mindful the principles of granting orders on just and equitable grounds. In ***Saleem V Hatton National Bank Ltd*** [1994] 3 SLR 409 His lordship **KULATUNGA, J.** articulated the matters to be concern as " *In making orders in cases of termination of services, the court in consonance with the spirit of labour law and practice and social justice is guided by three cardinal principles, namely, the jurisdiction of the Labour Tribunal is wide, relief under the Industrial Disputes Act is not limited to granting benefits which are legally due and the duty of the tribunal is to make an order which may appear to it to be just and equitable*." In that event Court held even though termination was justified LT may consider compensation. It says *"A Labour Tribunal may order compensation upon a termination of services even where such termination is justified and no distinction as to whether such termination was upon a closure of an industry or for misconduct as a disciplinary; measure can be imposed in considering a claim for compensation."* In ***Up Country Distributors (Pvt) Ltd., v. Subasinghe*** **[**1996] 2 SLR 330, the court held though the award made by the tribunal is just and equitable. The tribunal has a discretion in determining the quantum of compensation, on the basis of the facts and circumstances of each case. That discretion should not be unduly fettered. His lordship **Wijetunga, J.** noted that *"the legislature has in its wisdom left the matter in the hands of the tribunal, presumably with the confidence that the discretion would be duly exercised. To my mind some degree of flexibility in that regard is both desirable and necessary if a tribunal is to make a just and equitable order*". In line with above principle the learned LT President has a discretion to grant compensation in lieu of reinstatement.

16] The learned Counsel for the Applicant drew attention that in ***Sri Lanka State Plantation Corporation V. Lanka Podu Seva Sangamaya*** [1990] 1 SLR 84, the Court held that Where the termination of service is found to be unjustified, the ***workman is, as a rule, entitled to reinstatement***. But in contrast to that in the case of ***Hatton National Bank V. Pereira*** **[**1996] 2 SLR 231 His lordship **G. P S. DE SILVA, C.J** took different view and held that "*Where*

termination is unjustified the ***workman cannot as of right demand reinstatement.*** *The tribunal is required to make a just and equitable order. The order must therefore be just and equitable to both parties. Consequently,* ***the tribunal has the discretion to order payment of compensation as an alternative to reinstatement.*** [Emphasis is mine] Thus it is two paths to go. The Learned LT President has chosen not to reinstate the Applicant but to award compensation. Was it just and equitable?

17] To address this question, it is seen that the Applicant was not dismissed on a ground misconduct or mistrust between the parties. His dismissal was a policy decision taken by the Respondent Bank to reduce Outsourced

Employees. In ***Indrajith Rodrigo v Central Engineering Consultancy Bureau*** [2009] 1 SLR 271 his lordship Marsoof J states in what circumstances warrant reinstatement. In that case, his lordship states as follows;

"I hold that the order of reinstatement made by the Labour Tribunal should be affirmed. It is a well-established principle that the primary (albeit discretionary) remedy for harsh, unjust or unreasonable termination of employment is reinstatement to the same position or re-engagement to a comparable position held prior to the said termination. ***Compensation is a secondary cure and is only ordered where, in the discretion of the Court or Tribunal Court, it is held that reinstatement or reengagement is not appropriate.*** *Reinstatement has always been awarded at the discretion of the Labour Tribunal or Court and such discretion has to be exercised judicially taking into consideration all the circumstances of the case."*

18] If the learned L.T. President is reluctant to award reinstatement he should give reasons to that effect. I hold that Tribunal had failed to give any reason for refusing the reinstatement of the Applicant. Thus that decision is untenable. It is mindful although the Reinstatement has always been awarded at the discretion of the Labour Tribunal; such discretion has to be exercised judicially taking into consideration all the circumstances of the case. It is seems to me the Learned L.T. President has failed to evaluate the plight of the Applicant. The Applicant was although terminated with effect from

30th June 2011; the Bank has allowed him to work till 13th of September 2011. The Respondent did not deny that the Applicant has worked during this period at Ampara Commercial Bank

Branch. The applicant worked as Office Assistant and this employment was his bread and butter. It is my considered view no one should be denied reinstatement unless it is not appropriate, practical or viable. I therefore hold that Tribunal has failed to act judicially when considering proper redress to the Applicant. Thus, there is no issue of awarding compensation. Awarding Compensation should not be panacea for everything. If circumstances demand reinstatement must be awarded as a rule. In line with above legal parameter, I hold the Applicant's Appeal must succeed on above reasons. Thus **EP/ HC/AMP/LT/APP//404/2014 appeal is allowed.**

19] Result of these appeals are as follows;

a) **EP/ HC/AMP/LT/APP//404/2014 appeal is allowed. I hold that the Applicant Appellant's service to be treated as intact from the inception of his work as Office assistant that is 01st April 2009 till the date of this judgment. The Applicant is to be reinstated By the Respondent Bank as Office Assistant in Ampara Branch forthwith full back wages and allowances if any, in accordance with his last drawn salary. Since the Applicant will be getting back wages and reinstatement, I quash the part of compensation granted by the Learned L.T. President order dated 01St July 2014. The applicant entitled to get Rs 50,000 cost of this litigation summarily assessed. Judgment of this Court is to be conveyed to the Respondent Bank through the Labour Tribunal of Ampara forthwith.**

b) **EP/ HC/AMP/LT/APP//405/2014 appeal is dismissed with cost.**

20] This is uniform judgment for both appeals. Registrar of this Court is directed to remit original case record to the Labour Tribunal Ampara forthwith.

Writ Appeal No. 31374/2013

Commissioner Bellary City Corporation v. Bellary Mahanagara Palike

2014 SCC OnLine Kar 4959

(BEFORE A.S. BOPANNA AND B. SREENIVASE GOWDA, JJ.)

The Commissioner Bellary City Corporation, Bellary-551 301 ..... Appellant

Sri. C.V. Angadi, Advocate.

v.

1. Bellary Mahanagara Palike, Neeru Sarabaraju Noukarara Sangh @ (Regn. No. 04Bd/08) Having Their Office, at Plot No. 55, Ward No. 19, 2nd Cross, Shankar Colony, Bellary-580103, Rep. by its President C. Raghunath.
2. Karnataka Urban Water supply & Drainage Board Contract Employees Association ® (Regn. No. Bdo-497) Having Their Office at Plot No. 55, Ward No. 19, 2nd Cross, Shankar Colony, Bellary-580103, Rep. by its President C. Raghunath.
3. Sri. Sumitrappa S/o Kariyappa Age: 38 years, Occ: Service of Bellary City Corporation, R/o H. No. 159, 3rd Cross, Devinagar, Bellary - 581301.
4. State of Karnataka Department of Housing & Urban Development, Vidhana Soudha, Dr. Ambedkar Veedhi, Bangalore - 586001, by its Secretary.
5. State of Karnataka Department of Labour Welfare, Vidhana Soudha, Dr. Ambedkar Veedhi, Bangalore - 586001., by its Secretary.
6. Labour Officer Office of the Labour Office, Sub-Dn-2, Taluk Road, Bellary-581301
7. The Managing Director/Chairman, Karnataka Urban Water supply & Drainage Board, Cauvery Bhavan, K.G. Road, Bangalore - 560 009 ..... Respondents

Sri. V.R. Datar, Advocate, for R.1 to R.3,

Sri. C.S. Patil, Government Advocate, for R.4 to R.6,

Sri. N.M. Han Si, Advocate, for R.7.

Writ Appeal No. 31374/2013 & Writ Appeal Nos. 100107-344/2014 (L-RES)

Decided on April 28, 2014

JUDGMENT

There is a delay of nine days in filing the appeal. I.A. No. 1/2013 is filed seeking condonation of delay. Accepting the reasons, delay is condoned. The appeal is taken up for consideration.

2. The respondent No. 4 in the writ petitions is before this Court in this appeal, assailing the order dated 31.10.2013, passed in W.P. No. 81406/2013 and connected petitions. The respondents 1 to 3 herein were before the learned single Judge assailing the tender notifications dated 24.7.2013 and 30.7.2013 impugned at Annexures-G and S to the writ petitions. By the said notifications the appellant herein had sought to outsource the work indicated in the notification by calling for tenders from prospective bidders in terms of the provisions contained under the Karnataka Transparency in Public Procurement Act ('KTPP Act' for short). The respondents 1 to 3 describing themselves to be the union representing the workmen and one of the employees, who wrere stated to be carrying out the work under the appellant corporation were before the Court in the writ petitions claiming to be aggrieved by the outsourcing of perennial nature of work.

3. On considering the rival contentions, the learned single Judge has quashed the impugned notifications and in addition has made an observation that the employees who have not received the salaries during the pendency of the writ petitions be paid their salaries.

4. The learned counsel for the appellant while assailing the order passed by the learned single Judge would contend that, keeping in view the nature of work involved and the maintenance of water supply unit, the notifications have been issued. It is contended that the Government Order dated 2.4.2011 provides with regard to the extent of outsourcing of work with regard to maintenance. Keeping these aspects in view the notification has been issued and in any event the nature of work notified is of an emergent nature where otherwise maintenance would not be possible. With regard to the direction issued by the learned single Judge regarding payment of salaries it is contended that the issue as to whether the persons claiming under the writ petitioner unions were entitled to be paid through the appellant is premature at this stage. It is contended that certain of the employees claiming to be employees of the appellant had raised a dispute in Reference No. 2/1998 and the award dated 26.7.2010 passed therein is still pending consideration in writ petition filed by the appellant as well as the workmen and therefore the learned single Judge ought not to have issued such direction with regard to payment of wages. It is therefore contended that the order of the learned single Judge calls for interference.

5. The learned counsel representing the respondents 1 to 3 seeks to sustain the order passed by the learned single Judge. It is contended that with regard to the Government order referred by the learned counsel for the appellant or the notifications, which are being sought to be sustained, the contentions are contrary to the legal position. The learned counsel would place reliance on the judgment of the Hon'ble Supreme Court in the case of the Secretary, *State of Karnataka* v. *Umadevi*, (2006) 4 SCC 1. In addition, the learned counsel would also refer to the provisions contained in *the Contract Labour (Regulation and Abolition) Act 1970 ('Act 1970' for short).* It is his case that as per the document available at Annexure-U, the details of workmen who had rendered service was available as per the attendance taken through the bio-metric system and it is in that view the respondents 1 to 3 herein have sought for payment of wages in respect of the persons who have worked. It is therefore contended that the learned single Judge was not only justified in quashing the impugned notifications but also directing the appellant to pay the salaries in respect of the employees who have discharged their work during the pendency of the writ petitions.

6. In the light of the rival contentions there are two aspects which require consideration. Firstly, the validity of Annexures-G and S which were the subject matter in the writ petitions. A perusal of the notifications would indicate that the appellant has floated short term tender notification through e-procurement process calling upon the contractors to put forth their bid in respect of providing the work force in the nature as has been indicated in the notification. The further perusal of the said notifications would indicate that the category of workmen for which such notifications have been issued is for Valvemen, Gardeners and Cleaners. The contract is for six months and the contract amount has also not been notified. The subsequent notification at Annexure-S is also in similar terms. While taking note of the said notification and the Government order dated 2.4.2011 which is relied on by the learned counsel for the appellant what cannot be lost sight is that the appellant answers the description of "Other Authority" as contemplated under Article 12 of the Constitution of India. Keeping this aspect in view, if the judgment of the Hon'ble Supreme Court cited above is also to be kept in perspective. It is evident that the outsourcing of perennial nature of employment ought not to be embarked by the State and the other authorities as it would be against the constitutional scheme.

7. That apart what is also to be kept in view is the provisions contained in the Act 1970 which prohibits employment of contract labours. In that view if order of the learned single Judge insofar as quashing the notification at Annexures-G and S is perused, the learned single Judge was justified in coming to the conclusion that the work which was of the description in the instant petition could not have been outsourced. While arriving at such a conclusion the learned single Judge has also kept in view the communication dated 2.8.2013 (Annexure-M) to the writ petition. A perusal of the said communication would indicate that the Labour Inspector, Bellary District has in fact brought to the notice of the appellant that the notification issued by the appellant is contrary to law, since contract labour has been abolished in the appellant corporation. When the contract labour has been abolished by issue of notification as indicated in the said communication, the employment of contract labour even by outsourcing will not be permissible and therefore the notification being contrary to law was rightly quashed by the learned single Judge.

8. Having arrived at the above conclusion, the next aspect relates to the grievance put forth by the learned counsel for the appellant with regard to the observation made by the learned single Judge in Para 9 of the order relating to the payment of salaries during the pendency of the writ petitions. Admittedly there is no details indicated in the order. It is in that view the learned counsel for the appellant contends that the members of the petitioner union could not have sought for payment of such salary from the appellant, since according to the learned counsel for the appellant they were discharging their work under the contractors. In that regard reference is made to the earlier proceedings before the Labour Court in Reference No. 2/1998.

9. We have perused the award passed by the Labour Court, which is available at Annexure-N to the writ proceedings. It is not in dispute that against the award passed therein, writ petitions are pending consideration. Even if that be the position, the right as claimed therein is different and distinct from the situation which we are considering at present in the instant case. Pending consideration the correctness or otherwise of the impugned notifications at Annexures-G and S to the writ petitions, the outsourcing through tender could not take place and as such the earlier manner in which the work was being carried out for the benefit of the appellant was being

continued. In that regard, no doubt there is rival divergent contentions advanced by the appellant on the one hand, the respondents 1 to 3 on the other, as to whether the work being performed by such workmen is directly under the appellant or under the contractors. The Respondents 1 to 3 have relied on Annexure-U being the details of the bio-metric attendance chart to contend that the persons indicated therein have discharged work for the benefit of the appellant. If these aspects are kept in view, considering the fact that the question as to whether they are working directly in the appellant or under the contractor, being a disputed question of fact, it cannot be decided in a writ proceedings.

10. Be that as it may, what cannot be disputed is that some of the members of the respondents 1 to 3 have either worked under the appellant or under the contractors employed by the appellant. Even if it be the position that they are working under the contractor, the appellant being the principal employer has a duty cast on them to see that the contractor engaged by them pays the wages to the employees working under them. To the said extent the observation made by the learned single Judge is clarified to hold that the appellant would secure details from their contractors to have the details relating to the number of persons who have worked under the contractors and to compare the same with the bio-metric attendance details retained by them and also to find out whether the contractors have paid the wages to the persons who have been employed by them and have discharged in the appellant's establishment and if wages have not been paid by the contractors, the appellant shall take steps to see that the contractors pay the said wages or in the alternative pay the wages and recover the same from the contractors as provided under the provisions of the Act 1970.

11. With the said clarification these appeals stand disposed of.

12. Consequently, I.A. Nos. 1 and 2 of 2014 and I.A. No. 1/2013 stand disposed of.

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Writ - C No. - 11760 of 2011

Lala Babu Baijal Memorial Inter College v. State of U.P.

2012 SCC OnLine All 553 : (2012) 4 All LJ 310 : (2013) 96 ALR (SUM 14) 7 : (2013) 137 FLR (Sum 28) 14

(BEFORE SUDHIR AGARWAL, J.)

Writ - C No. - 11760 of 2011

C/M Lala Babu Baijal Memorial Inter College and Another ..... Petitioners

v.

State of U.P. and others ..... Respondents

Petitioner Counsel:- N.L. Pandey, N.N. Pandey

Respondent Counsel:- C.S.C.

Connected with

1. Writ - A No. - 27387 of 2011

C/M Janta Inter College, Bhala Paliwar and Another ..... Petitioners

v.

Chief Secretary, Govt. of U.P., Lucknow and Others ..... Respondents

Petitioner Counsel:- A.K. Malviya

Respondent Counsel:- C.S.C.

With

2. Writ - A No. - 62616 of 2011

Deepak Kumar Sharma ..... Petitioner

v.

The State of U.P. and Others ..... Respondents

Petitioner Counsel:- Siddharth Khare, Ashok Khare

Respondent Counsel:- C.S.C., A.K. Shukla

With

3. Writ - A No. - 8492 of 2012

Vineet Nagar & Another ..... Petitioners

v.

State of U.P. & Others ..... Respondents

Petitioner Counsel:- V.K. Singh, G.K. Singh

Respondent Counsel:- C.S.C.

With

4. Writ - A No. - 27388 of 2011

C/M Inter College Karanda Thru. its Manager ..... Petitioner

v.

Chief Secretary, Govt. of U.P., Lucknow and Others ..... Respondents

Petitioner Counsel:- A.K. Malviya

Respondent Counsel:- C.S.C.

With

5. Writ - A No. - 45708 of 2011

Principal, Purushottam Adarsh Kanya Inter College and Another .... Petitioners

v.

State of U.P. and Others ..... Respondents

Petitioner Counsel:- Prabhakar Awasthi

Respondent Counsel:- C.S.C.

With

6. Writ - A No. - 45111 of 2011

Principal, Janta Inter College, Ahiraula, Azamgarh ..... Petitioner

v.

Chief Secretary, Govt. of U.P., Lucknow and Others ..... Respondents

Petitioner Counsel:- B.M. Chaturvedi

Respondent Counsel:- C.S.C.

With

7. Writ - A No. - 33140 of 2011

C/M Gram Darshan Inter College and Another ..... Petitioners

v.

State of U.P. Thru Secy. and Others ..... Respondents

Petitioner Counsel:- V.S. Dwivedi

Respondent Counsel:- C.S.C.

With

8. Writ - A No. - 49269 of 2011

Uma Shankar and Another ..... Petitioners

v.

State of U.P. and Others ..... Respondents

Petitioner Counsel:- Pankaj Agarwal

Respondent Counsel:- C.S.C.

With

9. Writ - A No. - 63653 of 2011

Pushpendra Singh ..... Petitioner

v.

Education Secretary, Govt. of U.P., Lucknow and Others ..... Respondents

Petitioner Counsel:- Ashok Mehta

Respondent Counsel:- C.S.C.

With

10. Writ - A No. - 64630 of 2011

Principal, Dr. Kailash Nath Katju Inter College, Alld. & Another .

…. Petitioners

v.

The State of U.P. and Others ….. Respondents

Petitioner Counsel:- Anil Bhushan

Respondent Counsel:- C.S.C.

With

11. Writ - A No. - 68199 of 2011

C/M Amar Singh Uchchtar Madhyamik Vidhyalya ….. Petitioner

v.

State of U.P. & Others ….. Respondents

Petitioner Counsel:- Rajeev Kumar Singh

Respondent Counsel:- C.S.C.

With

12. Writ - A No. - 68591 of 2011

Bharat Saini ….. Petitioner

v.

State of U.P. & Others ….. Respondents

Petitioner Counsel:- Amit Rana

Respondent Counsel:- C.S.C.

With

13. Writ - A No. - 68592 of 2011

Reshu Gupta ….. Petitioner

v.

State of U.P. & Others ….. Respondents

Petitioner Counsel:- Amit Rana

Respondent Counsel:- C.S.C.

With

14. Writ - A No. - 62476 of 2011

Ashish Kumar Singh ….. Petitioner

v.

The State of U.P. and Others ….. Respondents

Petitioner Counsel:- Siddharth Khare, Ashok Khare

Respondent Counsel:- C.S.C.

With

15. Writ - A No. - 63197 of 2011

Yateendar Singh Varma ….. Petitioner

v.

State of U.P. & Others ….. Respondents

Petitioner Counsel:- Awadh Narain Rai

Respondent Counsel:- C.S.C.

With

16. Writ - A No. - 67140 of 2011

Smt. Sangeeta Devi ….. Petitioner

v.

State of U.P. and Others ….. Respondents

Petitioner Counsel:- B.K. Tripathi, B.K. Trigunait
Respondent Counsel:- C.S.C., B.S. Pandey, Ravi Pratap

With

17. Writ - A No. - 61539 of 2011

Principal, Hafiz Siddique Islamia Inter College, Badaun ..... Petitioner

v.

The State of U.P. and Others ..... Respondents
Petitioner Counsel:- V.K. Singh, B.P. Singh, G.K. Singh
Respondent Counsel:- C.S.C.

With

18. Writ - A No. - 62465 of 2011

C/M Kamla Nehru Chandra Kumari Jain Inter College, Fzd. & Anr. ..... Petitioners

v.

The State of U.P. and Others ..... Respondents
Petitioner Counsel:- Anil Bhushan
Respondent Counsel:- C.S.C.

With

19. Writ - A No. - 631 of 2012

Asha Rani Ahuja ..... Petitioner

v.

State of U.P. & Others ..... Respondents
Petitioner Counsel:- Pankaj Satsangi
Respondent Counsel:- C.S.C., Birendra Pratap Singh

With

20. Writ - A No. - 1432 of 2012

C/M Shri Tara Chand Chaturvedi Inter College ..... Petitioner

v.

Principal Secretary, Education & Others ..... Respondents
Petitioner Counsel:- Suyash Pandey, N.L. Pandey
Respondent Counsel:- C.S.C.

With

21. Writ - A No. - 50905 of 2011

Sri Lal Bahadur Shastri Inter College, Sursi, Kannauj & Others .... Petitioners

v.

State of U.P. and Others ..... Respondents
Petitioner Counsel:- Yogish Kumar Saxena
Respondent Counsel:- C.S.C.

And

22. Writ - A No. - 74197 of 2011

Virendra Swaroop Saxena ..... Petitioner

v.

State of U.P. & Others ..... Respondents

Petitioner Counsel:- Vinod Kumar Singh
Respondent Counsel:- C.S.C., Mohd. Yasin

Writ - C No. - 11760 of 2011
Connected with
Writ - A No. - 27387 of 2011; Writ - A No. - 62616 of 2011; Writ - A No. - 8492 of 2012; Writ - A No. - 27388 of 2011; Writ - A No. - 45708 of 2011; Writ - A No. - 45111 of 2011; Writ - A No. - 33140 of 2011; Writ - A No. - 49269 of 2011; Writ - A No. - 63653 of 2011; Writ - A No. - 64630 of 2011; Writ - A No. - 68199 of 2011; Writ - A No. - 68591 of 2011; Writ - A No. - 68592 of 2011; Writ - A No. - 62476 of 2011; Writ - A No. - 63197 of 2011; Writ - A No. - 67140 of 2011; Writ - A No. - 61539 of 2011; Writ - A No. - 62465 of 2011; Writ - A No. - 631 of 2012; Writ - A No. - 1432 of 2012; Writ - A No. - 50905 of 2011; Writ - A No. - 74197 of 2011
Decided on March 21, 2012

Hon'ble Sudhir Agarwal, J.

1. With the consent of learned counsel for the parties since common questions of law and facts have been raised in all these matters, I proceed to decide these matters finally under the Rules of this Court at this stage by this common judgment.

2. In this bunch of writ petitions the core issue relates to the Government Order *(hereinafter referred to as the "G.O.")* No. Ve.Aa-2-27/Dus-59(M)/2008, dated 06.01.2011 issued by Sri Anoop Mishra, Principal Secretary, Finance U.P. Government, Lucknow addressed to various Principle Secretaries of different departments and Directors of different departments. The subject of G.O. is sanctioned Pay Band and Grade Band as modified/upgraded for Class-IV cadre of aided educational/technical educational institutions in the revised pay scale pursuant to 6th Pay Commission recommendation. Though in the writ petitions entire G.O. is challenged but during the course of arguments the learned counsels for petitioners have confined their attack only to Para 2 thereof. Para 2 says that in future no appointment on Class-IV posts (except the junior cadre of technical posts) shall be made and vacancies of Class-IV posts shall be managed by the system of outsourcing.

3. The relevant para 2 of G.O. dated 06.01.2011 reads as under:

"2. मुझे यह कहने का निर्देश हुआ है कि भविष्य में चतुर्थ श्रेणी के किसी भी पद (कनिष्ठ वर्ग के प्राविधिक पदों को छोड़कर) पर नियुक्ति नहीं की जायेगी तथा चतुर्थ श्रेणी के रिक्त होने वाले पदों के सम्बन्ध में केवल आईɜट सोर्सिंग के माध्यम से व्यवस्था की जाय।

परन्तु उक्त व्यवस्था उत्तर प्रदेश सेवा काल में मृत सरकारी सेवकों के आश्रितों की भर्ती नियमावली 1974 के अन्तर्गत समूह "घ" के पदो पर की जाने वाली नियुक्ति के संबंध में लागू नहीं होगी।"

"2. I am directed to say that in future appointments shall not be made on any Class IV posts (except on the junior cadre of technical posts) and the Class IV posts falling vacant shall be managed only by outsourcing.

But the said provision shall not apply to the appointments to be made on the Group D posts under the Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules 1974."

(English translation by the Court)

4. Some of the writ petitions have been filed by Committee of Managements of Secondary Schools and Colleges challenging para 2 of G.O. dated 06.01.2011 as it deny them power of appointment on Class-IV posts in their respective educational institutions. Some of the writ petitions have been filed by candidates who have been selected for appointment on Class-IV posts for various secondary educational institutions but educational authorities have denied approval or recognition to such selection in view of the ban imposed vide para 2 of G.O. dated 06.01.2011.

5. The respondents-State of U.P. and its authorities have filed counter affidavit in some of the writ petitions and learned counsels for the parties have agreed to read the said counter affidavits in all matters. For referring the pleadings in counter affidavit, the parties have referred to Writ Petition No. 27387 of 2011 and this Court shall also proceed to refer pleadings in the aforesaid counter affidavit.

6. Sri Ashok Khare, Senior Advocate has advanced his submissions in Writ Petition No. 62476 of 2011, 62616 of 2011 and 74197 of 2011. Sri N.L. Pandey, Advocate in Writ Petition No. 11760 of 2011; Sri A.N. Rai, Advocate in Writ Petition No. 63197 of 2011 and Sri G.K. Singh, Advocate in Writ Petition No. 8492 of 2012 have made their submisisons. The other learned counsels appearing for petitioners have adopted the submissions advanced by the above learned counsels.

7. The basic ground of challenge is that the impugned G.O. is ultra vires of Section 16(G) of U.P. Intermediate Education Act, 1921 *(hereinafter referred to as the "Act, 1921")* and Regulation 100 Chapter III of Regulations framed under Act, 1921. It is even otherwise arbitrary, irrational and violative of Article 14 and 16 of the Constitution of India. Constituting an encroachment on managements' right to manage their institutions, it is also violative of Article 19 of the Constitution. It is also submitted that correctness of G.O. came to be examined by this Court in Writ Petition No. 36249 of 2011, *Luv Kush Pandey* v. *State of U.P.*, decided on 14.10.2011 wherein the Court did not decide the question of vires of aforesaid G.O. but held that the cases where vacancies occurred and selections were made before issuance of aforesaid G.O., the same would not be governed by aforesaid G.O.

8. Sri Ashok Khare, learned Senior Advocate submitted that Writ Petitions No. 62467 of 2011 and 74179 of 2011 are squarely covered by aforesaid judgment of Lucknow Bench in *Luv Kush Pandey* (supra).

9. Sri G.K. Singh, Advocate in particular submitted that G.O. is also not protected by reference to Section 9 of Act, 1921 inasmuch as every order is not referable to the said provision. It is applicable where immediate action is needed. The present G.O. is addressed to all the departments and not confined to educational institutions. By no stretch of imagination, even otherwise, it touches upon Section 9 of Act, 1921. He also placed reliance on a Division Bench judgment of this Court in *Satish Kumar* v. *State of UP*, 2006 (4) ESC 2786 (para 34).

10. As already said, the respondents have filed their counter affidavits in some of the cases and the counter affidavit filed in Writ Petition No. 27387 of 2011 has been

referred. It is pleaded therein that Chapter 2.2 para 2.2.9 of 6th Central Pay Commission Report Vol. 1 provides that a separate running Pay Band, designated as 1S scale is being recognized for posts belonging to Group-D. However, the same shall not be counted for any purpose as no future recruitment is to be made in this grade. All the present employees belonging to Group-D, who possess prescribed qualification, for entry level in Group-C, will be placed in Group-C Running Pay Band straightaway w.e.f. 01.01.2006. Other Group-D employees who do not possess qualification are to be retrained and thereafter be upgraded and placed in Group-C Running Pay Band. Till such time they are retrained and redeployed, they will be placed in 1S scale. The Pay Commission has said that 1S scale is not a regular or permanent pay scale and for the existing employees it shall operate only till the time, existing Group-D staff is placed in Group-C Running Pay Band. The mechanism for placing Group-D staff in revised Group-C Running Pay Band has been discussed in detail in Chapter 3.7 relating to Group-D staff. Group-D employees who are not placed in Group-C Pay Band straightaway will be given the band after retraining without any loss of seniority vis a vis those in Group-D who possessed higher qualification, redeployed and were placed in Group-C Running Pay Band w.e.f. 01.01.2006. It also refers to para 2.2.10 of 6th Pay Commission Report providing that so far as future recruitment is concerned no direct recruitment in 1S scale will take place and this scale will be operated for regulating emoluments during training period of candidates who do not possess the minimum qualification of matric. The Commission expressed its view that candidates not possessing minimum qualification of matric and/or ITI cannot be recruited in Government as all jobs in Government requires same level of skill.

11. Respondents have further pleaded, that, Since 6th Pay Commission Recommendations were implemented by State Government in respect to its employees also, a policy decision was taken regarding pay revision and the State Government issued G.O. No. Ve.Aa.-2-2052/Dus-59(M)/2008 dated 08.09.2010 applicable to various departments of State Government providing therein that no recruitment in future on Class-IV posts (except the lowest cadre of technical post) shall be made and future vacancies in Class-IV shall be managed by "outsourcing". The aforesaid G.O. was clarified by subsequent G.O. No. Ve.Aa.-2-3226/Dus-59 (M)/2008 dated 04.01.2011 that restriction against future recruitment in Class-IV posts shall not be applicable for compassionate appointments. It was further clarified by another G.O. No. Ve.Aa.-2-26/Dus-59(M)/2008 dated 06.01.2011 (Annexure-CA-4 to the counter affidavit) issued to various departments of Government stating that benefit of revised pay and Grade Band would be notionally applicable from 01.01.2006 and actual benefit/payment shall be admissible w.e.f. 08.09.2010. In respect to educational institutions aided by State Government similar G.O. No. Ve.Aa.-2-27/Dus-59(M)/2008, dated 06.01.2011 was issued and in furtherance thereof the impugned G.O. dated 06.01.2011 has also been issued. By another G.O. No. 4/1/2008-Ka-2/2008 (Annexure-CA-6 to the counter affidavit) it was also clarified by Government that in outsourcing, provision of reservation shall also be observed strictly.

12. It is said that the G.O. dated 06.01.2011 having been issued in furtherance of acceptance of 6th Pay Commission, the recommendations whereof have been accepted by Government, it is not open to petitioners to challenge the same partly while retaining benefit of recommendations of 6th Pay Commission in all other aspects.

13. So far as recommendations relating to Pay Revision as made by 6th Pay Commission and accepted by Government that is a different matter since it is not the case of respondents that Pay Commission had the jurisdiction to deal with matter of recruitment and appointment of employees and officers of Government. In my view, it would not be necessary for this Court to look into this aspect further for the reason that validity of Para 2 of G.O. dated 06.01.2011 has to be considered in the light of statutory provisions of Act, 1921, the Regulations framed thereunder and also the Constitutional provision, i.e., Articles 14, 16 and 19.

14. Before coming to other aspects of the matter the Court finds it prudent to examine the meaning of the term "Outsourcing". It is neither a technical term nor a term of art. I also could not find its origin in the ancient times but appears to have gain momentum in recent past, i.e., with the advancement of managerial policies in the field of information technology etc. It is only when the scope, extent, purpose and objective of "Outsourcing" would be clear, it would be more convenient to examine the correctness of Para 2 of G.O. in the light of statutory provisions as referred to hereinabove and other relevant provisions which this Court shall discuss a bit later.

15. When this Court enquired from the learned Additional Advocate General as to what the Government mean by asking the educational institutions to go for "Outsourcing" instead of making recruitment of Class-IV posts, he simply replied that educational institutions shall not have to recruit any Class-IV employee on their own but may have their work done, meant to be performed by Class-IV employees, by employing persons from labour suppliers or the organizations engaged in the work of "Outsourcing". He was immediately confronted, whether it amounts to a contract labour supply to which he said that exactly that is not the purpose but to some extent there may be some similarity.

What is Outsourcing

16. When this Court proceed to consider the meaning and ambit of the term "Outsourcing"; immediate questions arise (a) what is outsourcing; (b) what can be outsourced; (c) where one can find outsourcing resources; and, (d) is it a unikind of system or multiple kind.

17. The term "outsourcing" is not a very commonly recognized term in various Dictionaries but some recent and revised editions contain this term and define it.

18. The "**Concise Oxford English Dictionary Indian Edition**" (11th Edition Revised) (2008) published by Oxford University Press, New Delhi at page 1017 defines the term "outsourcing" as under:

"Outsourcing-obtain by contract from an outside supplier."

19. "Wikipedia" describes the term "outsourcing" as "the process of contracting a business function to someone else". In the commercial word particularly among the managerial class, the term "Outsourcing" is known in various ways. According to some "Outsourcing" is any task, operation, job or process that can be performed by employees of company, but is instead, contracted to a third party for a significant period of time. Hiring a temporary employee when a regular employee in an institution is on leave is not "Outsourcing". According to some others "Outsourcing" is contracting with other company or persons to do a particular function. Normally

outsourcing is resorted to such functions which are considered "non-core to the business". Another definition or meaning of "Outsourcing" is that it is simply farming out of services to a third party. The central idea, therefore, discerned from above is, that, "Outsourcing" is the process of contracting a function to someone else. Its opposite is "Insourcing".

20. "Insourcing" has been identified as a mean to ensure, control, compliance and to gain competitive differentiation through vertical integration or the development of shared services. "Insourcing" is also called as vertical integration.

21. "Outsourcing" is considered to be something more than purchasing and more than consulting. It is a long term results oriented relationship for a whole activity normally commercial over which the Provider has a large amount of control and managerial discretion. "Outsourcing" is the use of outside business relationship to perform necessary business activities and processes in lieu of internal capabilities. The most common forms of outsourcing presently known are "Information Technology Outsourcing" (ITO), "Business Process Outsourcing" (BPO) and Knowledge Process Outsourcing" (KPO). Business Process Outsourcing encompasses, Call Center Outsourcing, Human Resources Outsourcing, Finance and Accounting Outsourcing and Claims Processing Outsourcing.

22. The organizations want to seek "Outsourcing" normally take into account the issues like, cost savings, focus on core business, cost restructuring, improvement of quality, access and availability of better knowledge and experience, operational expertise, access to talent, capacity management, catalyst for change, enhancement for capacity of innovation, reduction of time in production of a product for supply to the market, Commodification, Risk Management, Tax Benefit, Venture Capital, Scalability, Creating Leisure Time, Reducing Liability, Revenue etc.

23. "Outsourcing", therefore, is the use of outside business relationship to perform necessary business activities and processes in lieu of internal capabilities. Those who provide "Outsourcing" facilities are called Outsourcing Partners, Outsourcing Suppliers and Providers. Those who go to purchase outsourcing services are called "Buyers" and "Users" in common parlance. The key to the definition of "Outsourcing" is the aspect of transfer of control. In Outsourcing, the Buyer normally does not instruct Supplier how to perform its task but, instead, focuses on communicating what results it want to buy. It leaves the process of accomplishing those results to supplier.

24. There are different kinds of outsourcing, namely, Tactical Outsourcing, Strategic Outsourcing, Transformational Outsourcing etc.

25. Though the term "outsourcing" as such has not been considered in detail by Courts but its purport and object can be discerned in the context the same has been referred to in certain decisions.

26. In *Common Cause (A Regd. Society)* v. *Union of India*, JT 2008 (4) SC 317 the Court considered a situation where a committee is appointed by the Court but with a further authority to issue orders to authorities or to public. Deprecating this practice in para 36 of the judgement the Court said:

"36. We would also like to advert to orders by some Courts appointing committees giving these committees power to issue orders to the authorities or to the public.

This is wholly unconstitutional. The power to issue a mandamus or injunction is only with the Court. The Court cannot abdicate its function by handing over its powers under the Constitution or the C.P.C. or Cr.P.C. to a person or committee appointed by it. ***Such 'outsourcing' of judicial functions is not only illegal and unconstitutional****, it is also giving rise to adverse public comment due to the alleged despotic behaviour of these committees and some other allegations. A committee can be appointed by the Court to gather some information and/or give some suggestions to the Court on a matter pending before it, but the Court cannot arm such a committee to issue orders which only a Court can do." (emphasis added)*

27. The above discussion clearly suggest and demonstrate that outsourcing does contemplate performance of job or function or work by a body outside the buyer or purchaser and the service provided himself perform the job through its own agencies and it cannot be equated with the supply of labour or employees by a third party. The two connote different situations, functions and idea. They are not same and identical. In the system of labour supplier there is an introduction of middleman who make the workers available as a commodity without creating any employer and employee relationship with principle employer and the contract labour but outsourcing as such is not the involvement of a middleman for arranging the labour force bit it is the system where a particular kind of job or performance itself is performed by third party, i.e., the service provided through his own man and it is the own result which is made available to purchaser or buyer.

28. Regarding the merits and demerits of outsourcing there are different views but this Court is not required to go therein since the discussion about "Outsourcing" made above was only in furtherance to understand what the G.O. intend to do, in effect, and, whether in view of relevant provisions of statute, it is permissible to do so.

Relevant Statutes

29. The relevant statutes which have been referred to by both sides are Act, 1921 and U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971 *(hereinafter referred to as the "Act, 1971")*.

30. Act, 1921 is pre-constitutional enactment. Prior thereto the secondary education was also governed and managed by Allahabad University. Act 1921 was enacted to establish a Board to take place of Allahabad University for regulating and supervising High School and Intermediate Education system in U.P. and prescribe courses therefor. It constituted Board of High Schools and Intermediate, U.P. *(hereinafter referred to as the "Board").*

31. Here a question incidentally may also arise as to the status of "Board". This came up for consideration before a Division Bench of this Court in *Ghulam Haqqani Khan* v. *State of Uttar Pradesh*, AIR 1962 Alld. 413. Two separat but concurrent judgments were rendered by Hon'ble B. Mukerji and S.C. Manchanda, JJ. The two questions formulated by Bench are stated in para 33a of the judgment, reads as under:

"(1) Whether the Board is a statutory authority, and if so, whether it is possible to create a statutory body as a department of Government?

(2) If the Legislature under Act II of 1921; has fixed the ambit and scope of the

powers to be exercised by such statutory body can any one else interfere therewith or enlarge their scope?"

32. Hon'ble Manchanda, J. observed that the Legislature intended the Board to be independent only in certain respects subject to overriding fiscal and general administrative control of Government. It referred to and relied on a G.O. dated 13.04.1951 stating that the office of Board of High School is separate from that of Director of Education and appointments to higher clerical posts in any one of those offices are to be confined to clerks of that office only. This means that for certain purposes Board is treated separate from Education Department and normally higher clerical posts are not interchangeable. It further observed that there is no inherent impossibility in a statutory authority being at the same time a department of Government unless the Act itself, which creates the authority, gives it a separate legal status, i.e., provides it with the right of perpetual succession, a common seal, right to sue and to be sued in its own name. Such a body as the Board, cannot have a separate legal existence for all purposes. It must, necessarily, in the matter of administration and fiscal control, be under the authority of someone else. His Lordship also observed that:

"It is true that the Act itself nowhere says that it shall be a department of Government but when the historical background is taken into consideration the appointments of the staff from the very inception of the Board were made by the Government, salaries to the ministerial staff were paid by the Government; the appointments, transfers, suspension and removal were always by the Government—the budget provisions for the Board were made by the State Government—shows that the Board was always treated as a department of Government for all purposes other than those powers which the Act itself had specifically conferred and made the Board autonomous to that extent."

33. In the concurring judgment, Hon'ble B. Mukerji, J. in para 10 said:

"10. It was not shown to us that the Board was ever treated as a Corporation or a body incorporated or it exercised any privileges peculiar to such bodies. I could think of no law, and none was shown to us, on which it could be contended that simply because a certain body was created by statute that body could not function as a Department of Government so as to be outside the scope of the executive power of the Governor under Article 154 of the Constitution. Clause (2)(b) of this Article conferred powers on Parliament and the State Legislature under which either could confer by law functions on any authority subordinate to the Governor but because of the provisions of Clause (2)(a) the Governor could not exercise 'Executive power' where such functions had been, conferred on any other authority by any existing law."

34. Again a Hon'ble Single Judge of this Court in *Sangam Lal Dube* v. *Director of Education*, AIR 1957 All 70 considered "Board's" status. Therein an order was passed by Director of Education transferring Sri Sangam Lal Dube who was working as Clerk in Board to the office of Government Normal School, Aligarh. The power of Director was challenged on the ground that Board is not part of Education Department and, therefore, Director has no such power. The contention was upheld in para 30 of the judgment, which reads as under:

"30. Various provisions of the Code and Financial Hand Book were placed before me to show that the powers of the Director and that of the Board are mutually exclusive.

District powers are given to the Secretary of the Board and to the Deputy Director of Education. It is not necessary for me to refer to all of them, but in my opinion the Board cannot be regarded as a part of the Education Department of the State so as to be under the control of the Director of Education.

Apart from it as I have already indicated the power to punish the staff of the Board has been given to the Secretary and I find that in the present case the transfer was in fact punishment awarded to the petitioner. The Director had in my opinion no power to transfer him. There is another aspect of the matter to be considered. If the Board of Education is a body created under the Act the staff of the Board is not a part of the Education Department. The transfer to some other office in fact amounts to termination of the services of the petitioner in the office and re-employment in another office and in that view of the matter also the opportunity should have been given to the petitioner."

35. I, however, do not find any contradictory opinion expressed in the later two judgment for the reason that the Hon'ble Single Judge has simply held that Board is not a part of Education Department but did not held that it cannot be treated to be a Department of Government for any purpose whatsoever which was the decision taken by Division Bench in *Ghulam Haqqani Khan* (supra).

36. Section 2 sub-section (a) of Act, 1921 defines "Board" as the Board of High School and Intermediate Education and its constitution is provided in Section 3. The members of Board can be removed by the State Government as provided in Section 3-A and the term of the office of members is provided in Section 4. Section 5 contemplates that the Board shall be reconstituted before expiry of term of office of members under Section 4. The constitution of Board in Section 3 and its functions as provided in Section 7 makes it clear that Board is a statutory body, independent of Government, having several members connected with Government or its various institutions but also several members belonging to other bodies like, Kendriya Vidyalaya Sangathan, State Legislative Assembly, State Legislative Council and private recognised institutions not maintained by the State Government etc. The State Government, however, has been conferred with power to address the Board with reference to any of the work conducted or done by Board and also to communicate it the Government views on any matter with which the Board is concerned. Under sub-section (3) and (4) of Section 7 of Act, 1921 the State Government can issue directions "consistent with the Act" which the Board shall be obliged to comply. The State Government also has power to make amendment in the regulations without making any reference to Board.

37. Thus, initially when Act, 1921 was enacted, power and authority enjoyed by private managements of educational institutions left intact, i.e., remained untouched. However, subsequently, it was found that protection is needed to avoid mismanagement of institutions and, therefore, a major amendment was made in 1958 extending and enlarging statutory power of supervision by the educational authorities upon the private management. This included provisions relating to framing of scheme of administration which would include provisions relating to management and conduct all the affairs of institution concerned, Power of approval of scheme of administration, and certain matters relating to staff of the College. In fact Section 16-A to 16-G were inserted by U.P. Act No. 36 of 1958.

38. For the purpose of present case Section 16-G is relevant which has also been relied, referred to and read repeatedly by learned counsels for the parties.

39. Section 16-G deals with "conditions of service of Heads of institutions, teachers and other employees". Sub-section (1) and (2) thereof reads as under:

"***16-G. Conditions of service of Heads of institutions, teachers and other employees***.- *(1) Every person* ***employed in*** *a recognized institution shall be governed by* ***such conditions of service*** *as may be prescribed by regulations and any agreement between the management and such employee in so for as it is inconsistent with the provisions of this Act or with the regulations shall be void.*

(2) Without prejudice to the generality of the powers conferred by sub-section (1), regulations may provide for-

(a) the period of ***probation****, the* ***conditions of confirmation*** *and the procedure and conditions for* ***promotion*** *and* ***punishment****, including* ***suspension*** *pending or in contemplation of* ***inquiry*** *or during the pendency of* ***investigation, inquiry or trial*** *in* ***any criminal case*** *for an offence involving moral turpitude and the* ***emoluments for the period of suspension*** *and* ***termination of service*** *with notice;*

(b) the scales of ***pay*** *and* ***payment of salaries****;*

(c) ***transfer*** *of service from one recognized institution to another;*

(d) grant of ***leave*** *and* ***Provident Fund*** *and* ***other benefits;*** *and (e)* ***maintenance of record of work and service****." (emphasis added)*

40. The conditions of service for which Regulations framed under Section 16-G, are provided in Chapter-III of the Regulations under Act, 1921.

41. Chapter I deals with "Scheme of Administration" and contains provisions in respect to subject covered by Sections 16-A, 16-B and 16-C. Chapter-II deals with "Appointments of Heads of institutions and teachers" with reference to Section 16-E, 16-F and 16-FF". The "conditions of service" with reference to Section 16-G are contained in Chapter-III.

42. Regulation 100 apply various provisions of Chapter-III to Class-III and Class-IV staffs of Secondary Schools and Colleges. This provision was inserted by notification No. 7/562-5-8 dated 10.03.1975 and reads as under:

"100. लिपिक, जिसमें पुस्तकालयाध्यक्ष भी सम्मिलित है, के सम्बन्ध में प्रबन्ध समिति तथा चतुर्थ श्रेणी कर्मचारी के सम्बन्ध में आचार्य/ प्रधानाध्यापक नियुक्ति प्राधिकारी होगा। लिपिकों, जिसमें पुस्तकालयाध्यक्ष भी सम्मिलित हैं, तथा चतुर्थ श्रेणी कर्मचारियों की नियुक्ति, परिवीक्षा, जिसकी अवधि एक वर्ष की होगी, स्थायीकरण एवं सेवा शर्तों आदि के संबंध में आवश्यक परिवर्तन सहित ऊपर के विनियम 1, 4 से 8, 10, 11, 15, 24 से 26, 30, 32 से 34, 36 से 38, 40 से 43, 45 से 52, 54, 66, 67, 70 से 73 तथा 76 से 82 के प्रावधान लागू होंगे, किन्तु चतुर्थ श्रेणी कर्मचारियों के सम्बन्ध में विनियम 77 से 82 के प्रावधान तभी लागू होंगे जब इस सम्बन्ध में राज्य सरकार द्वारा आवश्यक निर्देश निर्गत किये जायेंगे। इन कर्मचारियों के सम्बन्ध में विनियम 9, 12, 13, 14, 16 से 20, 27, 28, 54, 55 से 65 तथा 97 के प्रावधान लागू नहीं होंगे।"

43. These Regulations talk of probation, confirmation etc., i.e., the provisions relating to conditions of service and confirmation. The existing provisions, therefore, under Act, 1921 read with Regulations framed thereunder nowhere control, check or obstruct the power of management of a Secondary institution regarding recruitment and appointment of Class-III and Class-IV staff in any manner except to the extent of providing conditions relating to eligibility etc. and that too in the context of the fact that in recognised and aided educational institutions the payment of salary to the staffs is the responsibility of State Government and, therefore, the number of posts of Class-III and Class-IV staffs is also regulated by State Government, otherwise in all matters management of an educational institution (Secondary) is free and enjoy the power of recruitment and appointment of Class-III and Class-IV staff to the extent it requires for smooth working and functioning of institution.

44. The regulation of payment of salary is vide Act, 1971 which is applicable to the institutions which are recognised and receiving maintenance grant from the State Government. Section 10 of Act, 1971 makes the State Government liable for payment of salary of teachers and employees of every institution in respect of any period after 31.03.1971. It is in this context vide Section 9 a restriction has been imposed upon an institution not to create a new post of teacher or other employee except with the previous approval of Director or such other Officer as may be empowered in that behalf by Director. Here also the power of creation of post has been left with institution but in order to attract the provisions of Act, 1971 for a valid creation of post, an approval by Director or other officer as empowered by Director, is necessary. There is no power of abolition of any post in an institution conferred upon the Director or any officer. Power of appeal cannot be identified with power of creation but it is only regulatory.

45. A comprehensive reading of various provisions of Act, 1921 and in particular Section 16-G it is thus evident that power to frame Regulations has been conferred in respect to matters relating to "conditions of service" and nothing else. The term "conditions of service" is not wide enough to include every stage commencing from recruitment or appointment and thereafter. There is a distinction between the term "recruitment" and "conditions of service". It is worthwhile to mention that in Article 309 of the Constitution both these terms have been used in respect to Legislative power and in that context have been considered by Courts.

46. In service jurisprudence three terms are of wide application, have a definite concept and well known to those who deal in the subject. This is called "common parlance". These three terms are "recruitment", "appointment" and "conditions of service".

47. The meaning of term "recruitment" and its distinction vis a vis "appointment" came to be considered in *Prafulla Kumar Swain* v. *Prakash Chandra Misra*, 1993 Supp. (3) SCC 181 and the Court said that the term "recruitment" connotes and signifies enlistment, acceptance, selection or approval for appointment. Certainly, this is not actual appointment or posting in service. In contradiction thereto the word "appointment" means the actual act of posting a person to a particular office. Similarly, in *K. Narayanan* v. *State of Karnataka*, 1994 Supp. (I) SCC 44 the Court said that "recruitment" according to dictionary meaning "enlistment". It is a comprehensive term and includes any method provided for inducting a person in public service. However, in the context of the case the Court proceeded to observe that appointment, selection, promotion, deputation are well known methods of recruitment and even appointment can be made by transfer.

48. The term "conditions of service" is also no more res integra having been considered and defined by Courts time and again.

49. One of the earliest known case considering the term "conditions of service" is *North West Frontier Province* v. *Suraj Narain Anand*, Vol. LXXV Indian Appeals 343. Therein Privy Council considered the term "conditions of service" as mentioned in Section 243 of Government of India Act, 1935. It says that the term "conditions of service" must mean all the conditions on which a man serves and they must include inter alia the tenure of his service, the method by which he may be dismissed or reduced in rank etc.

50. In *State of Madhya Pradesh* v. *Shardul Singh*, 1970 (1) SCC 108 the Court explain the expression "conditions of service" as under:

"The expression "conditions of service" is an expression of wide import. It means all those conditions which regulate the holding of a post by a person right from the time of his appointment till his retirement and even beyond it in matters like pension etc."

51. In *I.N. Subba Reddi* v. *Andhra University*, 1977 (1) SCC 554 the Court explain the term as under:

"The expression 'conditions of service' means all those conditions which regulate the holding of a post by a person right from the time of his appointment till his retirement and even beyond it, in matters like pension etc."

52. Same view was taken in para 6 of the judgment in *Mysore State Road Transport Corporation* v. *Mirja Khasim Ali Beg*, 1977 (2) SCC 457.

53. In *Lily Kurian* v. *Sr. Lewina*, 1979 (2) SCC 124 in para 13 of the judgment, the Court referred to above decisions and observed that the expression "conditions of service" includes everything from the stage of appointment to the stage of termination of service and even beyond including the matter pertaining to disciplinary action.

54. Again it came for consideration in *Syed Khalid Rizvi* v. *Union of India*, 1993 Supp (3) SCC 575. The Court formulated a question, whether seniority is a condition of service or part of rules of recruitment. It observed that conditions of service may be classified as salary, confirmation, promotion, seniority, tenure or termination of service etc. The Court considered whether a right to promotion and right to be considered for promotion constitute a condition of service. Referring to a Constitution Bench decision in *Mohd. Shujat Ali* v. *Union of India*, 1975 (3) SCC 76 the Court observed that a rule which confers a right to actual promotion or a right to be considered for promotion is a rule prescribing a condition of service. It also refers to another Constitution Bench decision in *Mohd. Bhakar* v. *Krishna Reddy*, 1970 SLR 768 observing that any rule which affects the promotion of a person relates to his condition of service. Then it also refers to a further earlier judgment of Apex Court in *State of Mysore* v. *G.B. Purohit*, C.A. No. 2281 of 1965, decided on 25.01.1967 to hold that a rule which merely effects chances of promotion cannot be regarded as varying a condition of service. Chances of promotion are not conditions of service. Same view was reiterated in a later Constitution Bench decision in *Ramchandra Shankar Deodhar* v. *The State of Maharashtra*, 1974 (1) SCC 317. All these decisions were harmonized by Court in *Syed Khalid Rizvi* (supra) observing that if an employee was initially recruited into service according to Rules and promotion was regulated in the same Rules to higher echelons of service, in that arena, promotion may be considered to be condition of service.

55. In a Division Bench decision of this Court the above decisions have been referred to and this Court in *Dr. Rajeev Ranjan Mishra* v. *State of U.P.*, 2008) (1) ESC 595 has said:

"The distinction between rule of "recruitment" and "condition of service" is no more res integra having already been settled by the Apex Court in a catena of cases. In State of U.P. v. *Shardul Singh 1970 (1) SCC 108 the Apex Court held that the term "conditions of service" means all those conditions which regulate the holding of a post by a person right from the time of his appointment till retirement and even pension etc. It was reiterated in I.N. Subbareddy* v. *State of A.P. 1997 (1) SCC 554. In Syed Khalid Rizvi* v. *Union of India 1993 Supp (3) SCC 575 the Apex Court held where a rule permits relaxation of provisions pertaining to "conditions of service", the same would be applicable to the condition after appointment to the service in accordance with rules. It also held that that "conditions of recruitment" and "conditions of service" are distinct and the latter is preceded by an appointment according to rules, the former cannot be relaxed."*

"Part 3, 4 and 5 contain rules of recruitment which includes rules pertaining to reservation, eligibility and other qualifications with respect to nationality, educational qualifications, age, character, marital status, physical fitness etc. and procedure for recruitment. The rules pertaining to 'recruitment' cannot be relaxed by exercising power under Rule 26 since such rules are not relaxable."

56. The above decision has been followed in *Devendra Nayak* v. *State of U.P.*, Writ Petition No. 55988 of 2009, decided on 24.02.2011.

57. There is a Full Bench judgment of Gujarat High Court also dealing with this issue in *A.J. Patel* v. *The State of Gujarat*, AIR 1965 Guj 234a. The judgment was rendered by Hon'ble K.T. Desai, C.J. and in para 27, with reference to the terms "recruitment" and "conditions of service" mentioned in Article 309 of the Constitution, His Lordship said:

"From this Article it is evident that rules relating to the recruitment of persons to public services and posts are distinct from rules relating to the conditions of service. The conditions of service are conditions applicable to persons who have been appointed to public services and posts. The terms and condition relating to recruitment and relating to appointment to public services and posts must, therefore, be regarded as distinct and different from the conditions of service governing persons on their appointment to public services and posts."

58. In the context of above exposition of law, if this Court looks into Section 16-G it is evident that it talks of only "conditions of service" of such person who is employed in a recognised institution. Therefore, to attract Section 16-G authorising the competent authority to frame Regulations thereunder, the condition precedent is that the person must be employed in a recognised institution. The Regulations relating to condition of service presupposes an existing employed person. That being so, in my view, Section 16-G authorised the competent regulation framing authority to make Regulations dealing with "conditions of service" to a stage which comes after employment of a person in a recognised institution and not earlier thereto. This is how sub-section (1) of Section 16-G confers general powers of regulation framing. The above view is further fortified from the fact that various categories in respect whereto the conditions of service can be laid down by regulations all come after appointment of a person and not till the stage of appointment. Besides, Section 16-G, no other provision has been shown to this Court authorising the Board or Government to frame regulations dealing with recruitment and appointment of staffs, teaching and non-teaching, of a recognised institution. The only other provision whereby the State Government possesses certain power either to modify, rescind or make any Regulations or to issue instructions to the Board in a particular manner, is Section 9 but it is also restricted, i.e., only in the matters which are consistent with this Act, i.e., Act, 1921 and not beyond thereto. Therefore, Section 9 would also cover only those subjects which are consistent with the Act and not otherwise.

59. The impugned G.O. in the opening paragraph deals with the subject, pay scale, which is admittedly a condition of service and, therefore, there cannot be any apparent objection with regard to Legislative power or competence of the State Government in issuing the aforesaid G.O. But Para 2 thereof deals with a subject which has nothing to do with revision of pay scale as such. It hampers the power of Management or employer regarding recruitment and appointment of Class-IV employees in a recognised institution. Apparently this power is not shown to be supported by any provision of Act, 1921. To my mind it would not be included within the provision of Section 16-G also. Once it is evident that the power is not referable to Act, 1921, or any other statute, this would be ex facie ultra vires. For this reason alone this Court could have no hesitation in holding Para 6 of G.O. dated 06.01.2011, ultra vires and illegal in so far as it restrain the Management of recognised Secondary Educational Institutions from recruiting and appointing non-teaching staffs, i.e., Class-IV posts.

60. Even otherwise, Para 2 of G.O. to my mind would be contrary to certain regulations which provides the procedure and manner in which appointment shall be made by Secondary Educational Institutions on Class-III and Class-IV posts. There is no prohibition in making appointment on Class-IV posts against sanctioned posts available in recognised educational institutions. The G.O. in question cannot be said to be a regulation framed under Act, 1921. It also does not satisfy the condition

precedents so as to partake the nature of an order issued by State Government under Section 9(3) and (4) of Act, 1921. The G.O. is basically a general order issued to various departments with respect to revision of pay and in that context it has been issued in reference to Secondary Educational Institutions also.

61. Moreover, in the context of what it has permitted to be done by educational institutions, there also I am of the view that this order is palpably arbitrary, discriminatory, exploitative in nature and, therefore, suffers the voice of contravening constitution provision under Article 14 and 16. It is not a case where requirement of Class-IV staffs in educational institutions has been done away. The existing sanctioned posts of Class-IV have not been abolished. It is nobody's case that henceforth educational institutions shall not require any Class-IV staffs in its functioning. What it suggests and try to endeavour is that the educational institutions shall not employ Class-IV staff directly on their own so as to function and discharge the duties of Class-IV staff under the administrative and otherwise control of institution, but, the work supposed to be performed by Class-IV staff would be required to be done through the staff made available by an outside agency and by that agency's staffs. In true sense though it is termed "outsourcing", but it does not satisfy the requirement of term "outsourcing", as discussed above.

62. The normal functions of Class-IV staff in a secondary educational institution is ringing of bell, opening of class rooms, cleaning, providing stationary etc. from office to class teachers, taking files and other documents like examination copies etc. from one place to other and similar other menial job. All this work of Class-IV has to be performed by a person present in educational institution itself. It cannot be performed sitting outside the educational institution. Therefore, what the G.O. suggests is that for performing menial job of Class-IV, the workers shall be made available by a third party, by whatever name it may be called, may be a labour supplier, may be a Service Provider or else but in effect it amounts to introduction of a "middleman" for arranging Class-IV employees to perform the job of Class-IV in educational institutions for which the institutions shall pay the service charges which would include wages/salary of such person (Class-IV) and also the service charges of third party. This is nothing but a kind of contract labour arrangement.

63. Introduction of a middlemen where the requirement is perennial, continuous and permanent has been deprecated time and again and many statutes enacted with an objective to exclude middleman have been held to be in public interest. This is really strange that herein the State Government intend to introduce a system of middleman when it is not already there. Learned Additional Advocate General also could not explain that besides wages/salary of the person who would be available to educational institution for performing the job of Class-IV employee, the service charges to third party would also be paid and in these circumstances how it can be an arrangement for saving the cost. To this query he could not reply at all.

64. In my view, therefore, though the concept of making available the staff to perform Class-IV job by outside agency though termed "Outsourcing" but it is nothing but a system of supply of work force through a contractor or a person who satisfy the term "contractor" for all purposes though termed as "outsourcing". Hence the system as contemplated in Para 2 of impugned G.O. is evidently exploitative, arbitrary, unreasonable, irrational, illogical, hence violative of Article 14 and 16 of the Constitution.

65. This Court has also considered Para 2 of G.O. dated 06.01.2011 in *Luv Kush*

Pandey (supra) and has referred to various statutory provisions in Act, 1921 and Regulations framed thereunder. However, while reading down the G.O. so as not to cover the vacancies occurred before issuance of said order, the Court has observed as under:

"Learned counsel for the State has not been able to satisfy the object behind banning the regular process of appointment against a clear vacancy on class IV post and getting it filled up by outsourcing.

The outsourcing, not being a matter of recruitment under the Act and the Regulations, could not have been introduced by means of a Government Order. It is also to be taken note of that in the instant case the vacancy had occurred on 28.2.2010, i.e. much before the issuance of Government Order dated 6.1.2011. Prior permission was granted by the Director of Education on 21.12.2010, i.e. before issuance of the aforesaid Government Order. The appointment, however, was made after issuance of the Government Order dated 6.1.2011. The vacancy having occurred prior to the Government Order dated 6.1.2011, cannot be taken to be a future vacancy so as to restrain the Principal from filling up the post for both the reasons aforesaid, viz. (1) the restraint order could not have been issued for banning the appointment on a clear vacancy of class IV post through regular process of appointment and substituting it by a new method of appointment which is not envisaged under the Act and the Regulations framed thereunder and also for the reason that the aforesaid ban, if at all is to be upheld then it has to be read down for appointments on future vacancies i.e. which had occurred after the issuance of the Government Order dated 6.1.2011 and not for the vacancies which had occurred earlier."

66. In the aforesaid decision this Court though has doubted the correctness of Para 2 of G.O. but has not ultimately adjudicated thereon and left the issue open since the facts in that case show that vacancies had occurred prior to G.O. dated 06.01.2011 and, therefore, the Court by merely reading down the G.O. upheld selection made by educational institution on Class-IV posts. The observations therein, however, show that Court doubted the justification of Government's decision for banning regular appointment on Class-IV posts and getting it filled up by outsourcing but did not make a final adjudication on this aspect. This is evident from the question posed by Court, as is evident from following:

"The question, however, arises whether the State Government could have issued a blanket restraint order on making appointment on a class IV post on which (1) vacancy has occurred prior to the issuance of the banning order dated 6.1.2011, (2) the vacancy has occurred after the aforesaid Government Order dated 6.1.2011, and (3) whether such a ban can be imposed for making appointment as per the statutory provision and allowing appointment by adopting the process of outsourcing."

67. Since the wider issue of validity has not been decided therein, it cannot be said that except to the extent the G.O. in question has been read down by this Court, rest of G.O. stands affirmed by aforesaid judgment. A judgment is a binding precedence to the extent a issue is raised, argued and decided therein. It is not to be read as a statute. It cannot be read to cover something to which it has made no adjudication. I, therefore, find no obstruction in proceeding to consider the validity of Para 2 of G.O. dated 06.01.2011 in these sets of writ petitions where this issue has been specifically raised, argued and the Court has been called upon to adjudicate thereon.

68. In the result, following writ petitions are decided in the following manner:

(A) The Writ Petitions No. 11670 of 2011, 27387 of 2011, 27388 of 2011, 45111 of 2011, 33140 of 2011, 64630 of 2011, 68199 of 2011, 68591 of 2011, 68592 of 2011, 62476 of 2011, 63197 of 2011 and 1432 of 2012 are allowed to the extent that Para 2 of G.O. dated 06.01.2011 is struck down in its application to Secondary Educational Institutions recognised by the Board and governed by provisions of Act, 1921 and the Regulations framed thereunder, being illegal, arbitrary, unconstitutional and ultra vires.

(B) Writ Petitions No. 62616 of 2011, 50905 of 2011, 8492 of 2012, 49269 of 2011, 63653 of 2011, 67140 of 2011, 61539 of 2011, 62465 of 2011, 631 of 2012 and 74197 of 2011 are allowed to the extent that orders impugned passed by State Government/educational authorities, pursuant to Para 2 of G.O. dated 06.01.2011, which has already been struck down, as above, are hereby set aside. They are directed to pass fresh order in accordance with law and in the light of the observations made above.

(C) The Educational Authorities are also directed not to obstruct the process of selection and appointment on Class-IV posts in Secondary Educational Institutions only on the basis of Para 2 of G.O. dated 06.01.2011.

69. The Writ Petition No. 45708 of 2011 is disposed of directing the competent educational authorities to pass appropriate order on the matter of approval on selections made in educational institutions concerned for appointment on Class-IV posts expeditiously and in any case within a period of one month from the date of production of a certified copy of this order.

70. There shall be no order as to costs.

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LIMITING APPLICABILITY OF LEGAL PROTECTION IN EXPORT PROCESSING ZONES OF SRI LANKA

PROMOTING DECENT WORK IN EXPORT PROCESSING ZONES (EPZS) IN SRI LANKA

By A. Sivananthiran

Introduction

Over the past three decades export processing zones (EPZs) have become popular instruments of trade policy, offering enterprises located in them free trade conditions and a liberal regulatory environment. Many countries see export promotion as an important policy for economic growth in developing countries. Various measures are being adopted by the governments in these countries to promote export competitiveness. As a policy means of achieving this goal, the concept of EPZs has gained noticeable significance in recent years. Terms such as EPZs, free trade zones (FTZs), special economic zones (SEZs) and export processing factories (EPFs) refer to similar concepts, with variations in policy prescriptions and objectives. As EPZ is most commonly used, this paper uses it interchangeably with FTZ and SEZ.

In creating the EPZs, the immediate goal for Sri Lanka was to generate direct foreign investment, exports, foreign exchange, and employment. As in most countries, in Sri Lanka EPZs do not account for a large percentage of the total national employment but gains must be weighed against the cost of generating the benefits of EPZs, in particular the possible loss of taxes and revenues.

The basic objective of this paper is to examine emerging issues concerning EPZs in Sri Lanka, focusing on decent work, and setting out recommendations to address these issues.

EPZs provide customs-free and tax-exempt, export-oriented manufacturing facilities, investment incentives and streamlined administration, cheap utilities, and better infrastructure. According to Jayanthakumaran (2002), most enterprises in EPZs are engaged in processing intermediate imports for exports. Also included are labour-intensive light manufacturing such as garment production, assembly of light electrical goods and electronics. Among the benefits offered are exemption from: some or all export taxes; some or all duties on imports of raw materials or intermediate goods; direct taxes such as profits taxes, municipal and property taxes; indirect taxes such as VAT on domestic purchases; national foreign exchange controls. Foreign companies also benefit

from free profit repatriation. EPZs offer streamlined administrative services, especially to facilitate import and export, and provide free enhanced physical infrastructure for production, transport and logistics (Milberg, 2007).

EPZs are the mechanism through which global production chains are elaborated, and their prospects are closely linked to the dynamics of global investment and trade. EPZs evolved mainly because as production costs rose in developed market economies, companies shifted the labour-intensive parts of the production process offshore, where EPZs provided an attractive base.

Enterprises either set up their own plants, or build up a network of subcontractors with whom they work very closely in order to ensure that performance is satisfactory. Given the current trend towards verticalization, major brands concentrate only on the design and marketing of their brand, while subcontracting all the manufacturing activities. The subcontractor sources the materials and components, manufactures the article and performs the necessary quality controls. If any of the time, cost or quality limits are not met, the subcontractor bears the cost and may lose future contracts to competitors.

In Sri Lanka, EPZ activities include goods production and assembly to services, including information processing, telecommunications, business process outsourcing (BPO), hotels, power generation, etc. As in most countries in Asia, Africa and Latin America, the largest share of investment was absorbed by the textiles and garments sector. Today there are about 300 enterprises within the bonded zones and 1,200 establishments receiving similar benefits outside the zones.

The main findings in this paper can be summarized as follows:

The presence of EPZs has grown over the past 30 years, in terms of the number of zones, employment, and share of exports.

This growth has been most marked in two zones, namely Katunayaka and Biagama, both outside Colombo, the capital city.

Despite this growth in EPZ activity, EPZs still make up a relatively small percentage of population. “EPZ intensity” (calculated as EPZ employment as a share of national employment) for 2006 was 1.67, compared to Mauritius which was 17.74 per cent.

Wages in EPZs continue to be at or slightly above wage levels outside EPZ areas, while the female composition of EPZ employment is possibly declining due to a tightening of the labour market for female workers.

There appears to be an improvement in the degree of enforcement of labour standards and rights in EPZs compared to the situation in 1997 as a result of social audits and the reorganization of the labour inspectorate.

The completion, in 2004, of the phase-out of apparel quotas under the Agreement on Textiles and Clothing, did not significantly affect Sri Lanka and has remained cost competitive.

EPZ firms still do not form links to the domestic economy, in most cases purchasing almost all their inputs from abroad. Demand expansion would ease this structural obstacle to growth.

The distinction between EPZs in the bonded area and outside is diminishing as the same conditions are being extended to 1,200 establishments outside the enclaves. As the EPZ/non-EPZ distinction diminishes, the issue of labour standards and their enforcement will become a key issue.

The outline of this report is as follows: section 1 describes the macroeconomic perspective and the labour market scenario; section 2 deals with the labour administration system; section 3 describes the evolution of the EPZ policy in Sri Lanka; section 4 deals with the analytical framework on key labour issues. Section 5 concludes the analysis and draws policy implications.

1. Sri Lanka's macroeconomic perspective

Since the late seventies, Sri Lanka has looked to a liberalised economy and economic growth as key to development. However, despite a reasonable record of economic growth, poverty has not been reduced. According to the 2006 Central Bank Report (CBR 2006), Sri Lanka recorded a 7.4 per cent growth rate – the highest since 1978, and an unemployment rate of 6.5 per cent. However, unemployment and underemployment among the youth is still a serious problem which the government is trying to address. Despite the favourable developments, emerging inflationary threats and the overall security situation posed serious challenges for policy-makers. One of the key policy thrusts was persistently directed towards curbing the rising inflation pressure. The

average annual inflation stood at 13.7 per cent in 2006. Inflationary pressures pushed up annual consumer price inflation to an average of 18.9 per cent in January-April 2007, with serious consequences for the labour market, including workers employed in the EPZs.

The economic outlook in Sri Lanka for 2007-08 will largely depend on the internal security situation (EIU, 2007). In 2006, exports performed relatively well, supported by steady garment export growth as investment projects in the sector were implemented. The garment sector has in the past benefited from Sri Lanka's inclusion in the European Union's Generalised System of Preferences scheme, which grants tariff reductions to participating countries.

The labour market scenario

Labour force and employment

According to the latest labour force surveys conducted by Sri Lankan Department of Census and Statistics (DCS, 2006), the midyear population of Sri Lanka was estimated at 19.9 million in 2006. Of this, the labour force was 7.6 million, comprising 7.1 million employed and 0.5 million unemployed. Another interesting labour market development in Sri Lanka is the large size of the public sector. One in every ten workers in employment is employed in the public sector. Furthermore, as 35 per cent of the workforce are employed in the formal sector, the size of the informal economy is relatively smaller compared to countries such as India, Pakistan and Bangladesh.

Wages

Wages in the public sector are largely determined by the government. For formal private sector employees, the wage-setting mechanism includes several forms: tripartite determination, collective bargaining, remunerative tribunals, individual employer-employee contracts, and more recently, decisions and adjustments by government directives. In the informal private sector, wages are mostly determined based on demand and supply conditions in the market (CBR, 2006).

The minimum wage fixing system prevailing in the private sector comprises 43 sectoral Wage Boards which include workers in the EPZs. However, one of the current weaknesses of the Wage Board is that it does not cover *certain* categories of employees in the EPZs.

A recent ILO study (2007) noted that wages, especially in the private sector, were very low wages and showed a decline in real wages over the years. There has been an increase in the gap between wages in the private and the public sector where wages are double than those in the private sector.

The study also pointed out the growth in the wage gap by sex and region, as well as the issues of wage-fixing and workers' rights in export processing zones. Wage bargaining is limited at both the sectoral and enterprise level and collective agreements have over the years reduced in number and coverage. The study brought home the fact that there was no link between wages and productivity and/or economic performance. While trade unions insist on the need for setting wages that ensure decent living standards, especially in the private sector, employers stress the need to develop policies to curb inflation and pay systems that link wages to enterprise performance, in order to keep their competitive position. The table below shows that real wages for workers in industry and commerce have fallen in 2006 in the private sector. For industry and commerce as a whole, real wages fell by 11 per cent.

Table 1. Wage rate indices

Employment Category	Index						Percentage Change					
	Nominal			Real			Nominal			Real		
	2004	2005	2006(a)	2004	2005	2006(a)	2004	2005	2006(a)	2004	2005	2006(a)
1. Government employees												
Central government employees	1,872.1	2,417.5	3,155.6	123.3	142.7	164.2	22.8	29.1	30.5	14.0	15.8	15.1
Non-executives	1,709.0	2,178.4	2,853.8	112.5	128.6	148.5	21.2	27.5	31.0	12.6	14.3	15.5
Minor employees	2,039.5	2,672.4	3,474.1	134.3	157.8	180.8	24.6	31.0	30.0	15.7	17.5	14.6
Government school teachers	1,428.4	1,818.6	2,304.2	94.1	107.4	119.9	21.0	27.3	26.7	12.4	14.1	11.7
2. Workers in wages boards trades												
All wages boards trades	1,233.0	1,329.7	1,358.2	81.3	78.5	70.7	2.3	7.8	2.1	-4.8	-3.5	-9.9
Workers in agriculture	1,397.7	1,527.4	1,567.1	92.2	90.2	81.6	1.1	9.3	2.6	-5.9	-2.3	-9.5
Workers in industry and commerce	1,044.1	1,078.4	1,090.7	68.9	63.7	56.8	3.4	3.3	1.1	-3.7	-7.6	-10.8
Workers in services	751.0	779.7	779.7	49.5	46.0	40.6	10.8	3.8	0.0	2.9	-7.0	-11.8

(a) Provisional

Source: Department of Labour

Source: Central Bank Report, Sri Lanka. 2006.

However, labour productivity continued to improve in 2006, following the trend of the last few years. In terms of value addition, it increased by around 3 per cent compared to the previous year, to Rs.142,700 per employee, based on the employment numbers adjusted for the Northern and Eastern provinces for 2006 (CBR). The considerable increase in productivity in the services sector was the main contributor to the increase in productivity in 2006 while the contribution from the industry sector was marginal.

The labour relations framework

The constitution of Sri Lanka recognizes the fundamental right to organize trade unions and the freedom to join unions. Sri Lanka has also ratified all the fundamental ILO Conventions. Under the Trade Union Act (TUO No. 14, 1935), the right to form and join a trade union is a core right of every citizen. The rights, immunities, and governance of a trade union are provided for by the TUO. The status of trade unions was enhanced further by an amendment to the Industrial Disputes Act which became operative in December 1999, which according to trade unions facilitated trade union organization in the zones. This amendment compelled mandatory recognition of a union that had a membership of 40 per cent of the workforce by defining refusal to bargain with such a union by the employer as an unfair labour practice. Other acts of the employer, such as interference in the activities of a trade union, were also declared as unfair labour practices (Sharmila and Shamali, 2001). The Employers' Federation of Ceylon, the apex organization of employers, continues to see the amendment as one-sided and not clearly defining the activities of workers which could constitute unfair labour practice,

Prevention and settlement of disputes

For the purpose of settling disputes, the employer and employee have the right to settle a dispute internally, by mutual agreement or by entering into a collective agreement. The Industrial Disputes Act provides for the intervention of the Commissioner of Labour through a number of mechanisms. A dispute may be settled by conciliation or mediation between the parties, or it may be referred to settlement by an industrial court or arbitrator (Sivananthiran, 1999).

The Commissioner also has the power to summon parties and conduct any inquiries he considers necessary where he believes an industrial dispute exists. Employees and trade unions may also resort to trade union action, including strikes, downing of tools, picketing, etc., to obtain their demands and rights from employers.

According to the latest available data for the period January to June 2006, the Department of Labour dealt with a total of 4,269 disputes (DOL Administrative Report, 2005). During the same period, the conciliation machinery of the Ministry of Labour settled 3,948 of these disputes – a commendable effort. The Ministry employs about 400 labour inspectors; labour inspections for the year 2005 dropped overall (DOL Labour Statistics, 2005).

Collective bargaining

In 2005 and 2006 an average of 40 collective agreements were concluded by workers and employers (DOL Labour Statistics, 2005). The number of strikes in 2006 were the lowest recorded in the last 10 years. However, some disputes and continuing worker unrest in some key public sector institutions (such as the Sri Lanka Railway, Ceylon Electricity Board, the Sri Lanka Ports Authority and Ceylon Petroleum Corporation) during the same year (CBR) have raised concerns as to maintaining overall industrial harmony. Over the years, public sector disputes have been increasing and the Government has requested ILO assistance in strengthening its dispute settlement machinery. In the private sector, particularly in the EPZs, rising inflation has led to negotiations in some enterprises between the unions and employers for higher wages.

Terms of employment

While employers and employees are generally free to contract the terms of employment by mutual agreement, several statutes establish minimum standards. The Shop and Office Employees' (Special Provisions) Act specifies minimum leave entitlements, payment of wages, maintenance of records and registers; the Factories Ordinance provides for minimum standards of health safety and welfare for workers employed in factories. According to the terms of the Wages Board Ordinance, a number of Wages Boards were established for specific types of activities, and these Boards determine wages by a tripartite discussion (Sharmila and Shamali, 2001).

Labour inspection

According to the Industrial Disputes Act, the Commissioner of Labour, any labour officer or any other prescribed officer has "the power to enter and inspect at all reasonable hours of the day or night any place in which any workmen are employed, for the purpose of examining any register or record" (required to be maintained under the Act). The inspecting officer also has the right to require the production of registers and records at a place of his choice, to make copies of all such records, and to interrogate any person whom he finds at the workplace and whom he has reasonable cause to believe is an employer or a workman. Any expenses incurred in this regard are met by the state. The 2005 Annual Report of the Ministry of Labour indicates that the number of inspections under the Wages Board Ordinance, the Provident Fund, and the Shops and Office Act all declined in 2005 compared to 2004.

2. The evolution of free trade zones in Sri Lanka

Sri Lanka attained political independence in 1948. However, the process of industrialization began only in the late 1950s when the government formulated a new development strategy with emphasis on industrialization (Abeyratne, 1997). The industrialization policies initiated during this period were influenced by contemporary development thinking, hence based on the Import Substitution Industrialization (ISI) strategy. For about two decades until 1977, Sri Lanka remained a paradigm case of an inward-oriented trade regime (Aggarwal, 2003; Abeyratne). By the late 1960s, however, the balance of payment situation had worsened in Sri Lanka and a new policy emphasis on export promotion was placed within the overall framework of the ISI strategy.

In 1978, the government set up the Greater Colombo Economic Commission (GCEC) with wide ranging powers to facilitate foreign direct investment (FDI) in the fully export-oriented ventures. The immediate goal for the country was to generate foreign direct investment, exports, foreign exchange, and employment – all of which would not be created without the EPZs.

Following the establishment of the Katunayaka zone, the BOI became involved in massive expansion in EPZ schemes. Today there are 12 new EPZs; table 3 shows the employment generated in each of these zones by gender.

Table 2. EPZs: Employment statistics 2007 (within bonded area only)

Zone	Male	Female	Total
Katunayake	16406	34069	50475
Biyagama	9338	10649	19987
Koggala	1810	8254	10064
Mirijjawila	168	1207	1375
Seethawaka	5839	9515	15354
Horana	560	138	698
Kandy	324	216	540

Zone	Male	Female	Total
Wathupitiwala	1308	4443	5751

Mirigama	669	1454	2123
Malwatta	6616	2001	2617
Mawathagama	911	2228	3139
Polgahawela	590	1304	1894
Total	3853	7547	114017

Source: BOI, document handed during interview

Thus, the EPZ policy in Sri Lanka was designed primarily to attract foreign investment and foreign exchange within the framework of the export-oriented policy regime: with significant relaxation of rules governing FDI, developed infrastructure and support services, freedom from diverse industrial regulations, high quality governance, and other attractive incentives. All the zones are generally located in industrially developed districts. Special efforts are made to promote zones outside Colombo, and certain complimentary incentives are offered to the investors there. These include additional tax holidays, concessionary turnover tax, and lower ground rent. It is estimated that the garment sector in 2005 itself provided direct employment to approximately 340,000 people, 87 per cent of which were women. Another 600,000 workers were indirectly dependent on the industry through employment in a range of support and related service occupations (ILO, 2005).

The Katunayake EPZ (KEPZ) is the most highly developed of all the BOI zones, currently with 90 enterprises operating in the facility. Of these enterprises 24 are apparel exporter plants. However other sectors are also represented, such as precious stones and jewellery (5), trading houses (5), hosiery and yarn (4), glove production (4), electric and electronics (4), footwear (3), artificial flowers (3), bags and tents (1), and rubber products (1) .

The Katunayake EPZ companies belong in the most modern sector of the Sri Lankan economy. Exports earnings from the zone totalled 97,186 million rupees in 2006 (BOI, 2007). There are investment projects from 17 countries – 12 enterprises from Hong Kong, 12 American, 10 British, 10 Indian, 10 German, 7 Japanese, 6 Sri Lankan, 4

Belgian, 4 Italian – in addition to companies from Taiwan, Korea, Singapore, China, Luxembourg, France, Sweden and Norway.

In nearly three decades, the zone has contributed to the creation of new job opportunities. When the KEPZ was started in 1978 there were only 261 employees working for the two enterprises established in the zone. In 2007 the zone has a workforce of 34,920 local employees and 197 expatriates and has thus brought employment opportunities to a large number of women workers. The table shows employment in the KEPZ has declined somewhat from 1995 due to the relocation of factories to other countries and to other regions in Sri Lanka, technical upgrading, changing employment relationships and shortage of workers. Currently there is a shortage of 15,000workers in the various EPZs in the country.

The Board of Investments (BOI)

In Sri Lanka the BOI is the apex EPZ authority. As in many other countries the BOI operates a one-stop centre for foreign investments. It has its origins in the Greater Colombo Economic Commission and is directly responsible to the President of Sri Lanka. Operating as an autonomous body, it functions as a central facilitation point for investors, providing advice and assistance at every stage of the investment process, and is thus the only organization that an investor needs to contact. It is important to note that the BOI is responsible not only for the promotion of EPZs but also for all other foreign direct investments.

The BOI is empowered to grant special concessions satisfying special eligibility criteria. The mechanism through which such concessions are granted is the agreement which modifies, exempts, and waves BOI regulations pertaining to Inland Revenue, customs, exchange control and import control. From time to time, the incentives have been expanded to drive Sri Lanka's two-pronged strategy of diversification of exports towards advanced technology and value added and investments in large-scale projects (including infrastructure) (Aggarwal, 2005).

To attract FDI in the initial phase of the evolution of the zones, the government granted generous tax concessions which allowed foreign ownership, a tax holiday of up to ten years including no taxes on the remuneration of foreign personnel employed and on royalties and dividends of shareholders, as well as duty exemptions on the importation of equipment, construction materials and production inputs. In early 1979

the BOI introduced the Foreign Currency Banking Units Scheme, which provided the EPZ units unlimited access to foreign currency credit at interest rates prevailing in the world financial markets.

The BOI also provided EPZ units with industrial services such as land, power, water and telecommunication services at subsidized rates. Investors can also own 100 per cent equity in the sectors such as exports, tourism, infrastructure services, dairy and livestock, electronics. Investors other than those above can set up joint ventures, e.g. banking, insurance, energy, and power supply.

One of the unique services provided by BOI is the role of facilitator in the provision of various services to investors. At the time of entry of an investor, the BOI designates an officer to assist and guide the investor in all his dealings with various government departments and with the departments within the BOI (Aggarwal, 2005).

Sectorwise data for all the zones was not available at the time of writing. However, the Director of Labour Relation s provided the sector composition for the two most important zones in Sri Lanka, the Katunayaka and Biagama (table 4).

Table 3. Sector wise distribution of enterprises for the year 2006 in Biagama and Katunayake

Sector	2006
Food and beverage and tobacco	6%
Textiles, garments, leather	50%
Chemicals, petroleum, coal, rubber and plastic	12%
Non metallic mineral products	4%
Manufactured products	8%
Services including agricultural products	12
Others	8

Source: BOI internal document (2007).

As seen in many other countries, in both Katunayake and Biyagama, the share of textiles and garments make up 50 per cent of total investments in 2006. Thus the process of diversification is critical for Sri Lanka. Nonetheless, industrial upgrading has occurred

within this sector, with firms moving from assembly to full-package production, in which higher value added aspects of production are included in the process. Within the EPZ-based apparel sector, Sri Lanka is clearly moving towards the upper end of the market and to full-package production. Exports from EPZs continue to contribute a major share to national exports in Sri Lanka, rising from 33 per cent in 2002 to 38 per cent in 2006.

At present, Sri Lanka not only faces stiff competition from other developing countries of South and South-East Asia, but also from China, which has emerged as a dominant force in the global apparel industry. In the higher-value clothing segment, producers such as Malaysia, the Republic of Korea, Singapore and Hong Kong (China) are also now serious competitors. One of the most significant factors affecting the competitiveness of the Sri Lankan garment industry is low productivity. While it has become evident that Sri Lanka cannot compete on low labour costs alone, the emphasis has been shifted to improving the productivity of both labour and the manufacturing operation as a whole.

Within the BOI, the Industrial relations Department handles complaints made by individual workers or workers' councils and resolves industrial disputes. It also provides other services related to human resources such as providing enterprises with manpower resources, setting the terms and conditions of employment, wages and labour standards and providing updated information on employment statistics. There are 30 officials in the Industrial Relations Department spread over the 12 zones.

Recent investment trends in EPZs

According to the BOI, of the total new foreign direct investment in 2006, more than 60 per cent was invested in the telecommunications sector, textiles, apparel and leather industry, hotels, power generation, information technology and business process outsourcing (BPO). Within the industrial sector, the largest share of investment was absorbed by textiles, apparel and leather products, food, beverages and tobacco products, chemical, rubber and plastic products and non-metallic mineral products. Of the 354 approved projects, 82 projects were fully foreignowned and 87 were joint ventures between Sri Lankans and foreign investors, while the rest were fully owned by Sri Lankans. Therefore the trend is towards more joint ventures and local investments (CBR, 2006).

The government is of the view that the thrust of the long-term industrial policy is to develop a globally competitive, dynamic and technologically sophisticated industrial sector. The BOI is of the view that industrial policy should encourage innovation and productivity improvement in processes and services. In this regards, the foreign investment is expected to make a vital contribution by providing capital, access to technology and access to markets. To facilitate this process, the government has initiated several measures aimed at strengthening the legal and regulatory framework, providing necessary infrastructure, improving corporate governance, enhancing quality and maintaining standards, and improving the competitiveness of industries.

GSP Plus status

Sri Lanka is the only country in Asia to benefit from Generalised System of Preference (GSP Plus) status: a reduction of import duty to zero per cent on 7,200 items exported to the EU. This is subject to Sri Lanka ratifying all eight core ILO Conventions, all eight human rights covenants, and 11 conventions on the environment. An additional requirement pertains to value addition pertaining to exported items.

The global market access of Sri Lankan exports was expanded further in 2006 with continuous negotiations at multilateral, regional and bilateral fora. The country, while adhering to the commitments given to the World Trade Organization (WTO), engaged in bilateral trade negotiations with India, Pakistan and other regional countries. Trade negotiations with India in 2006 was mainly focused on resolving the problems relating to quantitative restrictions imposed by India for certain exports and further negotiation of a Comprehensive Economic Partnership Agreement (CEPA).

The government is also pursuing negotiations with the EU aimed at rationalizing the stringent rules of origin (ROO) criteria imposed under the GSP Plus scheme, which require Sri Lanka to add at least 50 per cent value addition in the case of apparel exports in order to qualify for such benefits.

Wages and the feminization of employment in EPZs

More than 70 per cent of workers in the zones are women . The large female share in EPZ employment has been well documented, with women accounting for over 70 per cent and sometimes over 80 per cent. Over the last two decades, studies indicate a strong preference for women workers because they are cheaper to employ, less likely to

unionize, and have greater patience for the tedious, monotonous work in assembly operations. This is the same situation in EPZs around the globe.

As stated earlier, Sri Lankan labour laws governing EPZs are the same as in the rest of the country. Although labour laws are uniform nationally, there are emerging issues regarding the enforcement of these laws in EPZs and the restrictions on trade union creation and actions, in reference to the longer working hours and the faster pace of work; trade unions face difficulties or are discouraged.

There is lack of data to compare the wages of workers inside the zones with comparable companies outside. The general impression has been that they are at about the same level as wages for equivalent work in the rest of the economy (table 3). This may be due to factors such as wage regulation by the Wages Board, the need to adjust to inflation as well adjustments made to public sector wages in 2006. Over the last two years, there have been pockets of labour shortages reported in the labour market and the feminization of EPZ employment appears to have peaked.

In the past, EPZs in Sri Lanka, as elsewhere, tended to higher female employment where the skill intensity of production is low; however, in Malaysia, when the EPZ production shifted to higher-technology production, many of the women were able to obtain employment as technicians in the electronics sector (Sivananthiran, 1993).

Table 4. Enforcement of labour regulations – inspections, 1997-2005

Item	1997	1998	1999	2000	2001	2002	2003	2004	2005
(1) Labour inspections conducted									
(a) Under Wages Boards Ordinance (no.)	8,113	8,583	11,137	9,424	10,812	10,890	16,305	16,306	11,334
(b) Under Shop & Office Employees Act (no.)	11,664	13,254	13,397	12,313	12,266	17,385	21,643	26,354	18,396
(c) Employees Provident Fund Act	12,039	16,144	16,667	30,458	43,053	52,495	52,466	61,190	34,105

(2) Arrears of underpayment revealed at inspections									
(a) Under Wages Boards Ordinance (Rs.'000)	4,547.0	8,055.9	7,821.0	7,909.6	15,235.1	102,904.4	61,052.7	61,244.1	28,097.1
(b) Under Shop & Office Employees Act (Rs.'000)	2,375.8	1,508.2	2285.2	3,136.3	893.9	1,914.3	432.6	238.7	2,113.8
(c) E.P.F. Act (Rs.Mn.)	243.2	248.1	363.8	475.2	634.9	921.0	602.4	830.8	1,551.9

Source: BOI 2007

EPZs and linkage with the domestic industry

Despite the growth in apparel exports during the last two decades, the development of backward linkages has been poor. The industry is heavily dependent on imported inputs, with the result that the level of value added is low. In addition, the need to import raw materials results in longer lead times, posing another serious threat to the international competitiveness of the industry. It has not been developed due to the high cost of investment required for the setting up of such operations, and the relatively small market. Sri Lanka therefore faces stiff competition from the countries that are well supported by backward linkage industries (e.g., India and China). Backward linkages did not occur mainly because local producers were unable to meet world market standards for price, quality and delivery terms, and more importantly, there was lack of interest from local manufacturers in serving EPZs because of low perceived returns.

The government has taken several measures to promote regional industrialization. Under "Nipayum Sri Lanka" (the 300 Enterprises Programme), incentives were given for industries to relocate in the regions, which included exemption from income tax for 5-10 years and from duties and value added tax (VAT) for the import of new plant and technologically advanced machinery. This is a major step undertaken to bridge the gap between the incentives granted for BOI and non-BOI projects. Under the 300 Enterprises Programme, many concessions given to BOI investors were extended to local investors as well. Further, factories which were relocated outside the Western Province were allowed to deduct the costs of relocation from their taxable income (CBR, 2006). This will in the medium term blur the EPZ/non-EPZ distinction. The issue of labour standards

and their enforcement in local enterprises will pose further challenges to labour administration.

The Budget 2007 provided measures to further develop the domestic industry. Special attention has been placed on the establishment of textile processing zones to develop backward linkages in the apparel industry. Further, the Budget 2007 also proposed the establishment of a technology institute under the supervision of the National Research Council. This is expected to improve the competitiveness of several industries such as textiles, rubber, electronics and minerals.

The EPZ sector is facing several impediments in achieving higher growth. According to the Joint Apparel Association Forum (JAAF), rising energy costs is a burden. Sri Lanka is a net importer of oil and the supply of reliable and affordable energy to the industrial sector is extremely important in order to achieve higher industrial growth. In addition, the Association emphasized the need to resolve the issue of inadequate infrastructure, the rising costs of labour and raw materials, the lack of skilled labour, the lack of technically qualified personnel in the construction industry, rigid regulations in the labour market and the inefficiencies in public sector enterprises.

Findings and major labour issues

Strategies for coping in a post-MFA environment

The Sri Lankan garment industry has experienced phenomenal growth since the late seventies and continues to be the strongest performer as far as the manufacturing subsector is concerned. Furthermore the garment industry had a comparative advantage as a recipient of GSP Plus status and as a result of a bilateral agreement with the United States. In order to address the issues pertaining to adjusting to the post-MFA[1] era after January 2005 with a view to promoting decent work in the EPZs, a workable system of social dialogue between the three partners – employers' and workers' organizations and the government's labour administration system – in working together towards

Sri Lanka has ratified about 40 ILO Conventions, including the eight core Conventions, and its national legal framework contains stringent measures in respect of these and other rights and freedoms at work (DWCP, 2006). For instance, the

[1] International trade in apparel and textiles is regulated by a system of bilateral tariffs and quotas known as the Multifiber Arrangements or MFA; quota restrictions were lifted in 2005.

Constitution of Sri Lanka guarantees the fundamental right to the freedom of association (Article 14(1)).

However, despite this strong legal environment, there are problems in giving practical effect to some rights at work. There are deficits in ensuring the freedom of association, particularly in some EPZs. Collective bargaining is not widely used as a mechanism for dispute resolution.

Improving quality and productivity in the garment sector in EPZs

Most garment manufacturers were geared to producing standard garments for the major markets under export quotas. Before the MFA quota ended, 60 per cent of total garment exports were based on quota exports in 2004, and Sri Lanka's dependence on quotas had been steadily increasing since 1995. So far, the sector has done well not only in surviving but in maintaining its share in the total exports; however, it faces intense competition from China and India.

Despite the fact that the Sri Lankan garment industry has achieved phenomenal growth over the last two decades, it faces several challenges as follows:

Low productivity compared to India and China despite higher literacy levels.

Inadequate training of managers and workers is an important factor constraining productivity and competitiveness.

One of the most significant factors affecting the competitiveness of garment manufacturing enterprises is the poor relationship between employers and employees.

Sri Lankan manufacturers are more likely to invest in technology in order to reduce their labour force.

Some of the factories currently operating do not comply fully with labour standards, losing potential market share as a result of turnover.

Poor infrastructure (roads, transport and telecommunications), as well as delays caused by documentation and customs procedures at ports and airports have seriously affected lead time and costs in the garment industry.

Establishing a Compliance Unit within the MOL to secure compliance with the law

Commencing in 2002, the ILO supported a change process within the Ministry of Labour to enable it to adapt to the country's transition to an economy based increasingly

on market forces as the means of resource allocation. It recognized the need for the national labour administration system to adjust and restructure to accommodate new policy initiatives. The ILO support enabled the Ministry to reexamine its role in national development, embrace a range of development initiatives, and adopt new approaches vis-à-vis labour protection and industrial relations. The resulting changes and activities have benefited the clients of the labour administration system; however, further action would be necessary to effect these benefits on a larger scale

Some of the outputs included the preparation of a Performance Improvement and Reporting System to guide the Department of Labour in improving staff productivity and overall performance, particularly at district level. A report on "Strengthening the procedural and operational aspects of the labour inspection system" was drawn up, and a new inspection report form was introduced based on an integrated inspection system. The preparation of a master register of all establishments liable to inspection has also commenced. Advice has been provided on the nature and purpose of the newly set up National Institute of Occupational Safety and Health and the Institute for Labour Studies.

The restructuring also led to the establishment of a Compliance Unit to secure compliance with labour laws in BOI factories. Its work began with a study of decent work in the garment sector, but since the resignation of the unit chief (to become the Director of Industrial Relations in the BOI itself), it has lost direction. The task in the area of securing compliance and in coordinating with private systems of assessment is a big challenge.

Tripartite action plan

Another initiative supported by the ILO was the development of a tripartite action plan by a Multi-Stakeholder Task Force that was formed as an outcome of the tripartite workshop "MFA and beyond", held in Colombo in July 2004. The workshop was organized by the ILO at the request of some workers' organizations and the Apparel Industry Labour Rights Movement (ALaRM), a consortium of workers' organizations and NGOs which has been working on the issue of potential job losses associated with the end of quotas.

The tripartite action plan to deal with possible job losses as the TC industry restructures and adjusts to a post-MFA environment. Much remains to be done in terms of follow up and achieving the objectives of decent work.

The relationship between private systems of assessment and the MOL's Labour Inspectorate

The number of labour inspections in general have declined over the last two years and with this the number of regular inspections within the zones have fallen. Thus the number of disputes over payment of statutory benefits to workers have been a major challenge.

The closure of factories within the zones have often happened abruptly and without adequate notice, and workers were left without compensation or back-pay and national insurance payments. For example, by the end of 2005, 15 factories had closed with over 3,000 workers losing their jobs. Only three factories paid any form of compensation to the workers; many others defaulted on employment protection payment. A more serious problem is the payment of Provident Funds.

In the vacuum created by the lack of regular labour inspections from the Ministry of Labour, many garment buyers and multinational enterprises – comprising 50 per cent of the total number of EPZ establishments – now implement a system in their supply chain through which their suppliers are assessed for conformity with a code of conduct. These assessments are also known as "social audits". For example, Nike employs its own compliance officials in its factories. A large number of companies within the zones in the garment export trade have also recruited their own compliance officials who work together with the personnel department. One company visited in the Colombo EPZ paid US$1,300 for each of five audits conducted by five different buyers during the past 12 months.

In this regard, for the MOL and the ILO, the following issues are raised: given that the ILO international instruments are most frequently cited in Codes of Conduct, what steps can be taken to put into practical effect the principles underpinning these international instruments to private enterprises; second, how can this be done in a manner consistent with the approach of the ILO as stated in the instruments; and third, what is the relationship between these private systems of assessment and the MOL's labour inspectorate, and how can their activities be coordinated?

In response to a request by the apparel industry to discuss ways of ensuring the highest levels of compliance and give this sector a competitive edge, the ILO, in partnership with EFC and the Joint Apparel Associations Forum (JAAF), organized a Compliance Managers Conference which dealt with social auditing, compliance and labour issues. More work needs to be undertaken in working towards a multi-stakeholder monitoring mechanism with the participation of the MOL.

Facilitating the entry of labour inspectors in the FTZs

One of the key factors for effective inspections in the FTZs is the free entry of labour inspectors to undertake routine and surprise inspections. Sri Lanka has ratified ILO Convention 81, Article 12 of which enables labour inspectors to enter freely workplaces liable to inspection. Section 40 provides that "any employer who fails to permit entrance, hinders any officer in the exercise of the powers of inspection, fails or refuses to furnish such records, prevents any other person from answering an inspecting officer or furnishes false information shall be guilty of an offence punishable with a fine, a term of imprisonment or both". Similar provisions regarding the power to enter and inspect conditions in workplaces pertaining to safety, health and welfare standards stipulated by law are found in the Factories Ordinance, which applies to a majority of the enterprises established under the BOI.[2]

It is important for labour inspectors to observe the confidentiality required with regard to the purpose of the inspection if it is carried out in response to a complaint, specifically as to the source of the complaint. According to the BOI, this issue has risen due to the security provisions necessitated by the EPZs being custom-bonded areas. Thus, they state that anyone entering the zone must have BOI permission by way of appropriate identification, to satisfy the customs and legal requirements on security. Consequently the position seems to be that while workplaces in the EPZs are not excluded from labour inspection, and as EPZs are high-security areas, access to such workplaces is subject to prior permissions. This is a major concern for effective compliance of labour laws given the increasing complaints regarding non payment towards provident fund and the trust fund.

[2] This issue was discussed by the CEACR in June 2007 as a result of complaints by unions.

To address the issue of entry into the zones, way back in 1999 the ILO Colombo Office brokered an agreement between the BOI and the MOL, resulting in an MOU between the two parties. One of the key points in the agreement was consensus to place an officer within the zones. Apparently this arrangement worked only in one zone and not in others. Most stakeholders agree that the ILO Colombo Office should convene a meeting to revisit this arrangement.

A new MOU needs to put in place new working modalities to gain access to workplaces in the EPZs without prior authorization. The provision of proper credentials is a requirement in Article 12 of the Convention which should enable inspectors, in practice, to enter freely and without previous notice any workplace liable to inspection or which they may have caused to believe to be liable to inspection.

Targeting BOI factories outside the EPZs for labour inspections

At present, there are 300 BOI factories inside the FTZs and about 1,200 BOI establishments with the same conditions outside the zones.

The BOI Industrial Relations Department has in the past undertaken fairly regular monitoring of the 300 BOI factories inside the zone, but not the 1,200 outside. One of the constraints faced by industrial relations officials is understaffing and the lack of formal training in either dispute settlement or basic monitoring of labour standards and undertaking assessments as a preventive activity. The monitoring/assessment is usually undertaken by senior officials and any shortcomings found are communicated to MOL officials for necessary action.

Concerning the factories within the zones, the main activities of BOI IR officials can be summed up as follows: maintaining industrial peace by settling disputes; handling grievances and coordinating with the MOL when initial mediation fails; monitoring of labour standards through regular visits; facilitating the establishment of Employee Councils and promoting workplace cooperation.

Maintaining a Central Employment Data Bank to register job seekers and place them in suitable jobs. Naturally this had an effect on the BOI factories both inside and outside the bonded zones. Here the BOI industrial Relations officials also have a responsibility to monitor labour standards and work closely with their MOL counterparts.

The key issue for compliance with labour standards is that other 1,200 establishments outside the bonded area designated as BOI factories? The overall responsibility according to the BOI is with MOL which itself has seen a fall in regular inspection.

This situation of non-compliance in some EPZ factories regarding statutory dues, particularly Provident Fund benefits, has been compounded by the growth in outsourcing third-party contracts in the production chain. Some of these establishments outside the zones also act as suppliers for the larger factories inside the zones. It is therefore imperative that proper labour inspections be undertaken for the 1,200 factories on a priority basis.

Improving the planning, monitoring, and implementation of labour standards

Sri Lanka has ratified ILO Convention No. 81 on labour inspection and is thus obliged to maintain a system of inspection in order to secure the enforcement of laws relating to working conditions and the working environment, provide information and advice to employers and workers on how to comply with national laws, and ensure that defects or abuses not covered by existing laws are reported to the competent authority.

The Convention does not stipulate the precise details of the inspection system, other than that it should be under a central authority. In Sri Lanka the central authority is the Department of Labour within the Ministry of Labour. The Department is responsible for a number of divisions, each with responsibility for enforcement and compliance in different areas. The inspection of working conditions, work safety and occupational hygiene is undertaken by different inspectors. Sri Lanka has some 400 labour inspectors responsible for general inspection relating to working conditions under various legislations, and another 25 inspectors responsible for inspection under the factories legislation. In addition, the Employee Provident Fund has 200 officers (field officers) responsible solely for ensuring compliance under EPF legislation. In effect, therefore, inspection functions are undertaken by three different types of inspectors.

A modern labour inspection system is driven by the objectives of prevention, protection coordination and improvement, with the actual design of the inspection system a response to these objectives. Under such a system the emphasis is on securing compliance with all labour laws and regulations. With the assistance of the ILO, the MOL has lately been reorganized, the inspection form revised, and a monitoring and

implementation unit set up. These efforts were expected to have a positive impact on the inspection system and increase the number of labour inspections (which has severely decreased from 2005 . Instead of the minimum 20 inspections per month per inspector, most labour inspectors were conducting inspections of only 50-60 per cent of the targeted establishments assigned to them).

It is recommended that the MOL inspectors, the OSH inspectors and the BOI officials coordinate their activities and work as a team, in tandem with the private sector audits which are on the increase. It is expected that the new National Institute of Occupational Safety and Health and the Institute of Labour Studies, although not having inspection duties, will be able to provide the required technical support for the successful operation of a well coordinated inspection system.

The proper management of the inspection system necessitates an approach to labour inspections that makes better use of inspection resources, including logistics, transport, etc. This will increase the effectiveness of routine inspection visits undertaken by inspectors (helping to prevent small issues from escalating into major problems).

The other major issue concerning labour inspections is how to work closely with trade unions and employers organizations and other stakeholders in securing compliance.

Computerising data on labour inspections undertaken in EPZs

Both the BOI and the MOL presently lack an effective mechanism for monitoring and analysing inspections of enterprises. The MOL's administrative and information processes in Sri Lanka have in the past relied heavily on manual procedures, resulting in a massive flow of paperwork pertaining to inspections. Data on compliance required by the Ministry of Industry or the BOI on the extension of GSP Plus status were also handled manually. It is now well recognized that that the manual, paper-intensive system is low in productivity, inefficient, and not consistent with a modern approach to labour administration.

To address this, it is highly recommended that a computerized system be put in place for the intake and analysis of data obtained during inspections. In early 2007 all the districts offices of the DOL acquired e-mail facility. Computerization will facilitate the planning of inspections and follow-up work, particularly the MOL's district and sub-

district offices. The MOL's work on effective monitoring of the BOI factories will be greatly enhanced by computerisation. In this manner both the BOI and MOL will be able to tap into a common database.[3]

Increasing the number of skilled labour inspectors

With the expansion of the Sri Lankan economy, the number of enterprises liable to inspection also increases. In order to maintain and increase the quality inspection penetration rate within the zones, more and better trained inspectors will be needed.. This will also require shifting the emphasis to prevention and working closely with trade unions, employers and buyers and other civil society groups. As well, media and corporate communications campaigns could be launched to broadcast messages on non-compliance, productivity, and good practices to stakeholders on a large scale.

In the meeting with the Permanent Secretary, it was made known to us that MOL was in the process of recruiting 100 labour inspectors in the three months following. In this regard, it would be appropriate to review the required qualifications for inspectors and to ensure proper training for them in the task of securing compliance rather than policing enterprises.

Promoting social dialogue and the freedom of association in EPZs

The general complaints raised by most trade unions pertain to the difficulty in organizing and acquiring recognition in the free trade zones. This is due among other things to employers resorting to the creation of Employees' Councils (as promoted by the BOI) which have the effect of hampering the creation of free and independent trade unions and the exercise of the right to bargain collectively. The unions have already complained to the Committee on Freedom of Association (Case No. 2255, Complaint against the Government of Sri Lanka, presented by the International Textile, Garment and Leather Workers' Federation (ITGLWF) on behalf of the Ceylon Mercantile Industrial and General Workers' Union (CMU)).

Employees' Councils have been in existence since 1994. However in June 2002, at the time when Sri Lanka was applying for the GSP Plus status, the BOI published a set

[3] The ILO-DIALOGUE Better Factories Cambodian Project is currently reviewing the computerisation of garment factories. In Southern Africa, the ILLSA (Improving labour systems in SA) project has also developed a software programme for monitoring and evaluating labour inspections. So far the project has provided computerised systems to Namibia, Lesotho, and Swaziland

of revised standards called "Guidelines for the Formation and Operation of Employees' Councils". The unions point out that Employees' Councils are set up without consultation with the unions, and are under the control of the BOI which is able to actively participate in all aspects of the Councils' activities. They maintain that the Employees' Councils are not freely elected and are therefore not "elected representatives", as defined in the Workers' Representatives Convention, 1971 (No. 135), and that the control exerted by the BOI prevents the Employees' Councils from acting in full freedom to organize their activities, formulate programmes and promote effectively the interests of their members. In addition, the BOI was seen as being clearly partial to the Employees' Councils over trade unions.

Finally, unions are of the view that the current procedures for recognition in the existing law are unsatisfactory. The BOI Guidelines state that if a union represents 40 per cent of the workforce, then the union – not the Employees' Council –can represent the workers in collective bargaining; however, if the union does not meet this minimum requirement, then the Council can become the collective bargaining agent if authorized by at least 40 per cent of the workforce. This has put unions and Employees' Councils in a position where they must compete for bargaining rights, which is a breach of the freedom of association.

Notwithstanding this, the unions are trying to develop a strategy for both the medium and long term on the issue of Employees' Councils. In the years before the end of the MFA in December 2004, the ILO Colombo Office played an active role in organizing activities in the garment sector to overcome the adverse effects associated with the end of MFA. The Apparel-industry Labour Rights Movement (ALaRM), a collective of trade unions, labour NGOs and observer organizations affiliated with the apparel industry, was formed during this time to work for the rights of women workers in the industry, specifically to train, educate and raise awareness of rights among women workers, study and publicize the working conditions of the workers in the garment industry, negotiate with the managers and owners of the garment factories to improve the welfare of women workers, and request the government and the buyers to act with responsibility on labour matters. At present, ALaRM is engaged in mobilizing workers, research and documentation, media and publicity campaigns, lobbying and negotiating with employers, the government and buyers – all part of an international campaign to improve the plight of workers.

Some of the unions in ALaRM have agreed that since only about 35 factories have registered trade unions, it may a good interim measure to work with Employees' Councils, as the latter can handle some of the grievances of the workers which are currently not being addressed at all. In addition, they maintain that working with Employees' Councils can lead to the formation of trade unions. They argue that this is one of the "new forms of organizing" in the labour movement that takes into consideration the changed nature of work, in the process enabling ALaRM to efficiently reach a large number of factories and mobilise their workers. In short, in the absence of any other workers' bodies at the enterprise level, the Employees' Councils can be used to advance the rights of workers and can be a good stepping stone for building a strong labour movement in the predominantly female apparel sector (interview ALaRM member, August 2007).

Other unions in ALaRM pointed out that the organization of trade unions has been unsuccessful due to several factors: suppression by the employers of unionization efforts, misinformation concerning trade unions, the government policy of non-implementation of laws relating to trade unions, and the lack of trade union capacity and financial resources to organize workers (interview with Marcus, August 2007). However, they add that the major issue within the FTZs, especially in apparel factories, was that the employers have used Employees' Councils against the attempts to unionize and that the Councils had been basically introduced in order to prevent the formation of trade unions.

However, they expressed willingness to work with Employees' Councils on the following conditions:

Statements should be prepared and distributed among employees to create awareness about the real nature and workings of Employees' Councils.

The differences between Employees' Councils and trade unions should be made clear in discussions with the members of Employees' Councils, with the participation of trade union representatives.

Exchange programmes should be organized to allow union members to share their experiences with non-union workers in other enterprises in the EPZs.

By and large, unions are not happy with the progress made in organizing unions in Sri Lanka's export processing zones (EPZs), their complaint that employers often refused to recognize unions or bargain with them, leading to strikes and lock-outs.

The process of granting recognition to unions for collective bargaining purposes is marked by excessive delays. Employers tend to delay the holding of union certification polls for a long time, and many union members are harassed and/or fired in the meantime. As a result, workers are afraid of being identified with unions, especially when the union loses the poll. Employers also resort to outsourcing in order to alter their workforce figures to ensure that the 40 per cent union membership requirement is not met ..The Department of Labour recently sought to address this problem by issuing instructions to labour officers on the implementation of the law and on pro-active measures to be taken to facilitate union certification polls.

According to the unions, the 1999 Industrial Disputes (Amendment) Act, which protects workers against acts of anti-union discrimination in taking up employment and in the course of employment, has not been effectively applied. They do not think that the maximum penalty of US$250 is a strong enough deterrent. Since the Act was adopted, many serious cases of anti-union discrimination and non-recognition of trade unions have been reported.

The Labour Department is responsible for filing complaints against employers alleged to have engaged in unfair labour practices. Such offences are tried before a Magistrate's Court. Due to a backlog, it takes a long time to bring cases to court, and the delays lead to the weakening and disbandment of unions.

To summarize, in Sri Lanka the alliance between the unions and local NGOs enabled it to focus its agenda on promoting decent work in the EPZs and organizing the unorganized workers. ALaRM is in a position to enter into a dialogue with the stakeholders to promote collective bargaining and workers' rights. According to ALaRM, there are 35 unionised establishments in the EPZs and given the relatively low wages prevailing in the EPZs, the activities of ALaRM will go a long way in promoting collective agreements.

As the ITGLWF General Secretary Neil Kearney remarked:

... Key to sustainability is the establishment of mature systems of industrial relations built around social dialogue. "In the industrial context effective dialogue

requires a voice for workers as well as management. Unfortunately, serious shortcomings in the application of the right of workers to freedom of association and to bargain collectively can make social dialogue almost ineffective. Increasingly, it is recognized that no matter how well intentioned the corporate social responsibility approach of brands and retailers, the impact is limited and unsustainable in the longer term without social dialogue. Given that social dialogue is a key outcome of unionisation and collective bargaining it is now essential that these be at the heart of any sustainable Decent Work programme in the EPZs in global value chains and CSR initiatives (Kearney, 2006).

The ILO is implementing a number of technical cooperation projects (Better Factories Cambodia, Better Work, Morocco Jordan decent work project in the garment industry), which promotes and facilitates dialogue between national social partners and buyers (multinationals). The ILO policy position is that no CSR (corporate social responsibility) initiative is sustainable unless it is connected to and supported by a strong national industrial relations system and its actors. CSR work is usually top-down, with the MNEs imposing social compliance on their trading partners. Recent studies conducted by the Ethical Trading Initiative (ETI) show that this "policing" approach is costly and does not result in positive changes in terms of social compliance. The ILO's approach is to build a win-win partnership between national social partners and MNEs in EPZs to improve the industry's competitiveness and compliance with national law and core international labour standards. Building sound industrial relations is vital in this strategy.

Employers' initiatives to promote decent work in the FTZs through the Factory Improvement Programme

The Employers' Federation of Ceylon (EFC) is the leading employers' organization in the region. Currently it has a membership of almost 500 members, of which 78 are BOI establishments. Many of the garment factories in the zones are members of the Joint Apparel Association Forum (JAAF), an associate member of the EFC.

Under the Local Management Development Project, MCC and the
Declaration the EFC collaborating on an intensive training and follow-up effort in both EPZ and non-EPZ enterprises, starting in Sri Lanka and gradually moving into other selected countries.

During the past four years, the EFC participated in a programme for the garment sector which increased labour productivity and product quality and promoted bipartite dialogue and safe working conditions. The Factory Improvement Programme (FIP) was implemented, with ILO support, for the apparel sector in the EPZs, designed to raise the factories' capacity to comply with international labour standards and increase their competitiveness.

The programme comprises six training modules, followed by visits to the participating factories by the experts conducting the modules. The modules are as follow:

(1) continuous improvement (setting in motion the structure, discipline, teamwork and commitment of senior management towards the entire project);

(2) quality improvements (tools, techniques, systems and internalizing a quality culture);

(3) workplace cooperation (introduce/enhance worker-management relations and social dialogue, participation of worker-level teams for a two-way process and worker rights);

(4) productivity enhancement (process planning and monitoring, efficient techniques and overtime assessment and monitoring);

(5) human resources management (organization culture, procedures and practices, payroll practices, employee appraisals and worker development);and

(6) occupational safety and health (safety techniques, safety training, healthy workforce and conforming to international requirements).

Given the low productivity prevailing in most enterprises in the garment sector, there is a need for follow-up by the employers to ensure more garment factories come within this scheme (Best, 2005)

The programme methodology – in terms of targeting management capacity, combining labour issues with those of productivity and quality, and actionorientated learning – worked well in making the programme a success.

According to the EFC, the FIP can be credited for improvements in most factories (IOE, 2007). A major achievement was the introduction of improved management systems and better understanding of how to address labour issues on the part of the managers. The programme put in place straightforward changes, such as improved measuring and planning systems (mainly because the managers were most interested in

these). Workers benefited from the changes in terms of higher wages and better health and safety conditions at work.

The modules on social dialogue, HR and continuous improvement also achieved positive changes; workers reported that communication between workers and managers had improved.

The discussions at the Employees' Councils were generally seen by workers as the platform for raising their concerns. Typical problems workers cited as being resolved through the Councils involved transport, canteen food and pay anomalies. Workers in some factories mentioned wider changes arising from the FIP, such as more comfortable working environments and improvements in productivity and quality. The quantitative data also show improved business performance between the programme start and end. In-line and end-of-line defect rates across all factories fell by an average of 25 per cent and 42 per cent respectively. The man-machine ratio fell by an average of 19 per cent and cost-per-minute by 12.5. Falls in labour turnover (34 per cent) and absenteeism (27 per cent) provide indirect evidence that improved people management can increase employee satisfaction and commitment. Managers believed these improvements had direct consequences for efficiency and cost control, e.g. through lower recruitment and induction costs and lower risks of production hold-up (due to lower absenteeism).

The EFC is convinced that this experience can be now transferred to the factories in the bonded area as well as to their 78 BOI members who are outside the zones. The EFC has set up a voluntary mediation centre and is keen to work with the newly formed Association for Conflict Resolution in preventing disputes. Both initiatives will be of importance to the promotion of sound industrial relations in Sri Lanka and within the EPZs.

Following the success of the FIP programme, the FIP methodology has been adapted in **Cambodia** (the Better Factories Project) as well as in Vietnam and India.

EPZs and social dialogue

The EPZs have been characterized by the lack of social dialogue between employers' and workers' representatives; higher level tripartite social dialogue at the National Labour Advisory Council (NLAC) regarding the zones has also been very limited.

The weak enforcement of labour laws and the intense production processes in the EPZs can create an environment that generates conflict. In the absence of adequate mechanisms and processes for information-sharing, consultation, negotiation and dispute settlement, many of these conflicts are inadequately addressed and channelled. This is further complicated by the fact that many zone enterprises are run by managers unfamiliar with local customs in the country.

All the issues pertaining to adjusting to a post-MFA era discussed above and the promotion of decent work require a workable system of social dialogue as the key element in a strategy to mobilize and develop the capacity of all three partners – employers' and workers' organizations and the government's labour administration system – in order to improve employment conditions.

Recommendations

The Government of Sri Lanka is looking to the EPZs to make important contributions to development in terms of foreign exchange and employment generation. Apparel exports, which comprise a major chunk of total exports, successfully faced a quota-free trading environment during the last two years, but are likely to face intense competition in 2008 with the removal of restrictions on China's exports to the U.S. market. Sri Lanka's apparel industry needs to continue its efforts to enhance the quality of its products, improve compliance with international labour standards and with good governance principles, assure timely production and delivery, offer competitive pricing, improve the skills of its labour force, and the develop reputed international customer bases.

As well, continuing efforts to obtain some relief from the current Rules of Origin (ROO) criteria imposed under the GSP Plus scheme, which requires Sri Lanka to add at least 50 per cent value addition in case of apparel exports in order to be qualified for such benefit, would be highly beneficial (RCB, 2006) A better competition policy and a development framework for FDI are important, so is the need to focus on a decent work policy framework.

Given that the GSP Plus status will come up for review next year, it is vital for the key stakeholders and other actors concerned to work together to develop effective national policies that would fit into the DWCP (Decent Work Country Programme) of

Sri Lanka. Such policies should promote recent work and foster investment and trade in the EPZs in the bonded area and in the 1,200 establishments outside the bonded area. The issues that must be addressed include compliance with labour standards, social dialogue between the stakeholders, productivity, investment and technological upgrading to enable enterprises to move up the value chain.

Today there are also voluntary approaches emerging in the global market, e.g., the Framework Agreements between Global Union Federations and multinational companies. While the content of these agreements differ, most cover the core international labour standards and some also address issues such as "living wage" and health and safety concerns.

Coordination between the labour inspectorate and the private system of assessment

The MOL, the BOI and the social partners need to jointly work out a coordination mechanism between the private systems of assessment (undertaken by global brands such as Nike and Gap) and the labour inspectorate to ensure consistency with the approach of the ILO. Initiated in 2004 at the initiative of the ILO Colombo Office, this process should be continued and boosted; the ILO's work in this area in other countries (Better Factories Cambodia, Better Work, Morocco Decent Work project in the garment industry, Jordan TC project, etc.) can be useful models. In these projects the ILO facilitates dialogue between national social partners and buyers (multinationals). For the CSR initiative in Sri Lanka to be sustainable, it has to be connected to and supported by strong national IR systems and its actors.

Promoting social dialogue in the EPZs

The issues presented above present challenges to the tripartite constituents in Sri Lanka to mobilize and work together to develop stronger partnerships and work towards extending the GSP Plus status. This will go a long way to ensure the sustainability of the EPZ strategy in Sri Lanka.

The EPZs are part of global production systems which have emerged largely along sectoral lines, each sector developing distinct characteristics in terms of the organization of global production and governance of global supply chains. This is clearly the case in the Sri Lankan garment sector which produces labour-intensive consumer goods (textiles, garments and footwear); the ILO can continue to assist the constituents in this

area in by urging the existing National Labour Advisory Council to engage in dialogue on issues of common interest and to reach agreement on conclusions and recommendations for the improvement of social and economic conditions. Although the agreements that can be reached may be voluntary, they can have considerable influence in shaping policies and practices in specific sectors.

Employers

The employers' experience in implementing FIP 2 and 3 gives them a platform to improve competition, productivity and quality in the EPZs. The work done on a pilot basis in the FIP programmes in the last three years needs to be shared with their members: the 78 companies with BOI status, and JAAF (their major sector member). The EFC's excellent training department can assist companies in and outside the EPZs to improve working conditions and productivity through remediation and training, and by working with the government and international buyers to ensure a rigorous, transparent and continuous cycle of improvement. During our meeting with the EFC Director-General, the latter recommended that the ILO include this issue in their DWCP and secure funding to enable the employers to promoter decent work in the EPZs through the FIP.

Strengthening the MOL's capacity to enforce labour laws and promote social dialogue

1. A major factor for effective inspections in FTZs is the free entry of labour inspectors to undertake routine and surprise inspections The MOL and the BOI need to revisit the original MOU to ensure that labour inspectors are able to gain access to workplaces in the EPZs without the need for prior authorization (in line with ILO Convention No. 81, ratified by Sri Lanka).
2. Strengthening the planning, programming and monitoring capacity of the MOL

   As in most developing countries, the capacity of the Sri Lankan labour inspectorate needs to be improved. Although there are 400 labour officers, not all of them undertake inspection work. The Ministry's Monitoring Unit should be commended for the recent initiatives which have increased the number of inspections undertaken. These efforts need to be intensified to target the EPZs. Equally important is the training of inspectors and zonal managers on managing the inspection process.

There is a need for an inspection review in order to increase the frequency of public inspections in EPZ establishments in light of the upcoming GSP Plus review. The inspection review needs to take into account the frequency of private monitoring by buyers and identifying the gaps and overlaps.

Computerized information management system

One of the major tasks for the MOL is the development of a computerized information management system (IMS), similar to those found in Singapore, Hong Kong, Malaysia and Cambodia (under the Better Factories Programme) and the work carried out in the ILLSA project by the CTA. The ILO Colombo Office may be able to assist in a pilot phase to computerise the data on inspections from the 1,500 establishments. In this regard, the recommendations already put forward by a consultant regarding software should be taken into account. The MOL is eyeing the developments in the ILLSA project in Southern Africa whose ILO-developed software could be shared with the Sri Lankan MOL.

The MOL can also use the media as an effective means of disseminating information on labour law and good practices. Technological developments such as the Internet and low-cost delivery systems for television and radio have increased the quantity and range of information that can be made available to workers and employers, even to remote areas where the BOI factories are located. It is suggested that the public relations unit of the MOL look into this recommendation.

The MOL also needs to review the existing social dialogue mechanisms within the National Labour Advisory Council with a view to facilitating debate on promoting decent work in the EPZs. It is recommended that a subcommittee be created to discuss the labour issues in EPZs on a regular basis. Best practices and lessons learned from other countries also show that engagement with all stakeholders – including government agencies, workers' representatives and unions, factory owners, and civil society – is a necessary component of a strategy to promote decent work in EPZs.

Review of labour law

To promote collective bargaining in the FTZs, the government needs to review the legal provisions concerning the recognition of trade unions and penalties for unfair labour practices, as existing fines are too low. As outsourcing and employment relationships

have emerged as a major issue, the constituents have urged the MOL to organize (with the assistance from the ILO) a tripartite workshop on ILO Recommendation No. 198.

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PROBLEMS FACED BY WOMEN WORKING IN SRI LANKA'S EXPORT PROCESSING ZONES[4]

The Dabindu Collective

Sri Lanka has a population of over 19 million that consists of Sinhalese, the majority ethnic group, and Tamils and Muslims as minority groups. Over 50 percent of the population and the labour force of 6.6 million are women.

Although traditionally an agrarian country for over 25 centuries, Sri Lanka's economy underwent a drastic change since she opened her doors to investment in the late 70's as many other Asian countries did, by liberalising trade as a pre - requisite of globalisation. The first Export Processing Zone (EPZ or Free Trade Zone) was opened in June 1978 in Katunayake, for the production of export-oriented goods only. Foreign investors from European, American, and East Asian countries were lured by offering many incentives such as relaxation of labour laws, long tax holidays etc. But the main attraction was an educated, intelligent, and submissive work force consisting of young women whose labour could be exploited with overwork and low wages. The minimum wage is approximately US$40. In many factories annual increments and government stipulated wage increases are not granted promptly.

The incentives offered and concessions granted to investors have resulted in workers getting a raw deal with long working hours including compulsory overtime and almost impossible hourly targets to complete orders in time. They are scolded in abusive language by supervisors and managers (both local and foreign) for the slightest mistake and sometimes hit too.

Workers in most factories are forced to limit answering their 'calls of nature' by the use of a 'toilet token'.

The monthly attendance incentive is denied when workers are a few minutes late in reporting to work on a couple of occasions. Their total leave entitlement is 21 days per annum and in some factories new recruits are not allowed any leave until they have worked for one whole year. Health and safety measures at some factories are not adequate

[4] Retrieved from: http://www.amrc.org.hk/content/problems-faced-women-working-sri-lankas-export-processing-zones, visited on 6/12/2015

and there have been several cases of industrial accidents as a result of workers not wearing protective clothing.

Whereas the government spent millions on providing infrastructure for companies in EPZs, they did not build any hostels to house the influx of migrant workers, mainly from rural areas all over the island. The majority of these migrant workers are young women in their late teens and early twenties who are herded together inside small rooms in temporary structures hurriedly put up adjacent to private homes. They have to cook meals in a communal kitchen at each lodging house or in their shared rooms. The majority sleep on the floor though in some places two women share double beds. Because most companies provide no transport for women who finish the night shift at 10 or 11 p.m. and because public transport is also scarce late at night many women encounter trouble when returning along ill-lit roads to their crowded boarding places.

Being quite young, women workers tend to spend more on clothes and jewellery while eating sparingly to save money, resulting in malnutrition and general weakness. Most of them send money regularly to poor parents in villages far away. As they lack family protection many unscrupulous men, both single and married, take advantage of their vulnerability, resulting sometimes in unwanted pregnancies and abortions.

Although they toil hard bringing in the major portion of much needed foreign exchange to Sri Lanka, EPZ women workers are usually held in very low esteem by society. Ironically the government neglects them and the other major contributors to the national economy, i.e. the migrant women who work in the Gulf countries as housemaids, or pluck tea leaves in our plantations.

The Board of Investment is in charge of foreign investment including that of the EPZs and has provided direct employment to over 350,000 workers.

The problems of EPZ workers are aggravated as there are no trade unions to fight for labour rights. 23 percent of formal sector workers are organised in trade unions, but since the inception of EPZs formation of unions has been discouraged through intimidation, demotion, and dismissal of leaders.

Workers' councils were introduced by the government as a weak alternative to trade unions and in several factories they consist of worker representatives chosen by the

employers and not elected by workers independently. Worker's councils have no bargaining power but they have been useful in rectifying certain irregularities at some work places. They may be registered as unions in the EPZs. Since year 2000, some national and local level trade unions have been able to form union branches in a handful of factories. It is indeed a positive step towards safeguarding worker's rights in the EPZs but its success has yet to be seen.

In 1998 the International Labour Organisation (ILO) requested information on any progress made in collective bargaining in EPZs by the government. The government indicated that Article 4 of ILO Convention No. 98 is applied in all sectors of the economy including EPZs and enterprises within the preview of the Sri Lanka Board Of Investment, but that details on collective agreements were not yet available. The ILO urged the government to provide more details and concrete information about EPZs and industrial establishments including the number of collective agreements concluded and the number of workers covered.

APPEAL AGAINST CHANGES TO SRI LANKA'S LABOUR LAWS

In July 2000 the government of Sri Lanka sought to amend the overtime legislation to 100 hours of overtime per month. Current legislation states that the maximum number of overtime hours that women can work is 100 hours per year, with no more than six hours per week and the total number of weeks that overtime is worked should not exceed 25.

In media releases the Chairperson of the Board of Investment, Mr Thilan Wijesinghe claimed that these changes needed to be made so that Sri Lanka would remain internationally competitive, especially after the removal of quotas under the Multifibre Agreement (MFA) in the year 2005. And to conform to the codes of conduct of major brand labels/retailers who do business in Sri Lanka (this is despite the fact that most codes of conduct recognise that labour law or 14 hours per week overtime should prevail, which ever is better).

The Industrial Transport and General Workers Union (ITGWU), Free Trade Zones Workers Union (FTZWU), The Women's Centre and TIE-Asia sent out an appeal against these changes within Sri Lanka.

This amendment was eventually postponed in parliament due to the elections, but will be raised again. The main reason why democratic and independent unions are protesting against an increase in hours of overtime worked is that although routinely violated, the existing law offers some protection to workers if they refuse overtime work, as should be their right.

Positions vary amongst unions on the provisions that should be contained within the overtime legislation.

The position of the Free Trade Workers Union is that there must be real consultation and discussion with unions before changes are made and that any changes must reinforce the notion that overtime is voluntary and remunerated at overtime rates, as allowed for under current legislation. Any changes to overtime legislation needs to be viewed within the context of the entire labour legislation and living wages.

Workers need overtime work because their wage is not enough to live on. Sri Lankan workers are currently facing excessive price hikes on essential items as the government desperately needs funds to finance the ongoing civil war.

Presently, under emergency services regulations it is illegal for workers to strike in support of their demands or against proposed government changes to their conditions.

Sri Lankan unions and NGO's wrote supporting our appeal against changes to the overtime legislation.

As a result of letters sent regarding this appeal the International Labour Organisation sent a letter to the Sri Lankan Minister of Labour, annexing their report from Geneva, suggesting that the government convene a tripartite meeting, with unions, including the ITGWU and FTZWU. This meeting was not held, however we understand that the unions affiliated to the Government were called again to further discuss the amendment.

The Labour Department was watching the campaign and at one stage asked what the unions' future plans were. As a result of pressure, government did decide to reduce the maximum number of hours from 100 hours per month to 80 hours per month, which is still too high.

The new Minister of Labour is from the government union. It is our opinion that the government intends to press ahead with amendments to this legislation, using the new minister to pressure the unions to accept this.

From an appeal issued jointly by the Women Center TIE- Asia, The Industrial, Transport, and General Workers Union, and the Free Trade Zone Workers Union.

UNFAIR LABOUR PRACTICES IN INDIA & SRI LANKA

EMPLOYERS ENGAGED IN ANTI-UNION ACTIVITIES, UNFAIR LABOUR PRACTICES[1]

While there is a need to reform archaic labour laws, enforcement must be strengthened as a matter of priority as workers are increasingly being discouraged from forming trade unions with employers resorting to anti-union activities and unfair labour practices, especially in the export processing zones, while threats to employment surface in the economy, a draft policy document spearheaded by the Senior Ministers' Secretariat says.

The second draft of the proposed 'National Policy on Human Resources and Employment' was shared with a wide-range of stakeholders last week.

"There is a declining trend in unionization in Sri Lanka as it is with other countries of the region. The main contributory factor may be the loss of bargaining strength by trade unions," the draft said.

"Export Processing Zones (EPZ) in the country belongs to special category in this regard. In these Zones the allegation is levelled against employers that they discourage the formation and functioning of trade unions within these Zones, but encourage promotion of Employees' Councils," it said.

Social dialogue institutions and labour relations constitute a vital component of any human resources and employment policy providing the necessary human centric components. These institutions are responsible for maintenance of industrial and labour relations.

A contended labour force enjoying a decent work environment with sound labour relations geared to productive employment is what these institutions are expected to produce. The work-place co-operation will create a healthy environment for social dialogue institutions. And in this regard the management of enterprises should engage in periodical dialogues with trade unions and other worker organisations to resolve outstanding issues and differences of opinion in a friendly atmosphere, before such issues lead to disputes requiring intervention of authorities.

The draft policy document made the following observations and recommendations.

[1] *The Island* Available at: http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=49299 visited: 4/12/2015 at: 12:44 PM

"Employers sometimes take anti trade union action and resort to unfair labour practices. The enforcement of law in this regard needs to be strengthened and accelerated. Unfair labour practices ought to be corrected with tripartite consultation in the National Labour Advisory Council. By enacting the Trade Union Ordinance in 1935 and implementing the law to date shows that the governments in succession have recognized the trade union as a legally constituted democratic institution of the workers. All sectors, the government, public corporations and the private sector should recognize and respect the status accorded to trade unions legally. Unfair labour practices should be adequately dealt with under the law.

"The employer and the Trade Unions or organizations of workers should endeavour to maintain cordial labour relations at all levels. The recognition of trade unions or worker organizations is vital although there is no general provision in labour Law granting recognition to these organizations. However, the Industrial Disputes Act for the purpose of collective bargaining stipulates that a trade union having 40 percent of membership at the work-place ought to be recognised for collective bargaining purposes. Nevertheless to maintain cordial labour relations and work-place co-operation the employer should encourage collective bargaining even with trade unions with less than 40 percent membership.

"Labour relations concerning vulnerable segments, e.g.poor and unskilled women, young persons, disabled and sick persons in employment and domestic workers need to be protected. Their interests ought to be looked after in terms of statutory provisions.

"The employers in EPZs will be encouraged to permit freedom of association among workers. They need to respect trade unions and their functioning must be allowed as the trade union is the legally recognized social dialogue institution for workers. The Department of Labour, as the supervisory and implementing authority, will grant the certificate for collective bargaining for trade unions having40 percent of membership, and also initiate action against the violators of unfair labour practices. The BOI also would strengthen the facilities accorded to workers and trade union leaders to meet and discuss matters pertaining to trade unions freely and in privacy.

"Many priority issues concerning labour relations are under discussion. Of these, the need for establishing a "Pension Scheme" and an "Insurance Scheme" (to cover health and accidents) for

the private sector including the public corporation sector is highlighted. Despite many constraints in the establishment of such contributory schemes, it is inevitable to establish them in the light of growing demand with the ageing of the population in the country. As the initial step the scheme may be of voluntary nature.

"Certain threats to security of employment have surfaced. Out-sourcing and contract labour practices result in downsizing of the numbers of workers in regular employment. While noting that this type of business innovations exists, measures will be taken to provide security of employment to existing workers. Retraining for alternative employment will be encouraged to help those workers who lose jobs in this process.

"In the modern context different types of employment prevail in the country - part time work, working from home, working on assignment basis etc. These can be accommodated within the contract of employment as agreed, between the employer and the employee.

"A general criticism is that Sri Lanka's labour and social legislation is rigid in nature. The legal provisions relating to labour and employment are said to be complex and extensive. A recent global survey has indicated that Sri Lanka ranks as a country with a high level of employment "rigidity" (IBRD/World Bank, 2005).

"In this scenario increasing flexibility of labour laws and regulations is essential. However this requires a detailed study at the tripartite forum, NLAC and may embark on such a move preferably reaching a consensus among the employees (trade unions), employers and the government. By identifying all provisions that appear to be rigid such as, provisions restricting five-day week, restriction of night work after 8.00 p.m. particularly for business process outsourcing (BPO) and other areas, the related statutory provisions may be relaxed. In doing so, basic standards set out in ratified ILO Conventions will be adhered to.

"In the event of breakdown of industrial relations, leading to industrial disputes, the Commissioner General of Labour will initiate steps to settle the disputes concerned in terms of statutory provisions. An alternative dispute settlement mechanism is available in the Industrial Disputes Act. Except for conciliation, however, all the other procedures laid down in the Act are

time consuming and result in delayed relief or redress granted to workers. Identifying these drawbacks the mechanisms have to be strengthened statutorily and by other means.

"Strengthening of the National Labour Advisory Council - the most effective tripartite forum – will facilitate building of tripartite consultation at national level. This forum need to be streamlined, as the apex body to decide the labour policy and the mechanism to review, modify and re-frame the labour policy of the country. However the district level tripartite consultation forum now available will bestrengthened to facilitate freedom of association and to extend labour relations beyond enterprise level.

"The worker training programmes, at present now mostly centralized, will be decentralized and expanded to cater to workers, management representatives and to officials dealing with labour matters. In this regard, the Department of Labour, National Institute of Labour Studies and the National Institute of Occupational Safety and Health would conduct collaborative training programmes for different sectors.

"Social dialogue for public sector employees will be strengthened in parallel with that for private sector employees. A critical review could identify the constraints in unionization of the public sector, in respect of matter such as formation, membership, qualification, affiliation and federation. Action will be taken to relax the existing rigidities. A national level Committee appointed for this purpose could undertake this task and recommend to the Government, having called for the views of the general public, public officers and other organizations, how best the rigid provisions could be relaxed in the Trade Unions Ordinance," the draft policy document says.

CONTRACT OF EMPLOYMENT AND UNFAIR DISMISSALS[2]

By Uditha Egalahewa*

Description:

Contract of employment assumed that in the absence of physical restraint or other direct compulsion, parties were free not only to contract on whatever terms they wished, provided they were legal, but also assumed quite erroneously, that they contracted on equal terms.

Origin

The traditional theory of employment rested on the right to hire and fire. This theory looked at employment, as a mere contractual relation between Master and Servant which either party could terminate at will, subject to the condition of notice, in certain cases.

So it became necessary to recognize the ever-widening gap between the formal freedom of contract and the factual inequality of the parties in many instances, thereby undermining the traditional assumption of contract. The expansion of welfare and social functions of the State have led to statutory provisions modifying or adding to contracts thereby restricting the traditional freedom of contract. New conceptions of law developed and created social and public concern in the protection from exploitation of the economically weaker members of society, the regulation of terms and conditions of contract of employment etc.

Today the contract of employment occupies a far more unimportant place to industrial relations than it did. This is due primarily to State intervention through statutes and Labour Courts and the Collective Bargaining Agreements.

Common Law

The Common Law still completely governs the question whether a relationship of employer and employee exist between two persons.[3] In *Wijenaike v. Air Lanka* [4] Kulathunga J. held that

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[2] Retrieved from: http://www.lawnet.lk/docs/articles/sri_lankan/HTML/CV22.html, visited on 5/12/2015

* L.L.M.,(Col.) L.L.M. (IMLI). State Counsel (Revised Edition)

vacation of post and the duty of the employer to grant a hearing in vacation of post cases are governed by Roman Dutch Law.

Though statutory interventions to the Common Law are too great and the Labour Tribunals are entitled to grant relief notwithstanding anything to the contrary in any contract of service3 still Courts recourse to common law principles especially with regard to disciplinary terminations and vacation of post matters.

Are Written Contracts Necessary?

Generally a contract can be formed either in writing or verbally and the terms can be either implied or expressed. There is no general requirement of law that a contract of employment must be reduced to writing. It is obvious, however, that a written contract of employment enjoys the advantage of easier ascertainment of the terms and conditions of employment. Where there is no written contract of employment, the terms and conditions of employment would need to be spelt out, where applicable, from: -

(a) The Common Law;

(a) Statutory provisions;

(a) Collective agreements of awards of labour courts;

(a) Customs or usage and practice in the work place.

However, the exception is provided under the Shop and Office Employees Act, Section 17 of which requires an employer to furnish an employee on the date of his employment with such particulars relating to the conditions of his employment as may be prescribed. The prescribed information is given in the Regulations of 1954.

Effects of Collective Agreements, Court Orders, Industrial Awards and Statutes on Contracts.

Whatever may the terms and conditions of employment agreed upon between parties and incorporated in the contract of employment, they are all subject where applicable, to the provisions of collective agreements, awards of labour courts as well as statutory provisions.

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[3] S.R.De Silva, The Contract of Employment, Monograph, No.4- (Revised Edition); 1998 page 23

[4] [1990] 1 Sri Lanka Law report 293

The terms and conditions in a collective agreement between the employer and the workman's Trade Union, will become the implied terms of employment of the members of such Trade Union. Similarly any award by an Industrial Court or any other Tribunal will become terms and conditions of employment of workmen who are parties to the dispute on which the award was made. The provisions in Statutes will supersede the terms and conditions in any contract of employment.

No employer could impose any condition contravening a statutory provision, even if the workman agrees to such an inclusion. The minimum standards laid down by law cannot be ignored by any employer. Therefore, very little that a contract of employment entered into between a workman and an employer could decide on their own. Industrial Dispute Act - Section 31 B (4)

Discharge when Unfair

A termination may take the form of a discharge or dismissal. A discharge is a termination in terms of the contract of service. Discharge may take several forms.

(i) Termination with notice or with payment in lieu of notice.

(ii) Termination in accordance with the probation clause.

(iii) Retirement.

Termination with notice or with payment in lieu of notice.

The right to terminate the contract by either party with notice or with payment in lieu of notice is a condition that can be found in almost every contract of employment. The right of the employer to terminate in terms of conditions of the contract has been interfered with by statues. Services of an employee cannot be terminated except for disciplinary grounds without attracting the provisions of Termination of Employment (Special Provision) Act No.45 of 1971 as amended. The employer is required to obtain permission from the Commissioner of Labour in the case of non-disciplinary terminations. It should be noted that the provisions of the above Act are not applicable to employees of corporations and statutory bodies. However, employees of corporations and Statutory Bodies are entitled to seek redress from the Labour Tribunal in terms of Section 31B, as the Labour Tribunal is entitled to grant relief upon applications made on

termination of employment by the employer, notwithstanding anything to the contrary in any contract of service. Thus, unilaterally the employer is not entitled to terminate even in terms of the contract of employment.

The right of the employee to terminate the contract with notice or with payment in lieu of notice, however remains unaffected. Generally, the termination of this nature is known as resignation. On the question whether the resignation should be accepted has caused much confusion in the minds of many. The reason for this confusion is the difference between the terms of employment of Public Servants and the employees of the private sector including corporation employees. The contract of employment requires only notice to terminate the contract and there is no requirement that either party should accept the notice in order to terminate the contract. In *Decro - Well International S.A. v. Practitioners in Marketing Ltd*[5], "A repudiation and a notice of determination are clearly different things. A repudiation may be withdrawn at any time before acceptance, a notice of determination validly given cannot thereafter be withdrawn without agreement".

In *Lever Brothers (Ceylon) Ltd. v. Tissa Devendra*[6], Ananda Coomaraswamy J. following Decro - Wall International case rejected the contention that notice of termination should be accepted. It was held: "If the employer's contention is that the notice of termination had not been accepted by the applicant, any employee can continue to be in service indefinitely by refusing to accept the notice."

It is fundamental to a contract of employment that an employee cannot be compelled to specifically perform his contract of employment if he wishes to terminate the same. This question often arises when the employer is about to terminate the employment on disciplinary grounds and the employee tenders notice of termination.

The correct position would be that if notice of termination tendered validly before the dismissal, the employer cannot thereafter proceed to dismiss the employee.

The rights of a Public Servant are quite different from those of an employer in the private sectors. In terms of Article 55 of the Constitution, "all public officers shall hold office at

[5] [1971], WLR 361 (CA) Buckley L.J,
[6] CA 1192/88 CAM 14th June, 1989

pleasure". The Establishment Code, which has been formulated in terms of the powers vested in the Cabinet of Ministers (Article 55(4)), requires that the resignation need to be accepted. The legal position of a Public Officer has been analyzed in *Abeywickrama v. Pathirana*[7]. Unfortunately this is often cited as an authority even with regard to the issue relating to private sector employees.

In *Wijenaike v. Air Lanka and others*[8] Kulathunga J. held -

"In India and Sri Lanka public officers enjoy a status and the rights and liabilities of their employment arise from constitutional or statutory provisions. Their relationship with the State goes beyond contract."

Probationary Termination, It is very common for employers to include a 'probationary clause' in all contracts of employment or letters of appointment they issue to their employees. A "probationer" is a person who is on trial; one who is qualifying or giving proof of qualification for some position or office, a candidate, novice.

Venkata Ramaiya J. has identified the following characteristics of a probationer in employment in the Indian Case of *Venkatachariya v. Mysoor Sugar Company*[9],

"Obviously a probationer is not in the same position as others in service. He is in a state of suspense attended with uncertainty of an inchoate arrangement. Prima facie his rights and claims against the employer are less than those of others..."

In *Ceylon Trading Co. Ltd. v. the United Tea, Rubber and Local Produce Workers Union*[10] Siva Selliah J. while quoting the above definition in Venkatachariya Case, makes the following observations: " Probation is a period of testing and it is of the essence of the probate that the employer must be satisfied with the probationer during such period of testing not merely regarding competence, but character, co-operation, usefulness in the setup of the employer".

The view expressed in Venkatachariya Case has been repeatedly quoted and followed by our Courts in the past in some of the leading Judgements discussing the question of probation. The

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[7] [1986] 1 SLR 120
[8] [19901 1 Sri Lanka Law Report 293
[9] AIR 1954 Mysoor 175
[10] [1986]2 CALR 82

position of the probationer was discussed fully in *Richard Peiris v. Jayatunga*[11] by the Court of Appeal for the first time. In this case the Court discussed the two Indian cases, *Venkatachariya v. Mysoor Sugar Co. and Caltex Indian Ltd. v. Second Industrial Tribunal*[12]

The next case that came up for review is *Moosaji Ltd. v. Rasaiah*[13] decided in 1985. In this case the previous case of Richard Peiris was cited with approval and added the following new principles: -

(i) Probationer has no right to be confirmed

(ii) Employer is not bound to give reasons

(iii) Probationer must serve to the satisfaction of the employer

(iv) Employer is the sole judge on the question whether the service is satisfactory or not

(v) Tribunal cannot sit in judgement over the decision of the employer

(vi) Tribunal can inquire into the question of termination only for the purpose of ascertaining whether employer acted mala-fide or with ulterior motives or victimization.

Following are some of the important cases decided after the Richard Peiris and the Moosaji cases without deviating much from the aforementioned principles: -

(i) *Ceylon Ceramics Corp. v. Premadasa*, [1986] 1 Sri.L.R 29

(ii) *Sri Lanka Cement Corp. v. Fernando*, [1990]1 Sri. L.R 361

In this case Section 31B(4) of the Industrial Disputes Act which provides for the Labour Tribunal to make a just and equitable order notwithstanding anything contrary in any contract of service, was considered

(iii) *Shafeeudeen v, Sri Lanka State Plantation Corp*[14], In this case the Supreme Court emphasized the need for the LT to inquire whether the termination has been effected in the bona fide exercise of its powers under the contract, whether the termination is male fide, capricious, or

[11] [1982] I Sri .LR. 17
[12] HC Calcutta 1963 1 LLJ 156.
[13] [1986] 1 CALR 95
[14] S.C.(1994)Sn.L.R35.

unreasonable, whether it is with ulterior motives. The decision must be just and equitable but at the same time employer's contractual right should also be recognized. In this case Section 31B (4) and definition of the term "workman" in the Industrial Disputes Act was considered.

(iv*) S.W.R.D.Bandaranaike Memorial Foundation v. Perera*, [1998]2 C.A.L.R. 166)

(v) *Sri Lanka Cashew Corp. v. Thigarajah,* CA 450/84 and 459/84 decided on 18-5-1994.

(vi) *United Tea Rubber & Local Produce Workers Union v. Ceylon Trading Co,* CA 253/82 decided on 9-6-1986

(vii) *Swarnalatha Ginige v. University of Sri Lanka*, [1994] BASL Journal Vol. V Part II Page 5

(viii) *Parakrama v. Bank of Ceylon,* SC [1995] l Sri.L.R. 115

(ix) *Liyanage v. R.C.D.C.*,[1994] 2 Sri.L.R225

(x) *C.M.U. v. Ceylon Cold Stores Ltd*[15]. - Probationers can join Trade Unions and have the right even to strike.

Sometimes the employers place, confirmed workman again on a further probationary period when promoting or appointing the workman for another higher post. The imposition of second probationary period was considered by the Court of Appeal *in Haleys Ltd. v. United Tea Rubber Labour Association*[16] and it was held that the applicant had been in service for a period of 13 years prior to the General Strike. He had already served satisfactorily and there was no complaint by his employer as regards his efficiency and therefore it was improper to have placed him on probation again. However the Supreme Court in Liyanage's case held that when the workman accepted the new probationary employment by signing the appointment letter containing the probation clause, when absorbed to the service of the employer, he should be considered a probationer.

All authorities are agreed that a probationer has no right to automatic confirmation. Our courts have consistently accepted a probationer's disability to get automatic confirmation. The only exception would be when there is a stipulation to the contrary in the contract of employment. In

[15] [1995] 1 Sri.L.R 261
[16] [1987] 1 CALR 129

Hettiarachchi v. Vidyalankara University[17] it was held that the probationer cannot claim automatic confirmation on the expiry of the period of probation, unless the letter of appointment provides for such automatic confirmation.

The Supreme Court in the *State Distilleries Corp. v. Jackson Rupasinghe*[18] while confirming the several principles laid down in the previous cases interpreted these principles giving a shadow of hope to the probationer. In this case workman had been on 3 year probation and was neither confirmed nor extended thereafter. He was terminated about 1 1/2 years after the expiration of the 3 years probation period. It was argued that despite the original probationary period having lapsed long before, the applicant was still on probation and that he could be terminated. The Court considered the principle of implied extension and several other principles laid down in the cases coming down from Richard Peiris's case and the following clarifications were made: -

(i) The rule in Hettiarachchi's case with regard to implied extension was not an inflexible rule and would not necessarily apply when there is a long lapse or when it is inconsistent with the terms of the contract.

(ii) If the employer is bona fide not satisfied with the work and conduct of the probationer (or perhaps even if he entertains a genuine doubt or suspicion) he can dismiss the probationer or extend the probation period.

(iii) If the employer is in fact satisfied with the work and conduct of the probationer (or if his opinion to the contrary is vitiated by mala fides in the wide sense) he cannot dismiss the probationer.

(iv) In the two cases, Richard Peiris and Moosaji the view was taken that there is no requirement under the law that an employee should be forewarned orally or in writing so that he may adjust himself to the requirements of his service. This was no more than obiter. This view is inconsistent with the concept of probation as being a period of trial, at the end of which the employer must judge the performance of the probationer, there can be no proper 'trial' of a probationer unless the employer has given him (except in regard to obvious matters) adequate information and instructions both as to what is expected of him, and as to his shortcomings and

[17] 76 NLR 47
[18] [1994] 2 Sri.LR. 395

how to overcome them. It would hardly be just and equitable for an employer to say that an employee has not proved himself, by relying on his failure to fulfill undisclosed expectations or to remedy uncommunicated deficiencies.

(v) The decision in Hettiarachchi's case that there was an automatic renewal (or to say that there was no automatic confirmation) of probation is inconsistent with the concept of probation which implies that - at least in inquiry - a probationer would have a legitimate expectation of confirmation if his work and conduct was to the satisfaction of the employer. If at the end of the probationary period, he has proved himself satisfactorily in his performance the employee should be confirmed as otherwise it would be contrary to all notions of justice, equity and fairness between employer and employee. Of course, the position may be different if there are other extraneous circumstances, such as financial incapacity. If an employee has manifestly proved himself during his probationary period having regard to the purpose of probation, dismissal in the absence of exceptional circumstances would be mala fide, likewise in such a situation an express extension of probation (in lieu of dismissal) would be neither just nor equitable, for if the employee has already proved himself, an extension would not be proper and therefore it must follow that an extension cannot be implied.

(vi) The purpose of an extension will not be achieved if the employee has not been made aware of what is expected of him and of his deficiencies, where the employer has not expressly alleged, and the circumstances do not suggest, a need for further 'testing', a presumption of renewals is not justified.

(vii) If the employee had been made aware of his deficiencies and faults but without avail, the circumstances would justify an inference that the employer was not satisfied, and it would be just and equitable to infer a renewal - but not for a indefinitely long period.

Either party could retract the right by agreement. (Therefore, the wording of the probationary clause is very important as a contract may confer on the employee a right to be confirmed after the stipulated probationary period).

Elsteel Ltd. v. V.W.Jayasena[19] gives an example of a badly worded probationary clause. In this case the probationary clause was silent on the question whether the period could be extended

[19] S.C.Appeal No.20/88 decided on 6.4.1990

after the initial period. Therefore, Court held the employee stand confirmed, if not terminated after the stipulated period. It was also held that when reasons were assigned for termination even for a probationer, the employer was bound to prove them and probationary clause was of no use.

Retirement:

In *Independent Industrial and Commercial Employees Union v. Board of Directors of CWE*[20] it was held that retirement is a termination by the employer and thus a workman is entitled to make an application in terms of Section 31B of the Industrial Dispute Act complaining of unjust retirement. The question that often arise is whether a workman has the right to continue till 60 years or should he be retired at the age of 55 years.

In Sri Lanka, there is no law governing the age of retirement. In the absence of a statutory provision, the courts first recourse to the letter of appointment and if the letter of appointment is silent, the only other option would be the evidence of past practice. In the Government sector, including Corporations and statutory bodies, retirement age is governed by various circulars issued by the Cabinet of Ministers from time to time.

In *Gomes v. Sri Lanka State Trading Corporation and another*[21] the applicant was employed as an English Stenographer in the Cooperative Wholesale Establishment from 03-03-1952. The Textile Department of CWE was converted into Lanka Salusala Ltd. in 1967 and the applicant was offered employment on the same terms and conditions and without a break in service. Thereafter, through State Trading Corporations Act No.33 of 1970, Lanka Salusala Ltd. was converted into the Respondent Corporation. Since 1970, the Government policy had been to retire all employees at the age of 55 years. However, it was contended on behalf of the applicant that she had a reasonable expectation of working until she completed 60 years, as the retiring age at CWE was 60 years. Whilst accepting the principle of reasonable expectation, Wimalaratne J. distinguished *Kulatunga v. The Board of Directors of the CWE*[22] and held that the letter of appointment did not stipulate the retiring age and the applicant had failed to prove when the

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[20] 74 NLR 344 at 346
[21] [1983] 2 Sri LR 260
[22] S.C. 7/81 SCM 3.10.1981

practice of retirement at the age of 60 years was introduced to CWE. Thus the principle that whether the workman had a reasonable expectation to continue till 60 years was upheld.[23]

Today, there is a tendency for the employees of Corporations and statutory bodies to invoke the fundamental rights jurisdiction of the Supreme Court in cases of dismissals and retirements. It should be noted that the criteria adopted in the Supreme Court cannot be applied to applications made to the Labour Tribunals. However, certain principles evolving out of fundamental rights decisions especially with regard to mala fides and inequality in treatment may be relevant. In the recent case of *Suranganie Marapona v. Bank of Ceylon*[24] the Court held that the Board failed to show the Court that valid reasons did exist for the refusal to grant the extension and the refusal to grant the extension of services was arbitrary, capricious, unreasonable and unfair.

It should be noted that the Courts now look for the reasons for refusal in extension cases and have held that discretion has to be exercised fairly and reasonably.

Disciplinary Terminations

The concept of misconduct on the part of the employee arises out of the terms and conditions of the contract of employment and is intimately connected with the nature of relationship of master and servant. Sleeping whilst on duty by a clerk may not be serious as the same act done by a security guard. Therefore, the relationship and the nature of the employment plays a vital role and the gravity of misconduct has to be viewed only according to the particular circumstances. The dismissal is the capital punishment in Labour Law and for all misconduct the punishment should not be the dismissal.

The Misconduct has been defined as -

"An act which is inconsistent with the fulfillment of express or implied conditions of service or which has a material bearing on the smooth and efficient working of the concern."[25]

The Court of Appeal in *Engineering Employees Union v. State Engineering Corporation*[26] enumerated the following guidelines to ascertain whether any act or omission by an employee is reprehensible and subversive of discipline

[23] See RVDB v. All Ceylon RVDB and State Corporation General Employees Union SC Appeal 39/83 SCM 30.51984
[24] [1997] 3 Sri L.R. 156.
[25] All Ceylon Oil Companies Workers Union v. Standard Vacuum Oil CI.ID 237 CGG 12034 8.1.60

(i) It must be inconsistent with the fulfillment of an express or implied condition of service

(ii) It must be directly linked with the general relationship of employee and employer

(iii) It must have a direct connection with the contentment and comfort of the men and work

(iv) It must have a material bearing on the smooth and efficient working of the concern.

There are numerous decisions of Appellate Courts as to what is misconduct and what is not misconduct. A discussion on the variety of misconduct itself is a study of its own and at this stage what is important is to understand the basic principles as to what constitute misconduct. However, there are instances where the refusal by workmen to carry out orders of the employer have been held to be not insubordination and thus not a misconduct. In *Winter Quilts (Pvt.) Ltd. v. D.J.Wansapura and others*[27], fifteen sewing girls of a garment factory refused to work after reporting for duty because the management had not paid overtime to one of their colleagues who could not meet the production target. This was not Trade Union action and neither amounted to a "strike" within the statutory definition. The Court held that every protest against working conditions and/or insufficiency of wages or remuneration and in particular about overtime payment cannot be treated as acts of insubordination. The Court further held

"In the light of general employer-employee relationship and trends in industrial disputes resolution it may not be possible to append to the acts by these workers the appellations insubordination ".

Thus, non-compliance with an order is not always insubordination and dismissal on such ground may be held unjustifiable. For instance, an employee need not comply with an unjust and malicious transfer.[28]

In *Nandasena v. Uva*[29] Regional Transport Board where an employee upon being found guilty of certain charges was imposed the punishment of deprivation of half-pay for the period of interdiction and the transfer to another station, Fernando J. held;

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[26] A 862/85 CAM 2.8.91

[27] CA 653 185, CAM 10.3.87

[28] *Ceylon Estates Staffs' Union v. The Superintendent*, Meddecombra Estate 73 NLR 278 at 287

[29] SC Appeal 59/92 SCM 29th January, 1993

"Even if the Appellant was guilty of failing to reveal the correct facts in relation to the incident in connection with which he was facing charges, I am inclined to the view that the two punishments imposed were unreasonable and disproportionate to the offence ... That part, the deprivation of nine months salary as well as a punishment transfer is patently excessive".

In this case too, the Supreme Court held that an employee has every right to protest and not comply with an unjust transfer.

Constructive Termination

The contract of employment between an employer and an employee comes to an end where the services of the employee is terminated. Such a termination can take place either directly or indirectly. Indirect termination of employment is known as constructive termination. Whether there is a constructive termination or not depends on the conduct of the employer as well as the facts and circumstances of each case. Sometimes long periods of interdiction without an inquiry have been held to be constructive termination.[30] If the employer brings about a situation where it becomes embarrassing or humiliating for the employee to work any longer, that too has been held to be constructive termination. In *Pfizer Ltd. v. Rasonayagam*[31] it was held that the order of the employer to the workman to report to a junior officer is tantamount to a demotion in the absence of a lawful explanation for such order, and that there had been a constructive termination.

"Demotion or Reduction in Rank" is sometimes held to be constructive termination of employment. Unless expressly provided for in a contract of employment or other agreement the employer has no right to demote an employee, as a punishment or otherwise.[32] The constructive termination becomes evident when the demotion is combined With reduction of salary. The principle is that employer is not entitled to vary the terms of contract of employment unilaterally.

The conduct on the part of the employer, most of the time, provides evidence of constructive termination. For instance, repeated transfers of an employee from one geographical locality to another in circumstances which makes it impossible for the employee to comply would, even

[30] Thaksala Weavers v. Perera SC SP LA 90/93 - SCM 14.7.93
[31] [1991] Sri LR 290
[32] SR.de Silva, Law of Dismissal, monograph 8 para 215

where an express right of transfer exists, amount to a mala fide exercise of that power, and thus to a constructive dismissal of the employee.[33]

Vacation of Post Amounting to Unfair Dismissal

It is common for the employers to treat the workmen who have been absent without leave or authority as having vacated their posts. This procedure is totally erroneous and contrary to law. In *Nelson de Silva v. Sri Lanka State Engineering Corporation*[34] which referred to Re Durand - (No.20) Judgement No.392 of the Administrative Tribunal of International Labour Organization and held that the concept of vacation of post involves two aspects. One is the mental element that is the intention to desert and abandon the employment. The second is the physical absence from the place of work.

Justice Kulatunga in a Fundamental Right application before the Supreme Court *Wijenayake v. - Air Lanka*[35] referred to the same principle and emphasized that physical absence alone is insufficient and that the party seeking to establish a vacation of post must prove that the physical absence co-existed with mental intent - "animus non revertendi".

In Wijenayake's case, the court established another important principle. That is the recognition of employees right to give his explanation for the absence before a final decision is taken. This right was traced back to Roman Dutch Law, which is now reflected even in the Establishment Code.

UNFAIR LABOUR PRACTICES IN INDIA

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

[33] S.R. de Silva, The Contract of Employment, Monograph No.4, Revised Ed: 1998 para 280
[34] [1996] 2 Sri LR 342
[35] [1990] 1 Sri. LR 393

Disputes Act 1947 has provided 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 victimisation and persecution at the hands of their employers.

Chapter VC 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 colourable 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 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.

INDIAN CASE LAWS

Umrala Gram Panchayat

v.

The Secretary, Municipal Employees Union & Ors.

2015(4) Scale 334

Hon'ble Judge: V. Gopala Gowda, J.

Facts: The appellant-Gram Panchayat was duly established under the provisions of the Gujarat Panchayat Act, 1993 (in short 'the Act'). The workmen of the Panchayat, some of whom are now deceased and are being represented by their legal heirs, were appointed to the post of safai kamdars of the appellant-Panchayat and have served for many years, varying from 18 years, 16 years, 8 years, 5 years etc. They were however, considered as daily wage workers and were therefore, not being paid benefits such as pay and allowances etc. as are being paid to the permanent safai kamdars of the appellant Panchayat.

The workmen raised an industrial dispute before the Conciliation Officer at Bhavnagar, through the respondent no.1, Municipal Employees Union (for short "Union") stating therein that after rendering services for a number of years, the workmen are entitled to the benefit of permanency under the appellant-Panchayat. The settlement between the workmen and the appellant-Panchayat failed to resolve amicably during the conciliation proceedings and therefore, the failure report was sent to the Dy. Commissioner of Labour, Ahmedabad, who referred the same to the Labour Court. The Labour Court by its Award held that the workmen are to be made permanent employees as safai kamdars in the appellant-Panchayat. The Labour Court directed the appellant-Panchayat that the workmen should be paid wages, allowances and other monetary benefits as well for which they are legally entitled to.

Aggrieved by the Award of the Labour Court, the Panchayat filed an appeal before the single Judge of the High Court, whereby the same was dismissed and it was held that the view taken by the Labour Court is just and proper. The appellant, thereafter, filed an LPA before the Division Bench of the High Court, which was also dismissed as not maintainable. Hence, these appeals have been filed by the appellant seeking to set aside the judgements and orders of the High Court as well as the Award passed by the Labour Court.

Issue: Whether the appellant is practicing unfair labour practice as defined under Section 2(ra) of the Industrial Disputes Act, 1947 as enumerated at Entry No.10 in the Fifth Schedule to the ID Act.

Held: The Hon'ble Court held that the High Court has rightly dismissed the case of the appellant as the Labour Court has dealt with the same in detail in its reasoning portion of the Award. It is an admitted fact that the work which was being done by the concerned workmen was the same as that of the permanent workmen of the appellant- Panchayat.

They have also been working for similar number of hours, however, the discrepancy in the payment of wages/salary between the permanent and the non-permanent workmen is alarming and the same has to be construed as being an unfair labour practice as defined under Section 2(ra) of the ID Act r/w Entry No.10 of the Fifth Schedule to the ID Act, which is prohibited under Section 25(T) of the ID Act and it also amounts to statutory offence on the part of the appellant under Section 25(U) of the ID Act.

Siemens Ltd. and Anr.

v.

Siemens Employees Union and Anr.

AIR2012SC175

Hon'ble Judge(s): D.K. Jain and A.K. Ganguly, JJ.

Facts: Present case lies in appeal against the order of the Division Bench which affirmed the finding of Single Judge and passed order against Appellant/Company by holding that work given to officers/trainees was work of workman and if workmen were promoted they would be doing job of workman with some additional work which would be considered it unfair labour practice.

The Appellant No. 1 is a public limited company having its registered office in Mumbai and is engaged in the business of manufacturing switchgears, switchboards, motors, etc., of its many factories, one is located at Kalwe, Thane. The Appellant employed about 2200 employees and Appellant No. 2 is the Chief Manager (Personnel) of the said Company.

Respondent No. 1, the contesting Respondent, is a registered trade union of the workers employed by the Appellant No. 1. It is recognized under the provisions of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (hereinafter, referred to as the Maharashtra Act). Respondent No. 2 the Switchboard Unit of the company, and is responsible for the routine functioning of the plant at Kalwe.

In 2007 the trade union preferred a complaint under Section 28 of the Maharashtra Act for unfair labour practices, jointly and severally against the company, its Chief Manager for personnel (appellant No. 2) and it's Works Manager (respondent No. 2) before the Industrial Court, Thane, Maharashtra. The trade union impugned a notification dated 3rd May, 2007 issued by the company for its workmen employed in its factory located in Kalwe, whereby applications were invited to appear for a selection process to undergo a two year long period as an 'Officer Trainee'. This training was to be in the fields of manufacturing, quality inspection and testing, logistics and technical sales order execution. The notification stated that after the successful completion of the said two years, the trainees were to be designated as 'Junior Executive Officers'. The case of the Respondent trade union is that though the designation of 'Junior Executive Officer' was that of an officer belonging to the management cadre, in fact it was merely a nomenclature, with negligible content of managerial work. It was urged that the job description of a Junior Executive Officer was same as that of a workman, with little additional duties. Resultantly, the Junior Executive Officers of the factory were now to do the very same work that had always been done by the workmen.

According to the trade union, any such change could not have been affected without giving the workmen a prior notice to such effect in terms of Section 9A of the Industrial Disputes Act, 1947. In this regard, the trade union referred to an agreement entered into between itself and the company in 1982. Clause (7) ensures that the job opportunities for workers shall not be reduced by the company by making its managerial staff perform the workmen's job. Clause (16) ensured the perpetuity of this Settlement until expressly overruled by a subsequent Settlement. It was submitted by the trade union that the change sought to be brought about by the company by its notification dated 3rd May, 2007, was in violation of Clause (7). The trade union thus complained that the company and its two officers resorted to unfair labour practices mentioned in

items 9 and 10 of Schedule IV of the Maharashtra Act, and had thereby violated the mandate of Section 27 of the Maharashtra Act.

Issue: Whether, Division Bench was justified in passing impugned order?

Held: The Court held that by introducing the scheme of promotion to which the workers overwhelmingly responded on their own it cannot be said that the management has indulged in unfair labour practice and opined that

"Any unfair labour practice within its very concept must have some elements of arbitrariness and unreasonableness and if unfair labour practice is established the same would bring about a violation of guarantee under Article 14 of the Constitution. Therefore, it is axiomatic that anyone who alleges unfair labour practice must plead it specifically and such allegations must be established properly before any forum can pronounce on the same. It is also to be kept in mind that in the changed economic scenario, the concept of unfair labour practice is also required to be understood in the changed context. Today every State, which has to don the mantle of a welfare state, must keep in mind that twin objectives of industrial peace and economic justice and the courts and statutory bodies while deciding what unfair labour practice is must also be cognizant of the aforesaid twin objects…

In the instant case no allegation of victimization has been made by the Respondent-union in its complaint. In the absence of any allegation of victimization it is rather difficult to find out a case of unfair labour practice against the management in the context of the allegations in the complaint. It is nobody's case that the management is punishing any workmen in any manner. It may be also mentioned here that no workmen of the appellant-company has made any complaint either to the management or to the union that the management is indulging in any act of unfair labour practice."

Ajaypal Singh

v.

Haryana Warehousing Corporation

MANU/SC/1231/2014

Hon'ble Judges: Sudhansu Jyoti Mukhopadhaya and Sharad Arvind Bobde, JJ.

Facts: The Appellant was a 'workman' within the meaning of Section 2(s) of the Industrial Disputes Act, 1947 with the Respondent-Haryana Warehousing Corporation (Corporation), which is an 'Industry' within, the meaning of Section 2(j) of the Industrial Disputes Act, 1947. The Appellant had completed more than 240 days of service in the preceding calendar year but his services were terminated with effect from 1st July, 1988 without one month's prior notice or pay in terms of Section 25F of the Industrial Disputes Act, 1947.

Presiding Officer, Labour Court, Rohtak by the Award held that the termination of services of the Appellant-workman was not justified and he is liable to be reinstated with full back wages. The said order was challenged by the Corporation before the High Court whereby it was held that the appointment of the workman was made in violation of Articles 14 and 16 of the Constitution of India and, therefore, the workman is not entitled to reinstatement, but allowed compensation of ` 20,000/- in favour of the workman and this order was affirmed by the Division Bench of the High Court.

Issue: Whether the validity of initial appointment of a workman can be questioned in a case in which Court/Tribunal has to determine whether the termination of service of the workman which comes within the meaning of "retrenchment", is violative of Section 25F of the Industrial Disputes Act?

Held: The Court upheld the Award of the Labour Court and set aside the award of the High Court on the ground that

"in the present case, the services of Appellant was not terminated on the ground that his initial appointment was made in violation of Articles 14 and 16 of the Constitution of India. No such reasons was shown in the order of retrenchment nor was such plea raised while reference was made by appropriate Government for adjudication of the dispute between the employee and the employer. In absence of such ground, we are of the opinion that it was not open for the High Court to deny the benefit for which the Appellant was entitled on the ground that his initial appointment was made in violation of Articles 14 and 16 of the Constitution of India. "

The Court further opined:

"*if any part of the provisions of Section 25F is violated and the employer thereby, resorts to unfair trade practice with the object to deprive the workman with the privilege as provided under*

the Act, the employer cannot justify such an action by taking a plea that the initial appointment of the employee was in violation of Articles 14 and 16 of the Constitution of India.

22. Section 25H of the Industrial Disputes Act relates to re-employment of retrenched workmen. Retrenched workmen shall be given preference over other persons if the employee proposes to employ any person.

23. We have held that provisions of Section 25H are in conformity with the Articles 14 and 16 of the Constitution of India, though the aforesaid provisions (Articles 14 and 16) are not attracted in the matter of reemployment of retrenched workmen in a private industrial establishment and undertakings. Without giving any specific reason to that effect at the time of retrenchment, it is not open to the employer of a public industrial establishment and undertaking to take a plea that initial appointment of such workman was made in violation of Articles 14 and 16 of the Constitution of India or the workman was a backdoor appointee.

24. It is always open to the employer to issue an order of "retrenchment" on the ground that the initial appointment of the workman was not in conformity with Articles 14 and 16 of the Constitution of India or in accordance with rules. Even for retrenchment on such ground, unfair labour practice cannot be resorted and thereby workman cannot be retrenched on such ground without notice, pay and other benefits in terms of Section 25F of the Industrial Disputes Act, 1947, if continued for more than 240 days in a calendar year.

25. However, in other cases, when no such plea is taken by the employer in the order of retrenchment that the workman was appointed in violation of Articles 14 and 16 of the Constitution of India or in violation of any statutory rule or his appointment was a backdoor appointment, while granting relief, the employer cannot take a plea that initial appointment was in violation of Articles 14 and 16 of the Constitution of India, in absence of a reference made by the appropriate Government for determination of question whether the initial appointment of the workman was in violation of Articles 14 and 16 of the Constitution of India or statutory rules. Only if such reference is made, a workman is required to lead evidence to prove that he was appointed by following procedure prescribed under the Rules and his initial appointment was legal."

Durgapur Casual Workers Union

v.

Food Corporation of India

2015(1) SCT 186(SC)

Hon'ble Judge(s): Justice Sudhansu Jyoti Mukhopadhaya, Justice Prafulla Chandra Pant

SUDHANSU JYOTI MUKHOPADHAYA, J.

The factual matrix of the case is as follows:

The Corporation had long back setup a rice mill in the name and style of Modern Rice Mill at Durgapur and it had been handed to successive contractors for running the same. The concerned workmen, forty nine in numbers, had been working as contract labours under the contractors in the rice mill. The last contractor was M/s Civicon. The contract system was terminated and the rice mill was closed in the year 1990-1991. Thereafter, the concerned workmen were directly employed by the Corporation in June, 1991 as casual employees on daily wage basis in the Food Storage Depot at Durgapur for performing the jobs of sweeping godown and wagon floors, putting covers on infested stocks for fumigation purpose, cutting grass, collections and bagging of spillage from godowns/wagons etc. There being an industrial dispute between the workmen and the Corporation regarding the regularisation of services of the workmen, the Government of India, Ministry of Labour in exercise of powers conferred on them by

Clause (d) of sub Section (1) and Sub Section (2A) of Section 10 of the Industrial Disputes Act, 1947

(hereinafter referred to as, 'the Act' for short) referred the following dispute to the Tribunal for adjudication vide Ministry's order No.L-22012/348/95-IR (C.II) dated 18thJuly, 1996.

SCHEDULE

"Whether the demand of Durgapur Casual Workers Union for absorption of 49 casual workmen as per list enclosed by the management of FCI, Durgapur is justified? If not, what relief they are entitled to?"

4. The said reference was registered as Reference No.21 of 1996 before the Tribunal. The Tribunal on appreciation of evidence brought on record by the Management of the Corporation and the workmen and hearing the parties answered the reference in favour of the workmen by Award dated 9th June, 1999 and held that continued casualization of service of workmen amounts to unfair labour practice as defined in item no.10 in part I of the Fifth Schedule of the Act and that social justice principle demands order of absorption and thereby directed the Management to absorb 49 casual workmen as per list.

5. The Corporation being aggrieved preferred a Writ Petition being W.P.No.21368 (W) of 1999 before the High Court at Calcutta. The learned Single Judge of the High Court on hearing the parties and taking into consideration the evidence on record, dismissed the writ petition by judgment and order dated 18th February, 2005 and affirmed the Award passed by the Tribunal.

6. Aggrieved by the aforesaid judgment of the learned Single Judge, the Corporation preferred an appeal before the Division Bench of High Court at Calcutta. One of the grounds taken was that the appointments of the workmen were backdoor appointments. The workmen were working under the contractor whose services as terminated in the year 1990-1991 and thereafter on their demand, the workmen were engaged as casual workmen under the Corporation in June, 1991. It was contended that in view of Constitution Bench judgment of this Court in *Secretary, State of Karnataka and others v. Umadevi (3) and others, (2006) 4 SCC 1* and decisions rendered by this Court in other cases, regularization of service cannot be allowed if it violates the basic principles of Articles 14 and 16 of the Constitution of India. The Division Bench of the High Court by impugned judgment dated 25th February, 2009 while setting aside the award as affirmed by the learned Single Judge held as follows:

"Hence, it appears that Appointing Authority has every right to appoint either in substantive capacity or in casual manner and/or ad-hoc. It is also a settled legal position of law that regularization/absorption of casual appointee/ad-hoc appointee in a permanent post is not other mode of appointment....."

"In the instant case it appears that the workmen, illegal appointees, moved the writ application in the year 1994 and got an order of status quo to maintain their service condition passed by the Writ Court and as such, service of the workmen since 1994 till this date is covered by the order of the Court, which is accordingly attracted by the said riders of para 53 as quoted, to negative their claim."

"Having regard to the aforesaid judgments of the Apex Court, now the law has got its firm root being the law of the land that no regularization even in respect of a workman under Industrial Dispute Act is permissible unless the contingencies of the law is satisfied, namely, appointment following the rule, appointment in a post and appointment for a long continuous period in the angle of Secretary, State of Karnataka and Ors. v. Uma Devi (3) and Ors. (supra). This law of the land was existing and it has been reechoed and reviewed in Secretary, State of Karnataka and Ors. v. Uma Devi (3) and Ors. (supra)."

"In the instant case, from the decision under challenge in the writ application passed by the learned Tribunal below, it appears that the Tribunal did not answer by any findings as to why workmen were legally entitled to be absorbed permanently on considering the settled legal position of law that absorption and/or regularization are not the mode of permanent appointment. Even the reasoning as advanced, namely, "unfair labour practice", it also does not support the decision to regularize in absence of any statutory provision for regularization of service of the workmen under the four corners of the Industrial Dispute Act, 1947. On the other hand, Industrial Dispute Act provides under Chapter VC as already quoted above by Section 25-U, a penal consequences for imprisonment and fine. The very essence and concept of unfair labour practice in the angle and anvil of Section 25-T and 25-Uis that in the industrial sector there is complete bar to appoint the casual appointees for a continuous period with the object to deprive them the status and privileges of permanent workmen and as a coercive measures to avoid such contingency, law has been framed in a negative angle restraining/prohibiting such unfair labour practice under the pain of punishment with imprisonment for a term in Section 25U. Hence, even if any unfair labour practice is assumed though it requires to be proved by leading the evidence that such appointment as casual appointee for a continuous period was with the mens rea to deprive the workmen from their permanent status and privileges, the award prima facie speaks an "error of law" due to a decision applying principle of "unfair

labour practice" for "permanent absorption" and it also covers the field of "without jurisdiction" principle….."

7. Learned counsel appearing on behalf of the appellants submitted that in absence of any pleading made by the Corporation before the Tribunal about legality of initial appointment of appellants, it was not open to the Corporation to raise such question before the Division Bench of the High Court. The Division Bench of the High Court was also not justified in giving any finding with regard to the initial appointment of the workmen, in absence of any issue suggested or framed by the Tribunal.

8. On the other hand, the respondents have taken a similar plea as was taken before the High Court that the initial appointments of the workmen were backdoor appointments and hence the regularization is not permissible.

9. We have heard the rival contention of the parties and perused the record.

10. The Industrial Disputes Act, 1947 is a beneficial legislation enacted with an object for the investigation and settlement of industrial disputes and for a certain other benefits. Section 2 (j) of the Act defines industry as follows:

"2(j) *"industry" means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen."*

The Industrial dispute is defined under Section 2(k) as follows:-

"2(k) *"industrial dispute" means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person."*

Section 2(ka) of the said Act defines "industrial establishment or undertaking" and reads as follow:

"(ka) *"industrial establishment or undertaking" means an establishment or undertaking in which any industry is carried on:*

Provided that where several activities are carried on in an establishment or undertaking and only one or some of such activities is or are an industry or industries, then,--

(a) if any unit of such establishment or undertaking carrying on any activity, being an industry, is severable from the other unit or units of such establishment or undertaking, such unit shall be deemed to be a separate industrial establishment or undertaking;

(b) if the predominant activity or each of the predominant activities carried on in such establishment or undertaking or any unit thereof is an industry and the other activity or each of the other activities carried on in such establishment or undertaking or unit thereof is not severable from and is, for the purpose of carrying on, or aiding the carrying on of, such predominant activity or activities, the entire establishment or undertaking or, as the case may be, unit thereof shall be deemed to be an industrial establishment or undertaking;"

"Unfair labour practice", as defined under Section 2(ra) means any of the practices specified in the Fifth Schedule.

11. The industrial establishment or undertaking as defined in the Act not only includes the State Public Undertakings, the Subsidiary Companies set up by the Principal Undertaking and Autonomous bodies owned or control by the State Government or Central Government but also the private industries and undertakings. Industrial Disputes Act is applicable to all the industries as defined under the Act, whether Government undertaking or private industry. If any unfair labour practice is committed by any industrial establishment, whether Government undertaking or private undertaking, pursuant to reference made by the appropriate Government the Labour Court/Tribunal will decide the question of unfair labour practice.

12. In the matter of appointment in the services of the 'State', including a public establishment or undertaking, Articles 14 and 16 of the Constitution of India are attracted. However, Articles 14 and 16 of the Constitution of India are not attracted in the matter of appointment in a private establishment or undertaking.

13. An undertaking of the Government, which comes within the meaning of industry or its establishment, cannot justify its illegal action including unfair labour practice nor can ask for different treatment on the ground that public undertaking is guided by Articles 14 and 16 of the

Constitution of India and the private industries are not guided by Articles 14 and 16 of the Constitution of India.

14. In the light of above discussion, in the present case the issues that are to be determined are as follows:

1) Whether an issue relating to the validity of initial appointment can be raised in absence of any specific pleading or reference.

2) The Tribunal having held, as affirmed by the High Court that the respondent corporation had committed unfair trade practice against the workmen depriving them of status and privileges of permanent workmen; whether the workmen were entitled for relief of absorption?

15. Before deciding the issues, it is necessary to notice the relevant decisions of this Court regarding regularization of service/absorption in the Government Service or its undertakings in the light of Articles 14 and 16 of the Constitution of India.

16. In ***Uma Devi (3)*** Constitution Bench of this Court while observing that casual/temporary employees do not have any right to regular or permanent employment held as follows**:**

"43. *Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant*

rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. The High Courts acting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularisation, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because an employee had continued under cover of an order of the court, which we have described as "litigious employment" in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates."

45. *While directing that appointments, temporary or casual, be regularised or made permanent, the courts are swayed by the fact that the person concerned has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with open eyes. It may be true that he is not in a position to bargain—not at arm's length—since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting*

even that employment when securing of such employment brings at least some succour to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution."

However, in respect of irregular appointments of duly qualified persons working for more than 10 years, this Court observed:

*"**53.** One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa11, R.N. Nanjundappa12 and B.N. Nagarajan8 and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above-referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularise as a one-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six*

months from this date. We also clarify that regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme.

17. This Court in the case of

M.P. Administration v. Tribhuban, (2007) 9 SCC 748

while taking into account the doctrine of public employment involving public money and several other facts observed as follows:

*"**6**. The question, however, which arises for consideration is as to whether in a situation of this nature, the learned Single Judge and consequently the Division Bench of the Delhi High Court should have directed reinstatement of the respondent with full back wages. Whereas at one point of time, such a relief used to be automatically granted, but keeping in view several other factors and in particular the doctrine of public employment and involvement of the public money, a change in the said trend is now found in the recent decisions of this Court. This Court in a large number of decisions in the matter of grant of relief of the kind distinguished between a daily wager who does not hold a post and a permanent employee. It may be that the definition of "workman" as contained in Section 2(s) of the Act is wide and takes within its embrace all categories of workmen specified therein, but the same would not mean that even for the purpose of grant of relief in an industrial dispute referred for adjudication, application of constitutional scheme of equality adumbrated under Articles 14 and 16 of the Constitution of India, in the light of a decision of a Constitution Bench of this Court in Secy., State of Karnataka v. Umadevi (3) and other relevant factors pointed out by the Court in)a catena of decisions shall not be taken into consideration.*

***7.** The nature of appointment, whether there existed any sanctioned post or whether the officer concerned had any authority to make appointment are relevant factors.*

18. The effect of Constitution Bench decision **in *Uma Devi (3)***, in case of unfair labour practice was considered by this Court in

Maharashtra State Road Transport and another v. Casteribe Rajya Parivahan Karmchari Sanghatana (2009) 8 SCC 556.

In the said case, this Court held that Umadevi's case has not over ridden powers of Industrial and Labour Courts in passing appropriate order, once unfair labour practice on the part of employer is established.

This Court observed and held as follows:

*"**34.** It is true that Dharwad Distt. PWD Literate Daily Wages Employees' Assn.v. State of Karnataka, (1990) 2 SCC 396 arising out of industrial adjudication has been considered in State of Karnataka v .Umadevi (3), (2006)4 SCC 1 and that decision has been held to be not laying down the correct law but a careful and complete reading of the decision in Umadevi (3) leaves no manner of doubt that what this Court was concerned in Umadevi (3) was the exercise of power by the High Courts under Article 226 and this Court under Article 32 of the Constitution of India in the matters of public employment where the employees have been engaged as contractual, temporary or casual workers not based on proper selection as recognised by the rules or procedure and yet orders of their regularisation and conferring them status of permanency have been passed.*

***35.** Umadevi (3) is an authoritative pronouncement for the proposition that the Supreme Court (Article 32) and the High Courts (Article 226) should not issue directions of absorption, regularisation or permanent continuance of temporary, contractual, casual, daily wage or ad hoc employees unless the recruitment itself was made regularly in terms of the constitutional scheme.*

***36.** Umadevi (3) does not denude the Industrial and Labour Courts of their statutory power under Section 30 read with Section 32 of the MRTU and PULP Act to order permanency of the workers who have been victims of unfair labour practice on the part of the employer under Item 6 of Schedule IV where the posts on which they have been working exist. Umadevi (3) cannot be held to have overridden the powers of the Industrial and Labour Courts in passing appropriate order under Section 30 of the MRTU and PULP Act, once unfair labour practice on the part of the employer under Item 6 of Schedule IV is established."*

"47. *It was strenuously urged by the learned Senior Counsel for the Corporation that the Industrial Court having found that the Corporation indulged in unfair labour practice in employing the complainants as casuals on piece-rate basis, the only direction that could have been given to the Corporation was to cease and desist from indulging in such unfair labour practice and no direction of according permanency to these employees could have been given. We are afraid, the argument ignores and overlooks the specific power given to the Industrial/Labour Court under Section 30(1)(b) to take affirmative action against the erring employer which as noticed above is of wide amplitude and comprehends within its fold a direction to the employer to accord permanency to the employees affected by such unfair labour practice."*

19. Almost similar issue relating to unfair trade practice by employer and the effect of decision of Umadevi (3) in the grant of relief was considered by this Court in **Ajaypal Singh v. Haryana Warehousing Corporation** in Civil Appeal No.6327 of 2014 decided on 9th July, 2014. In the said case, this Court observed and held as follows:

"20.*The provisions of Industrial Disputes Act and the powers of the Industrial and Labour Courts provided therein were not at all under consideration in Umadevi's case. The issue pertaining to unfair labour practice was neither the subject matter for decision nor was it decided in Umadevi's case.*

21. *We have noticed that Industrial Disputes Act is made for settlement of industrial disputes and for certain other purposes as mentioned therein. It prohibits unfair labour practice on the part of the employer in engaging employees as casual or temporary employees for a long period without giving them the status and privileges of permanent employees.*

22. *Section 25F of the Industrial Disputes Act, 1947 stipulates conditions precedent to retrenchment of workmen. A workman employed in any industry who has been in continuous service for not less than one year under an employer is entitled to benefit under said provision if the employer retrenches workman. Such a workman cannot be retrenched until he/she is given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice apart from compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months. It also*

mandates the employer to serve a notice in the prescribed manner on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette. If any part of the provisions of Section 25F is violated and the employer thereby, resorts to unfair trade practice with the object to deprive the workman with the privilege as provided under the Act, the employer cannot justify such an action by taking a plea that the initial appointment of the employee was in violation of Articles 14 and 16 of the Constitution of India.

23. *Section 25H of the Industrial Disputes Act relates to re-employment of retrenched workmen. Retrenched workmen shall be given preference over other persons if the employee proposes to employ any person.*

24. *We have held that provisions of Section 25H are in conformity with the Articles 14 and 16 of the Constitution of India, though the aforesaid provisions (Articles 14 and 16) are not attracted in the matter of re-employment of retrenched workmen in a private industrial establishment and undertakings. Without giving any specific reason to that effect at the time of retrenchment, it is not open to the employer of a public industrial establishment and undertaking to take a plea that initial appointment of such workman was made in violation of Articles 14 and 16 of the Constitution of India or the workman was a backdoor appointee.*

25. *It is always open to the employer to issue an order of "retrenchment" on the ground that the initial appointment of the workman was not in conformity with Articles 14 and 16 of the Constitution of India or in accordance with rules. Even for retrenchment on such ground, unfair labour practice cannot be resorted and thereby workman cannot be retrenched on such ground without notice, pay and other benefits in terms of Section 25F of the Industrial Disputes Act, 1947, if continued for more than 240 days in a calendar year.*

26. *However, in other cases, when no such plea is taken by the employer in the order of retrenchment that the workman was appointed in violation of Articles 14 and 16 of the Constitution of India or in violation of any statutory rule or his appointment was a backdoor appointment, while granting relief, the employer cannot take a plea that initial appointment was in violation of Articles 14 and 16 of the Constitution of India, in absence of a reference made by the appropriate Government for determination of question whether the initial appointment of the workman was in violation of Articles 14 and 16 of the Constitution of India or statutory rules.*

Only if such reference is made, a workman is required to lead evidence to prove that he was appointed by following procedure prescribed under the Rules and his initial appointment was legal."

20. In the present case, it is admitted that the workmen had been working as contract labours under the contractor in the rice mill of the Corporation. The contract system was terminated and the rice mill was closed in the year 1990-1991. The effect was termination of services of the workmen. In that view of the matter, they were entitled for re-employment when the employer proposed to take into his employment any person, in view of Section 25H, which reads as follows:

"Section 25H. Re-employment of retrenched workmen.-

Where any workmen are retrenched, and the employer proposes to take into his employ any persons, he shall, in such manner as may be prescribed, give an opportunity to the retrenched workmen who are citizens of India to offer themselves for reemployment and such retrenched workman who offer themselves for re-employment shall have preference over other persons."

Under Section 25H the retrenched workman who offer themselves for employment shall have preference over other persons. It was for the said reason the workmen were employed by the Corporation in June, 1991.

21. This Court in ***Ajaypal Singh*** held that the provisions of Section 25H are in conformity with Articles 14 and 16 of the Constitution of India, though, the aforesaid provisions (Articles 14 and 16) are not attracted in the matter of reemployment of retrenched workmen in private industrial establishment and undertakings. In that view of the matter it can be safely held that the workmen who were retrenched, were rightly taken in the services of Corporation. Admittedly, no plea was taken by the Corporation either before the State Government or before the Tribunal that the initial appointment of workmen were illegal or they were appointed through back door means.

22. In this background, we are of the view that it was not open to the Division Bench of the High Court, particularly in absence of any such plea taken by the Corporation before the Tribunal to come to a finding of fact that initial appointments of workmen were in violation of Articles 14 and 16 of the Constitution of India, nor it was open to the High Court to deny the benefit to which the workmen were entitled under item 10 of Part I of the Fifth Schedule of the Act, the

Tribunal having given specific finding of unfair trade practice on the part of the Management of the Corporation.

23. Having accepted that there was unfair trade practice, it was not open to the Division Bench of the High Court to interfere with the impugned award.

24. For the reasons aforesaid, we aside the impugned judgment dated 25th February, 2009 passed by the Division Bench of the High Court at Calcutta in F.M.A. No.2345 of 2005 (C.A.N.8685 of 2007 and C.A.N.4726 of 2008). Award dated 9th June, 1999 passed by the Tribunal in Reference No.21 of 1996 as affirmed by the learned Single Judge by order dated 18th February, 2005 in W.P. No.21368 (W) of 1999 is upheld. The respondent-Corporation is directed to implement the Award from its due date as ordered by the Tribunal. The appeal is allowed with aforesaid observations and directions. No costs

BALANCING RIGHTS OF EMPLOYER AND EMPLOYEE

Section 7 Update: Balancing Employer Rights vs. Statutory Rights: Where is the Balance Today?

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A production worker in a nonunion manufacturing plant believes that the piece rate system by which she is paid does not adequately compensate her. The employee voices her complaint to other employees and to her supervisor. The employee does not believe that the supervisor is adequately concerned about what she believes to be a plantwide problem, so the next day she approaches the plant manager with her complaint and tells him that her supervisor had been unresponsive to her complaint. Two other employees who are dissatisfied with the piece rate system also have complained to their respective supervisors.

Later that week the female production worker's supervisor raises the subject of the fairness of the piece rate system in the weekly supervisors meeting with the plant manager. At that meeting the supervisor learns that the production worker went over his head to the plant manager. When the supervisor walks back to his department after the meeting, the female production worker asks him when the plant is going to do something about the piece rate system. Since the employee previously had received a final written warning for tardiness, the supervisor terminates her for this instance of "insubordination."

A management company manages a large retail, business office, and hotel complex. The complex is comprised of several towers in which are located offices and an exclusive luxury hotel. The towers are connected by an enclosed retail shopping complex. The management company hires a contract cleaning company to clean the open areas of the retail shopping complex.

In mid-October union organizers began handbilling in the open area of the retail shopping complex while the contract cleaning company employees were working. The organizers, who were not employees of the

contract cleaning company or the management company, gave handbills to the contract cleaning employees, as well as hotel guests, shoppers, and office workers, which stated that the contract cleaning company was nonunion. The handbills did not urge a boycott. After receiving some complaints from shoppers and hotel guests, the security guards employed by the management company informed the organizers that the complex had a no-solicitation policy, and they would have to conduct their handbilling on the public sidewalks outside the complex.

In both of these situations, whether the employers' actions will be considered lawful under the National Labor Relations Act (hereafter, NLRA or the Act) will be determined by the Board's application of section 7.[1] In recent years the Board has made significant modifications in its interpretation of section 7. The Board overruled *Alleluia Cushion Co.*[2] and redefined concerted activity in *Meyers Industries, Inc. (Meyers I).*[3] In *Fairmont Hotel,*[4] the Board restructured the analysis it uses in balancing the competing interests of an employer's property rights with section 7 rights.

The *Meyers* Decisions

In *Meyers Industries, Inc. (Meyers I),*[5] the board overruled its previous decision of *Alleluia Cushion Co.*, which held that "where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted."[6] Prior to *Meyers I* the Board had expanded *Alleluia Cushion* to encompass the firing of an employee for: filing a criminal complaint against the company president,[7] filing for unemployment com-

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1. 29 U.S.C. § 157 (1982). Section 7 provides that:
Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

2. 221 NLRB No. 999, 91 LRRM 1131 (1975).

3. 268 NLRB No. 493, 115 LRRM 1025 (1984), *rev'd sub nom.* Prill v. NLRB, 755 F.2d 941, 118 LRRM 2649 (D.C. Cir. 1985), *on remand,* Meyers Industries, Inc. (*Meyers II*), 281 NLRB No. 118, 123 LRRM 1137 (1986).

4. 282 NLRB No. 27,123 LRRM 1257 (1986).

5. *See supra* note 3.

6. 221 NLRB at 1000, 91 LRRM at 1133.

7. Ambulance Services of New Bedford, 229 NLRB 106, 95 LRRM 1239, *enf'd* 564 F.2d 88, 97 LRRM 2110 (1st Cir. 1977).

pensation,[8] and refusing a job assignment because the employee believed the employer was violating Title VII.[9]

In rejecting the *Alleluia* definition of concerted activity, the Board in *Meyers I* reviewed the language and legislative history of section 7. The Board concluded that, like its statutory predecessors, concerted activity in section 7 should be given a "united-action interpretation."[10] The Board then reviewed pre-*Alleluia* decisions in which it had defined concerted activity in terms of "interaction among employees,"[11] mutual reliance among employees in refusing to take certain action,[12] and intent to solicit support of other employees.[13]

In comparison, the Board stated that under *Alleluia*, "the Board questioned whether the purpose of the activity was one it wished to protect and, if so, it then deemed the activity 'concerted.'"[14] The *Meyers I* Board then redefined concerted activity in terms of an objective standard, and set forth a definition that admittedly was not exhaustive.

> In general, to find an employee's activity to be "concerted," we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity.[15]

When the Board applied this definition of concerted activity to the facts before it, it determined that Kenneth Prill, the employee, had not been engaged in concerted activity. Meyers Industries, Inc., discharged Prill from his job because he made repeated complaints about the unsafe condition of the company truck and trailer that he was required to drive. These included a complaint to state authorities after an accident that resulted in a citation. At one time Prill was in his supervisor's office while another employee, who had been driving the same truck, stated to the supervisor that he would not drive the truck anymore until the company had repaired it.

The Board held that the company had not violated section 8(a)(1) of the Act when it discharged Prill. Prill's presence while another em-

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8. Self Cycle & Marine Distrib. Co., 237 NLRB 75, 98 LRRM 1517 (1978).

9. Dawson Cabinet Co., 228 NLRB 290, 96 LRRM 1373, *enforcement denied*, 566 F.2d 1079, 97 LRRM 2075 (8th Cir. 1977) (enforcement denied on the basis that the doctrine of constructive concerted activity was unsound).

10. 268 NLRB at 493, 115 LRRM at 1026.

11. *Id.* at 494, 115 LRRM at 1026 (construing Root-Carlin, Inc., 92 NLRB 1313, 27 LRRM 1235 (1951)).

12. *Id.* (construing Traylor-Pamco, 154 NLRB 380, 59 LRRM 1756 (1965)).

13. *Id.* (construing Continental Mfg. Corp., 155 NLRB 255, 60 LRRM 1290 (1965)).

14. *Id.* at 495, 115 LRRM at 1027.

15. *Id.* at 497, 115 LRRM at 1029.

ployee complained about the safety of the truck did not sway the Board. It stated that "Prill merely overheard Gove's complaint while in the office on another matter. . . . Taken by itself, however, *individual* employee concern, even if openly manifested by several employees on an *individual* basis, is not sufficient evidence to prove concert of action."[16] Finally, the Board stated that there was no evidence that the actions of either Gove or Prill were intended to enlist the support of other employees.[17]

Meyers I came before the District of Columbia Circuit Court of Appeals on a petition for review in *Prill v. NLRB,* and that court reversed and remanded the case to the Board.[18] The court stated that the Board's decision in *Meyers I* was not entitled to enforcement because it was based on an erroneous view of the law. According to the court, the Board erred when it did not exercise its own discretion in deciding *Meyers I* but assumed that the Act mandated that result.[19] Also, the court concluded that the definition of concerted activity set forth in *Meyers I* did not represent a return to a pre-*Alleluia* definition of concerted activity as the Board had asserted, "but instead constitutes a new and more restrictive standard."[20] The court of appeals relied in part on the Supreme Court's decision in *NLRB v. City Disposal Systems,*[21] in deciding that the Act did not mandate the result reached in *Meyers I.*

On remand,[22] the Board reviewed its objective standard of concerted activity set forth in *Meyers I* in light of the Supreme Court's decision in *City Disposal,* and it responded to several questions presented by the

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16. *Id.* at 498, 115 LRRM at 1030.

17. *Id.* at 499, 115 LRRM at 1031.

18. 755 F.2d 941, 118 LRRM 2649 (D.C. Cir. 1985).

19. *Id.* at 948, 118 LRRM at 2654–55 (quoting Planned Parenthood Federation of America, Inc. v. Heckler, 712 F.2d 650 (D.C. Cir. 1983)).

20. *Id.* at 948, 118 LRRM at 2655.

In *Meyers I,* 268 NLRB at 496, 115 LRRM at 1029, the Board, according to the court, mistakenly stated that its objective standard of concerted activity was "the standard on which the Board and courts relied before *Alleluia.*"

21. 104 S. Ct. 1505, 115 LRRM 3193 (1984).

22. Meyers Industries, Inc. (*Meyers II*), 281 NLRB No. 118, 123 LRRM 1137 (1986).

When *Meyers II* was before the Board on remand from the District of Columbia Circuit Court of Appeals, the General Counsel, Rosemary M. Collyer, filed a statement of position with the Board outlining when the General Counsel would issue unfair labor practice complaints in concerted activity cases. According to the memorandum, the General Counsel will issue an unfair labor practice complaint in the following circumstances: (1) when there is collective action by a group of employees; (2) when a single employee speaks or acts as the designated representative of one or more other employees (this designation may be express or implied); (3) when one employee seeks to induce other employees to take collective action, irrespective of whether the conversation leads to action; (4) when a union employee seeks to enforce the provisions of a collective bargaining agreement; and (5) when an employee's conduct is not concerted, but the employer disciplines the employee in order to make an example to others and to chill their inclination to engage in concerted activity. Meyers Industries, Inc., No. 7-CA-17207, General Counsel's statement of position on remand, at 7-9.

court of appeals' decision in *Prill.* The Board enunciated three guiding principles concerning what might constitute a permissible definition of "concerted activities" which it had drawn from *City Disposal.*

> First, a definition of concerted activity could include some, but not all, individual activity. . . . Second, inasmuch as an essential component of Section 7 is its collective nature, a definition of concerted activity should reflect this component as well. Third, . . .the Court in City Disposal separated the concept of "concerted activities" and "mutual aid or protection. . . ."[23]

The Board emphasized several factors that it would take into consideration in determining if activity would be considered concerted. Whether an employee has engaged in concerted activity is a factual determination according to the Board, based on a totality of the evidence. When the totality of the evidence demonstrates "group activities, whether 'specifically authorized' in a formal agency sense, or otherwise, [the Board] shall find the conduct to be concerted."[24] *Meyers II* made clear that, although a group spokesman need not be "specifically authorized" by the group to take certain action, there must at least be a general awareness on the part of the group of the intended action of the individual.[25]

There also will be concerted activity when an employee refrains from taking certain action in reliance on another employee. Thus, when one employee refrains from making his own wage complaint and instead relies on another employee to resolve the matter, then the Board will find that the employee who took the action was engaged in concerted activity. This is so even though the employee was only generally aware that the other employee was going to take action to resolve the wage dispute.[26]

The Board in *Meyers II* gave assurances that its objective standard for concerted activity encompassed situations in which there was only a speaker and a listener, so long as the individual activity was "looking toward group action."[27] The Board also noted that in some instances an employer may be held to have violated section 8(a)(1) of the Act if the employer's action has a chilling effect on the exercise of section 7 rights by other employees. "In *City Disposal,* the Court noted that the discharge of an employee who is not himself involved in concerted activity may violate Section 8(a)(1) if the employee's actions 'are related to other employees' concerted activities in such a manner as to render his discharge an interference or restraint on these activities.' "[28]

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23. 123 LRRM at 1140–41.

24. *Id.* at 1141.

25. *Id.* at 1142 (construing Mannington Mills, 272 NLRB 176, 111 LRRM 1233 (1984); Allied Erecting Co., 270 NLRB 277, 116 LRRM 1076 (1984)).

26. *Id.* at 1142 (construing Walter Brucker & Co., 273 NLRB 1306, 118 LRRM 1127 (1984).

27. *Id.* at 1142 (quoting Ontario Knife Co. v. NLRB, 637 F.2d 840, 844–45, 105 LRRM 2053 (2d Cir. 1980)).

28. *Id.* at 1144 (quoting *City Disposal,* 465 U.S. at 833 n.10)).

The Logical Outgrowth of Post-*Meyers* Decisions: An *Alleluia* Refrain?

The Board's decisions following *Meyers II* to a large extent have illustrated the types of activity that the Board indicated would be considered concerted activity in its decision in *Meyers II*. In *Unico Replacement Parts, Inc.*,[29] the Board held that the employer had violated section 8(a)(1) of the Act when one of the employer's supervisors told an employee that if one of the other employees called OSHA to report unsafe working conditions then it would close the plant. Consistent with the *Meyers* decisions, the Board stated that the employee's call to OSHA "would not be protected by the Act in the absence of evidence to indicate that he acted in concert with other employees."[30] The Board concluded, however, that the supervisor's threat of plant closure was unlawful because it was made in the presence of several employees and

> inasmuch as the threat could reasonably have been construed as indicating that complaints to OSHA, whether made by one or by several employees together, would result in plant closure, we find that [the supervisor's] comment had the effect of restraining employees in the exercise of their right to act, in a concerted manner, to report alleged safety violations to OSHA. . . .[31]

The Board's determination in *Unico* was not based on a finding of actual or constructive concerted activity. Rather, the Board's decision is consistent with its recognition in *Meyers II* that an employer's actions in some instances may have a chilling effect on the exercise of section 7 rights by other employees.[32]

The Board reaffirmed in *Meyers II* that its objective standard of concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management."[33] In *El Gran Combo*,[34] the Board held that the respondent, an orchestra specializing in Latin music, unlawfully discharged two orchestra members for their repeated attempts to enlist the support of the other combo members to protest a condition of employment. The two members had different complaints that arose from a common source, payments to be received from the group's twelfth album. The manager of the combo negotiated a deal by which each combo mem-

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29. 281 NLRB No. 46, 123 LRRM 1106 (1986).
30. *Id.* at 1106.
31. *Id.*

In *Ewing v. NLRB*, 768 F.2d 51, 55, 119 LRRM 3273 (2d Cir. 1985), the Second Circuit Court of Appeals remanded the case to the Board to consider whether the employer's failure to recall an employee from a layoff because that employee had made a complaint to OSHA would have a "chilling effect" on the collective rights of other employees.

32. 123 LRRM at 1144; *See also City Disposal*, 465 U.S. at 833 n.10.
33. 123 LRRM at 1142.
34. 284 NLRB No. 112, 125 LRRM 1290 (1987).

ber who played on the album would receive $1,000, and the combo's manager would receive $5,000 for his efforts as producer, mixer, and director. One of the combo members who played on the album, Duchesne, expressed dissatisfaction with the deal at a group meeting and stated that he thought the record was worth more than $1,000 per member and that he himself was worth more than $1,000.

Following another meeting at which Duchesne expressed his discontent with the record deal, he met with another combo member, Ramos, to inform him that he would not receive any payment from the record deal because he had not participated in the recording. Ramos informed the combo manager that he thought that he should be paid the same as any other member of the combo regardless of whether he participated in the recording. Ramos attempted to enlist the support of other combo members. Both Duchesne and Ramos apparently made comments to other members of the group that the manager was stealing their money.

The Board concluded that the manager of the combo fired the two combo members for engaging in concerted, protected activities. The Board found that "Duchesne's and Ramos' repeated attempts to enlist the support of the other combo members to protest a condition of employment, i.e., wages, constituted protected concerted activity. Their inability to sway their coworkers does not change the concerted nature of their activity."[35] The Board added that it was "immaterial in assessing the concertedness of the two employees' complaints that each may have been motivated by different reasons."[36]

Chairman Dotson dissented from the majority and concluded that Ramos and Duchesne had forfeited the protection of the Act by making false statements that the manager was stealing money from the group. In addition, Chairman Dotson determined that Ramos was not engaged in concerted activities. The portion of Chairman Dotson's dissent that is pertinent here are his observations that Ramos' objections were not concerted because they were "based on his unique situation as the only combo member not to have taken part in the album's recording."[37] Chairman Dotson reasonably concluded that Ramos was protesting a complaint personal to his unique situation of being the only member not to participate in the recording, rather than a matter of mutual or group concern.[38]

In *El Grand Combo,* the Board was not moving back to an *Alleluia* standard, but it did appear to take a step away from the strict interpretation of concerted activity that it set forth in the *Meyers* decisions. The majority decision by Members Johansen and Babson glossed over the

35. *Id.* at 1293.
36. *Id.*
37. *Id.* at 1295 (Dotson, Chairman, dissenting).
38. *Id.*

fact that Ramos was protesting a complaint unique to his personal situation.

Not long after the Board decided *Meyers II,* a theory of concerted activity began to emerge in Board decisions that can best be described as the "logical outgrowth theory." The logical outgrowth theory is analogous to the Board's *Interboro* doctrine,[39] and it often has been applied by the Board in situations that would have been determined by *Alleluia* in pre-*Meyers* cases.

In *Every Woman's Place,*[40] the Board determined that employee Doran's call to the Wage and Hour Division of the Department of Labor was a "logical outgrowth of the original protest by all three employees" concerning overtime compensation for holidays.[41] The Board noted that several weeks before employee Doran called the DOL, she and two fellow employees had brought the matter of overtime compensation to the attention of their supervisor on at least four or five occasions. The Board distinguished Doran from employee Prill in *Meyers* stating that Doran was seeking information "*because* she and fellow employees had received no response to their common complaint."[42]

A necessary theoretical underpinning to the Board's decision in *Every Woman's Place* was that the complaint by the employees concerning overtime actually amounted to group activity or a group complaint. As Chairman Dotson pointed out in his dissent, however, the record was silent regarding the circumstances surrounding these complaints made by the employees. According to Chairman Dotson, there was nothing in the record to support the majority's assumption that the employees approached their supervisor together. "From the record evidence it is equally plausible that the employees questioned [their supervisor] individually on separate occasions. Under *Meyers* such questioning is not concerted."[43] As Chairman Dotson emphasized in his dissent, the Board in *Meyers I* stated that "*individual* employee concern, even if openly manifested by several employees on an *individual* basis, is not sufficient evidence to prove concert of action."[44] In *Every Woman's Place,* the Board departed from its standard of concerted activity set forth in *Meyers I and II* by finding concerted activity even though the General Counsel failed to produce evidence that the

39. Under the *Interboro* doctrine, an individual's assertion of a right grounded in a collective-bargaining agreement is recognized as concerted activity. Interboro Contractors, Inc., 157 NLRB 1295, 61 LRRM 1537 (1966). The Supreme Court recently upheld the Board's application of the *Interboro* doctrine in *NLRB v. City Disposal Systems,* Inc., 104 S. Ct. 1505, 115 LRRM 3193 (1984).

40. 282 NLRB No. 48, 124 LRRM 1001 (1986).

41. *Id.* at 1001.

42. *Id.*

43. *Id.* at 1002 (Dotson, Chairman, dissenting).

44. *Id.* (citing *Meyers I,* 268 NLRB 493, 498, 115 LRRM 1025, 1030).

employees were acting together when they voiced their complaints to their supervisor.[45]

The Board's decision in *Every Woman's Place* does not mark a total return, however, to *Alleluia.* In *Barmet of Indiana,*[46] the Board found that two employees were not engaged in concerted activity when they were questioned by an OSHA inspector at the employer's facility and "both employees individually voiced complaints [to the inspector] about defective equipment."[47] The Board stated that the employees' participation in the OSHA investigation did not constitute concerted activity under *Meyers* because both employees were questioned individually, and there was "no evidence that they in any way acted with or on the authority of each other or any other employees in answering the OSHA inspector's questions . . . or in complaining about faulty equipment."[48] Accordingly, the employer did not violate the Act to the extent that it discharged the employees because of their participating in the OSHA investigation.

In *Barmet,* the Board made a crucial distinction that the majority failed to make in *Every Woman's Place.* In *Barmet* the lack of any evidence that the two employees acted with or on the authority of each other or any other employee in responding to the OSHA inspector fatally flawed the claim that they were engaged in concerted activities. While in *Every Woman's Place,* the majority found that the employees were engaged in concerted activities when they complained to their supervisor despite the lack of any evidence that their complaints had been with or on the authority of each other or any other employee.[49]

In *Salisbury Hotel, Inc.,*[50] the Board applied the logical outgrowth theory to find an employee's call to the Department of Labor was concerted activity. This decision, unlike the decision in *Every Woman's Place,* was more in line with the *Meyers* definition of concerted activity. In *Salisbury,* employee Resnick and other employees complained among themselves and to the employer about a change in the employer's lunch hour policy.[51] In addition, employee Resnick called the Department of Labor and asked whether the employer's lunch hour policy was lawful. The Board stated that "[a]lthough there is no evidence that the respon-

45. *See* 124 LRRM at 1002.

46. 284 NLRB No. 106, 125 LRRM 1338 (1987).

47. *Id.* at 1342.

48. *Id.*

49. Member Johansen, who formed part of the majority in *Every Woman's Place,* concurred in part and dissented in part to the decision in *Barmet.* In his decision in *Barmet,* Member Johansen would have found the two employees engaged in concerted activities on the basis of the *Interboro* doctrine. 125 LRRM at 1344–45 (Johansen, concurring and dissenting in part).

50. 283 NLRB No. 101, 125 LRRM 1020 (1987).

51. The employer decided to require all employees to take a mandatory lunch hour break, whereas previously an employee who did not was permitted to come to work an hour later or leave one hour early. 125 LRRM at 1020–21.

dent's employees explicitly agreed to act together to change the respondent's new lunch hour policy, they did at least tacitly agree that they had a grievance *and* that they should take it up with management."[52] The Board stated that the employees were engaged in a concerted effort to convince the employer to change its lunch hour policy and employee Resnick's call to the DOL was a continuation of these efforts. What is significant in this decision is that in finding employee Resnick's call to the Department of Labor a logical outgrowth of the prior concerted activity, the Board required evidence, not only that the employees agreed that they had a grievance, but also that they should take it up with their employer. According to this decision, mere complaining among employees about a situation is not enough to support a finding of concerted activity unless the employees at least tacitly agree that they should take action on their complaint. This is consistent with the Board's concern in *Meyers I* that concerted activity be defined "in terms of employee interaction in support of a common goal."[53]

Chairman Dotson, although concurring in the judgment, again disagreed with the majority's application of its logical outgrowth theory. He pointed out that there was no evidence that any of the employees knew in advance that employee Resnick would call the DOL or that they authorized her to call on their behalf. Chairman Dotson stated that the finding of concerted activity based on the logical outgrowth theory "effectively resurrects the *Alleluia* presumption that individual actions regarding 'group concerns' are concerted, despite the Board's laying it to rest in its *Meyers* decision."[54] Apparently Chairman Dotson would require employees not only to agree that they should take action but to agree on the specific action they should take as well.

In a significant footnote in *Salisbury Hotel,* it was stated that Member Johansen "would find that a discussion between two or more employees regarding terms and conditions of employment is necessarily concerted activity because it is an 'indispensable preliminary step to employee self-organization.'"[55] Thus, Member Johansen would not require that employee discussions be calculated to induce or prepare for group action or that it otherwise be related to group action. This appears to be an abandonment of concerted activity as defined in *Meyers I and II.* Member Johansen did not participate in the *Meyers* decision.

In *Consumers Power Co.,*[56] the employer, a public utility, held weekly meetings with its metermen during which the employees frequently made complaints about incidents of customer violence and of-

52. *Id.* at 1021–22 (emphasis added).

53. 268 NLRB at 493, 115 LRRM at 1026 (citing *Root-Carlin,* 92 NLRB at 1314, 27 LRRM at 1235).

54. 125 LRRM at 1022 (Dotson, Chairman, concurring).

55. 125 LRRM at 1021 n.10.

56. 282 NLRB No. 24, 123 LRRM 1305 (1986).

fered suggestions as to how the employer should react to these incidents. The Board held that employee Knight was engaged in concerted activity when he approached his supervisor along with another employee. Although the other employee turned away from the conversation while employee Knight confronted the supervisor about inadequate protection from customer violence, the Board found this concerted on two theories. First, it was concerted because the other employee acquiesced and relied on employee Knight's suggestion that they confront the supervisor. Second, and more importantly, the Board found that even if employee Knight had approached the supervisor alone, his action was a logical outgrowth of the other employees' concerted activity at the weekly meetings.[57]

Fairmont Hotel

In *Fairmont Hotel,*[58] the Board restructured the analytical framework by which it determines whether a union has a right under section 7 to carry on handbilling or related activity on the private property of another. The Board's decision departed from prior cases and Board decisions which had held that the union's right to access was determined by whether reasonable alternative means of communication exist.[59] In *Fairmont Hotel,* the Board stated that:

> it is the Board's task first to weigh the relative strength of each party's claim. If the property owner's claim is a strong one, while the Section 7 right at issue is clearly a less compelling one, the property right will prevail. If the property claim is a tenuous one, and the Section 7 right is clearly more compelling, then the Section 7 right will prevail. Only in those cases where the respective claims are relatively equal in strength will effective alternative means of communication become determinative.[60]

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57. *Id.* at 1306.

In *Jhirmach Enterprises,* 283 NLRB No. 91, 125 LRRM 1010 (1987), the Board again relied on the logical outgrowth theory to find an employee's actions concerted protected activity. In *Jhirmack,* several employees complained to management about the slow performance of a fellow employee. The Board found that their complaints were prompted by their concern that the fellow employee's poor performance would adversely affect their chances of winning a weekly production award. When one of the complaining employees informed the fellow employee of the complaints, the Board stated that this was a logical outgrowth of the prior concerted complaints. *Id.* at 1011.

Chairman Dotson concurred with the result on the basis that the employee's remark to the fellow employee amounted to actual constructive activity. "[T]he conversation consisted of Ramsey [the fellow employee] seeking information from Allison [the complaining employee] in an attempt to protect his job and Allison responding with the requested information and with words of encouragement to Ramsey to work faster and thereby protect his job. Such interaction . . . is actual concerted activity. . . ." *Id.* at 1011–12 (Dotson, Chairman, concurring).

58. 282 NLRB No. 27, 123 LRRM 1257 (1986).

59. *See, e.g.,* NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 38 LRRM 2001 (1956); Hudgens v. NLRB, 424 U.S. 507, 91 LRRM 2489 (1976).

60. 123 LRRM at 1260.

Factors that may affect the relative strength or weakness of a property right claim include the following: "the use to which the property in question is put; the restrictions, if any, that are imposed on public access to the property or to the facility located on the property; and the size and location of the private facility."[61] As an example, the Board stated that the owner of a large shopping mall who allows the general public to utilize his property without substantial limitation may have substantial difficulty in seeking to exclude picketers or handbillers, and the strength of his property claim would be diminished if he had heretofore excluded no one from the mall. In contrast, "a single store surrounded by its own parking lot provided exclusively for the convenience of customers will have a significantly more compelling property right claim."[62]

Factors that may affect the relative strength or weakness of a section 7 claim include the following:

> the nature of the right asserted, the purpose for which it is being asserted, the employer that is the target of the activity, the situs of the activity, the relationship of the situs to the target, the intended audience of the activity, and, possibly, the manner in which the right is being asserted.[63]

For example, the right to engage in organizational and economic activity at a situs of a dispute would be more compelling than handbilling and informational activity carried on at a location other than the situs of the dispute.

The Board applied this analysis in *Fairmont Hotel* to find that the hotel did not violate the Act when it ordered nonemployee union organizers to stop handbilling in the privately owned area in front of the main hotel entrance just beyond the hotel's formal lobby. The Board stated that the large size of the hotel diluted to a certain degree the privateness of the entrance area; however, other factors offset this dilution. In particular, the Board noted that there was no evidence that the Fairmont previously ever permitted anyone to handbill or picket on this private area. In addition, the hotel had a "valid interest in minimizing congestion, litter and the possibility of theft of luggage in the private area, ..." and the presence of handbillers would disrupt the hotel's decorum.[64] The Board also noted that innkeepers are held to a higher standard of care for their guests than other employers offering public facilities. Based on these factors, the Board concluded that the Fairmont Hotel was asserting a substantial private property interest in precluding handbilling on its private property.[65]

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61. *Id.* at 1259–60.
62. *Id.* at 1259.
63. *Id.* at 1260.
64. *Id.* at 1259.
65. *Id.*

The Board stated that the section 7 right at stake here, area-standards handbilling, was of more limited significance. One factor in assessing the strength of the union's section 7 claim was that area-standards activity "is directed at a narrow and highly inaccessible segment of the consuming public."[66] In assessing the section 7 right, the Board stated that area-standards activity has "no. . . vital link to the employees located on the [targeted] employer's property . . ." and in this case, " the Union's activity was significantly removed not only from employees represented by the Union but also from the targeted employer's employees."[67] The Board concluded that here the handbilling was carried out on the property of an employer "with which the Union had no primary dispute, not even an area-standards one, and the employees of which stood to reap no benefit, not even an incidental one, if the Union achieved its ultimate objective of improved wages for the employees of [the bakery]."[68]

Member Stephens wrote a concurring opinion in which he stated that he did not believe the Board's power to inquire into the availability of alternative means of communication with the target audience should be limited to those cases when section 7 rights implicated were in equipoise. Member Stephens concurred with the majority's analysis "[i]nsofar as the majority opinion's list of factors 'that may affect the relative strength or weakness of a claim of Section 7 rights means that the alternative means inquiry is not necessarily barred in particular classes of cases . . . .'"[69]

Access Under *Fairmont Hotel*

The results in cases subsequent to *Fairmont* have depended to a large extent on the section 7 right being asserted. In *Center St. Market, Inc.*,[70] the Board held that the respondent employer violated section 8(a)(1) of the Act when it threatened to have two employees arrested and had three other employees arrested because they distributed leaflets near the entrance of its supermarket. The handbilling employees had gone on strike after their collective bargaining agreement expired and the parties were unable to agree on the terms of a new agreement. In

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66. *Id.* at 1260.

By making this observation the Board appeared to reincorporate the availability of alternative means of communication into its analysis of the strength of the section 7 right being asserted. As later decisions by the Board show, this is the approach taken by Members Johansen and Stephens.

67. *Id.* at 1261.

The union had an area-standards dispute with a bakery that was wholly unrelated to the hotel except that it supplied some of the hotel's baked goods. The employees of the bakery were not represented by a union, and the union did not seek to represent or organize any of the employees at the hotel or the bakery.

68. *Id.*

69. *Id.* at 1261 (Stephens, concurring).

70. 286 NLRB No. 73, 126 LRRM 1212 (1987).

assessing the strength of the section 7 right asserted, the Board stated that the "right to picket in support of an economic strike is at the core of Section 7."[71] The section 7 right was even stronger in this case because the handbilling was performed by the respondent's own striking employees, the respondent was the target of the activity, and the activity took place at the front entrance to the respondent's store. In addition, the intended audience was the potential customers of the store.[72] Finally, because the handbilling was not disruptive, "the manner in which the Union's message was communicated did not diminish the strength of the Union's Section 7 right."[73]

The property right being asserted by the respondent, when compared to the "compelling" section 7 right to engage in economic activity, was less than compelling. In reaching this conclusion, the Board noted that public access to the supermarket was encouraged. More importantly, in the past the respondent had permitted public and charitable organizations to solicit in front of its store and now it was attempting to selectively enforce its property right.[74]

What is most interesting about *Center St. Market* is the analysis of Members Stephens and Johansen. In a footnote, Member Johansen stated that he considered the availability of reasonable alternative means of communication when evaluating the nature and strength of the section 7 claim. He stated that when an economic strike is involved, at a minimum, section 7 requires that the union have the right of confrontation and not merely the right to inform. According to Member Johansen, here the General Counsel had proved that the union had no reasonable alternative means of communication. This further supported his view that the section 7 right outweighed the respondent's property right.[75] Member Stephens concurred with the result on the basis that, considering the union did not have reasonable alternative means to communicate its message, the section 7 right involved here outweighed the property right asserted.[76]

In another case involving economic activity, the Board concluded that the respondent employer violated section 8(a)(1) by prohibiting certain employee and non-employee handbilling and picketing at two of its supermarkets.[77] In *Schwab Foods Inc.*, the respondent owned four retail grocery stores. The picketing and handbilling occurred after a breakdown in negotiations for a contract covering the Mooresville store employees. The property in question at the Mooresville store was a common

71. *Id.* at 1213–14.
72. *Id.*
73. *Id.* at 1214.
74. *Id.*
75. *Id.* at 1214 n.5.
76. *Id.* at 1214 (Stephens, concurring).
77. *See* 284 NLRB No. 120, 125 LRRM 1225 (1987).

vestibule and walkway area between the respondent's supermarket and a separately owned drugstore. The Board stated that there was no evidence that the vestibule/walkway area was limited to customers of the respondent, and in fact, the area was open to virtually anyone. Nor did the Board believe that the manner in which the handbilling and picketing took place posed a significant impediment to customers of the stores. These considerations, along with the dilution of the respondent's property rights caused by the presence of the adjoining drugstore, caused the Board to determine that the respondent's property claim was a relatively weak one.[78]

In contrast, the section 7 right asserted, peaceful primary economic activity, was at the core of section 7. Moreover, the activity took place at the situs of the employees' dispute with their employer, and the intended audience was the employer's customers.[79] The Martinsville store was a single store surrounded by a parking lot, the same circumstances given as an example in *Fairmont* in which the employer would have a strong property interest.[80] Nonetheless, the Board stated that the respondent had issued a general invitation to the public and no restrictions were placed on public access to the property. The Board concluded that the section 7 claim was not substantially diminished by the fact that the picketing employees were employed at one of the stores other than Martinsville because their employer was still on that site.[81] Based on these considerations, the Board concluded that the section 7 claim asserted outweighed the property right.

It is interesting to note the analysis applied by the individual Board members in these cases as well. The cases demonstrate that there is no uniform consensus regarding how the *Fairmont* standard should be applied. In a footnote in *Schwab Foods,* Member Babson agrees with Chairman Dotson that it is unnecessary to consider the availability of reasonable alternative means of communication unless the rights asserted by the union and respondent are relatively equal. Again, Member Johansen states that he considers the factor of reasonable alternative means of communication as he assesses the strength of the section 7 claim.[82]

Chairman Dotson disagreed with the majority's understanding of the facts and found that at Mooresville the handbilling caused congestion in the vestibule/walkway area, and the respondent was asserting a compelling private property right in prohibiting the use to which its property was put.[83] Concerning the Martinsville store, Chairman Dot-

78. *Id.* at 1228.
79. *Id.*
80. *See supra* note 58.
81. 125 LRRM at 1228.
82. *Id.* at 1228 n.20.
83. *Id.* at 1234 (Dotson, Chairman, concurring and dissenting in part).

son concluded that the strength of this section 7 interest was weakened because Martinsville was not the primary situs of the dispute. "[T]he disputed issue concerns only the employment terms and conditions of the Respondent's Mooresville employees, not those at Martinsville; and the individuals exercising these rights were striking employees from Mooresville . . . ."[84] Accordingly, Chairman Dotson would find no section 8(a)(1) violation.

Providence Hosp.[85] is the third case decided by the Board since *Fairmont Hotel* that involves economic activity. In this case, off-duty employees and non-employee union representatives were engaged in picketing and handbilling. When the hospital learned that the union intended to engage in this activity, it gave the union a notice requiring that any handbilling and picketing be done on public property and not on the grounds of Providence Hospital. With regard to the picketing, the Board held that the section 7 right to engage in an economic protest and the property right asserted were both strong and relatively equal.[86] The Board stated that there was no evidence that the public visited the hospital or its property for any reason unrelated to the provision of medical services. Also, the respondent had never allowed anyone to picket on its property. Finally, the Board stated that the presence of picketers on hospital property could disturb patients at the hospital. In a footnote, the Board stated that it had previously recognized that specialized health care concerns permit greater restrictions on exclusively employee section 7 solicitation and distribution within the hospital.[87] The Board's analysis of the hospital's property claim reflects a concern similar to the one expressed in *Fairmont* that the employer or property owner may have owed a special duty of care to those on the premises.[88] In concluding that the hospital did not violate section 8(a)(1) of the Act by requiring all picketing to be conducted on public property, the Board stated that the General Counsel had failed to prove that means of communication alternative to picketing on the hospital property were not available.[89]

The Board did find that the hospital violated section 8(a)(1) by prohibiting *handbilling* on its private property. The Board made this decision on the basis that the hospital's "ad hoc adoption of a special rule to prohibit handbilling on its property by employees engaged in the protest concerning contract negotiations constituted disparate treatment of union activities in violation of Section 8(a)(1) of the Act."[90]

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84. *Id.* at 1235 (Dotson, Chairman, concurring and dissenting in part).
85. 285 NLRB No. 52, 126 LRRM 1145 (1987).
86. *Id.* at 1147.
87. *Id.* at 1147 n.5.
88. 123 LRRM at 1260 (the hotel in *Fairmont* had a stronger property claim because innkeepers frequently are held to a higher standard of care).
89. 126 LRRM at 1147.
90. *Id.* at 1148.

The right to engage in organizational activity is another right that is highly protected under section 7 of the Act. In *Emery Realty, Inc.*,[91] the Board held that the respondent, Emery Realty, violated section 8(a)(1) by prohibiting the union from distributing organizational literature on its property to the employees of one of its tenants, the Netherland Plaza Hotel. Emery owned and operated a complex consisting of a forty-seven story office building with commercial space that was rented by the hotel and various retail stores and service shops. In this case the union had represented approximately 450 to 500 employees of the hotel's predecessor. The predecessor hotel closed, and Netherland Plaza reopened the hotel with virtually no employees who had been employed by the former owner.[92]

Emery Realty twice prohibited non-employee union representatives from distributing organizational handbills in front of the hotel employee's entrance off the main lobby of the complex, an area known as the arcade. The arcade runs through the center of the complex with stores and service shops on either side facing the arcade. The Board determined that in this case Emery Realty was asserting a relatively weak property claim. The arcade was open to the public generally and not just those persons who intended to visit one of the stores, shops, offices, or the hotel. Emery also allowed access to the arcade for pedestrians who simply wanted to use the arcade as a cut-through between two streets. More significantly, in the past Emery had permitted solicitations by various social service organizations. The Board noted that these solicitations caused little if any interference with Emery's property rights. Finally, the Board noted that Emery, as lessor, had an economic interest in the business success of the hotel with whom the union had its primary disputes.[93]

In assessing the strength of this section 7 claim asserted, the Board stated that organizational activity is at the core of the interest protected by the National Labor Relations Act. "Although nonemployee distribution of union organizational literature is involved, the right which the Union seeks to assert is a derivative of the right of the Hotel employees to engage effectively in self-organization."[94] The Board noted that there had been no customer complaints regarding the manner in which the union was conducting its handbilling, and the union restricted its handbilling to the very limited area in front of the employee's entrance to the hotel. "The Union's activity was thus in such proximity to the targeted employer's employees that the union could not have more carefully re-

91. 286 NLRB No. 32, 126 LRRM 1241 (1987).
92. *Id.* at 1241.
93. *Id.* at 1242.
94. *Id.*

stricted its handbilling activities so as to be able to reach the intended audience while not disturbing others."[95]

The Board concluded that the section 7 right asserted outweighed Emery's property right to exclude the union from handbilling. Even though the three member panel made this determination, it went on to determine that there were no reasonable alternative means of communication available to the union by which it could have communicated its message to the hotel employees.[96] This additional finding was necessitated because Members Johansen and Stephens, who do not believe that an inquiry into the availability of reasonably effective alternative means of communication is limited to circumstances in which the competing property and section 7 rights are in equipoise, were on this panel. In making this determination on reasonable alternative means of communication, the Board stated in a footnote that in some instances the reasonableness of suggested alternatives can be assessed on the basis of objective evidence without the union's having attempted to use those means. In other instances, however, the General Counsel will not be able to carry the burden of proving the absence of reasonable alternative means if the union has not attempted to use a particular suggested nonencroaching method of communicating its message and demonstrated thereby that the method is not a reasonable alternative.[97]

Since *Fairmont,* the Board has decided three cases in which the union activity had a recognitional objective or was protesting an unfair labor practice. In only one of those cases did the Board determine that the respondent violated the Act by prohibiting the handbilling and picketing. In *Greyhound Lines, Inc.,*[98] the respondent did not violate the Act when it caused the removal of union pickets and handbillers from the lobby of its bus terminal. The pickets carried signs and distributed leaflets urging customers not to patronize Burger King because it had been found guilty of an unfair labor practice by the Board and was unlawfully refusing to bargain with the union. The picketers and handbillers were not employees of Burger King, the employer with whom they had their dispute. Almost as soon as the picketing and handbilling began a bus terminal security guard removed the picketers and handbillers from the lobby of the terminal. The picketers and handbillers resumed their activity on the sidewalks outside the bus station terminal.

The Board conceded that this section 7 activity was protesting an unfair labor practice, and it had a recognitional objective. The immediate objective of the activity was to communicate with Burger King customers and to induce them to boycott the restaurant. The strength of

95. *Id.* at 1243.
96. *Id.*
97. *Id.* at 1244 n.13.
98. 284 NLRB No. 123, 125 LRRM 1266 (1987).

this section 7 right was diminished, however, because the picketing and handbilling inside the terminal was conducted by non-Burger King employees, individuals who were not asserting their own section 7 rights.[99] The section 7 right asserted was further weakened because the picketing took place on the property of Greyhound Lines rather than the property of Burger King, the employer with whom the union had its dispute. "[T]he fact that it was done on the Respondent's property, rather than on Burger King's property, tends to enmesh neutrals in the dispute."[100] The Board concluded that the respondent was asserting a significant property interest in controlling the activity and congested condition within its terminal. Although the Board Members could not agree on the relative weight of this section 7 right and the property right asserted, they did agree that the General Counsel had failed to prove that the union did not have reasonable alternative means of communication. Accordingly, the respondent did not violate section 8(a)(1) of the Act by removing the picketers and handbillers from inside its terminal lobby.[101]

In *Smitty's Super Markets, Inc.*,[102] the Board found that the employer did not violate the Act when it prohibited picketing in its parking lot or on the sidewalk in front of its store. The respondent was one of eight tenants in a shopping center surrounded by a central parking lot. The pickets carried signs which informed the public that the respondent was not under contract with the union and asked the public not to patronize the respondent's store. Chairman Dotson found that although the picketing suggested a potential recognitional and bargaining objective it was essentially informational and limited to an appeal to members of the public. "Although relatively stronger than the area standards secondary activity involved in *Fairmont*, the informational picketing here has little relationship to the Respondent's employees and is of limited significance as it is not at the 'core of the purpose for which the NLRA was enacted.' "[103] Chairman Dotson found that the respondent's property rights clearly outweighed the section 7 rights involved. Member Babson found the rights relatively equal in strength. He noted that access to the shopping center's parking lot was unrestricted and it was "open to virtually anyone, and certainly they are open to customers of any of the eight

99. *Id.* at 1267.

100. *Id.*

101. *Id.* at 1267–68.

Chairman Dotson would find that the respondent's property claim outweighed the union's section 7 right, but noted that under *Fairmont* the Board's initial assessment of competing claims should not consider the availability of reasonable alternative means of communication. Member Johansen found both interests asserted relatively weak, but he agreed that the General Counsel failed to prove the absence of reasonable alternative means. *See id.* at 1267–68 n.5.

102. 284 NLRB No. 128, 125 LRRM 1268 (1987).

103. *Id.* at 1269–70 n.4.

businesses at the center."[104] Member Babson stated that the section 7 claim while protected was of more limited significance than other section 7 rights.

Member Johansen stated that he did not evaluate the section 7 claim apart from the factor of reasonable alternative means of communication. However, he agreed with the other Board members that the General Counsel had failed to prove that the union did not have reasonable means of communication in communicating its message to the target audience.[105]

In *United Supermarkets, Inc.*[106] the Board determined that the respondent's employer violated the Act when it prohibited handbilling and picketing in the parking lot meant to protest an unfair labor practice. Like the supermarket in *Smitty's Super Markets,* the respondent's business was located in a small shopping center of eight stores with one parking lot. Unlike the section 7 right asserted in *Smitty's Super Markets,* here the Board stated that the section 7 right asserted was a strong one. The picketers and handbillers were protesting an alleged unfair labor practice and attempting to bring these alleged practices to an end. "Moreover, the Respondent was the *target* of the picketing in question, and the *situs* of the picketing was immediately in front of one of the Respondent's supermarkets at which some of the alleged unfair labor practices had occurred. Additionally, the Respondent's customers were the *intended audience* of the Union's picketing."[107] The section 7 right was further strengthened because the picketing was carried out not only by non-employee union representatives but also by two discharged employees. The Board later determined that one of those discharged employees was unlawfully discharged; therefore, she retained her status as an employee for the purposes of the Act.[108] Additionally the Board stated that although the picketers and handbillers inserted an area-standards element into their message, this did not reduce the character of the picketing, "taken as a whole, from that of unfair labor practice picketing to that of area standards picketing."[109]

The Board has decided five cases since *Fairmont Hotel* that involve only area-standards activity or informational picketing. In none of these cases did the Board find that the property owner/employer violated the Act when it prohibited access to its property.[110] These cases are also similar in the fact that in each of them, the section 7 activity was being con-

104. *Id.* at 1270 n.4.
105. *Id.* at 1270.
106. 283 NLRB No. 130, 125 LRRM 1069 (1987).
107. *Id.* at 1071 (emphasis added).
108. *Id.*
109. *Id.* at 1071 n.4.
110. *See* Homart Dev. Co., 286 NLRB No. 72, 126 LRRM 1244 (1987) (employer that operated shopping mall did not violate the Act when it prohibited non-employee

ducted by non-employee union agents.[111] Certain aspects of some of these decisions warrant discussion here.

In *L & L Shop Rite, Inc.*,[112] Chairman Dotson and Member Johansen stated that the respondent employer should be entitled to rely on a letter sent by the union to respondent in which the union disclaimed any interest in representing the respondent's employees and stated that the picketing and handbilling was "solely intended merely to notify the public of the store's non-Union status."[113] In concluding that the union was engaged merely in informational activity, Chairman Dotson and Member Johansen stated that "an employer should be entitled to rely on a union's unambiguous disclaimer of any [section] 7 claim superior to the one apparently asserted."[114] Member Babson disagreed with Chairman Dotson and Member Johansen's analysis of the section 7 claim involved. He stated that *Fairmont* required an assessment of the *actual* section 7 right and property right at issue, "not merely the party's subjective perception of those rights."[115] Member Babson viewed the picketing and handbilling as constituting a form of recognitional or organizational activity; however, he concurred that there was no section 8(a)(1) violation because the general counsel did not prove that there was no reasonable alternative means available to the union to communicate with the public.[116]

In *Browning's FoodLand, Inc.*,[117] Chairman Dotson found that the union's area-standards claims were significantly weakened because of the union agent's admitted intent to close the respondent's store. This was adverse to the employment interest of the respondent's employees.[118]

In *Sisters International, Inc.*,[119] the union was carrying out area-

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union representatives from handbilling at the outside entrance of a tenant's retail store to protest the tenant's hiring non-union subcontractors to build a store at different location); Skaggs Co., Inc., 285 NLRB No. 62, 126 LRRM 1149 (1987) (employer that operated drug store in shopping center did not violate the Act by threatening to arrest non-employee union agent for handbilling in center's parking lot, or removing handbills already distributed); L & L Shop Rite, Inc., 285 NLRB No. 122, 126 LRRM 1151 (1987) (employer that owned/operated supermarket in shopping center did not violate the Act by prohibiting non-employee union agents from picketing and handbilling on its property); Sister Int'l, Inc., 285 NLRB No. 105, 126 LRRM 1148 (1987) (employer did not violate Act by prohibiting non-employee union agents from handbilling at its restaurants constructed by non-union contractors); Browning's Foodland, Inc., 284 NLRB No. 104, 125 LRRM 1264 (1987) (employer that operated grocery store in shopping center did not violate Act by prohibiting non-employee union agents from picketing).

111. *Id.*
112. 285 NLRB No. 122, 126 LRRM 1151 (1987).
113. *Id.* at 1154 n.4.
114. *Id.*
115. *Id.* at 1156–57 (Babson, concurring).
116. *Id.*
117. 284 NLRB No. 104, 125 LRRM 1264 (1987).
118. *Id.* at 1265 n.4.
119. 285 NLRB No. 105, 126 LRRM 1148 (1987).

standards activity protesting the employer's use of non-union construction contractors to remodel and build respondent's restaurants. At the time the union was engaged in this activity, all remodeling and construction was completed at the respondent's restaurants. The Board held that the union's section 7 interest was significantly weakened because the union carried out its activity at the already completed restaurants of the respondent, which no longer had any apparent connection with the contractor's operation. "The Union had no primary dispute with the employer at the site of its protest, and success by the Union in improving the wages of non-union construction employees would not have even an incidental beneficial effect for the Respondent's employees."[120]

Conclusion

The Board's decisions following the logical outgrowth theory appeared to be an attempt to apply something analogous to the *Interboro* doctrine in a non-union setting. The difficulty with this approach is that the Board has not consistently found the requisite group or concerted activity before it makes the ultimate finding that an individual employee action was the logical outgrowth of group or concerted activity. In *Every Woman's Place,* Chairman Dotson stressed that there was no evidence to support the majority assumption that the employees had approached their supervisor together about their overtime complaint.[121] Without this evidence there was nothing on which the Board could base its finding that employee Doran's call to the Department of Labor was the logical outgrowth of the employee's complaint to their supervisor.

At a minimum, application of the logical outgrowth theory should require findings like the one made in *Salisbury Hotel,* that the employees had agreed that they had a grievance *and* that they should take action on their grievance.[122] Member Johansen's statement in *Salisbury Hotel* that he "would find that a discussion between two or more employees regarding terms and conditions of employment is necessarily concerted because it is an indispensable preliminary step to employee self-organization"[123] appears to be a complete abandonment of the *Meyers* objective standard of concerted activity.

Based on the present Board application of the *Meyers* standard of concerted activity, it is difficult to forecast what determination the Board would make regarding concerted activity based on the hypothetical presented at the start of this article. If the Board followed *Salisbury Hotel,* then the female production worker's complaint to the plant man-

120. *Id.* at 1149. *See also* Homart Dev. Co., 286 NLRB No. 72, 126 LRRM 1244, 1246–47 n.12 (1987).

121. *See supra* note 43.

122. 125 LRRM at 1021–22.

123. *Id.* at 1021 n.10.

ager would not be concerted activity unless the Board made a finding that she, along with the two other employees, had met and agreed that they had a complaint *and* that they should take action. It would not be enough that their individual concern was voiced by several employees on an individual basis. On the other hand, if the Board followed the lead of *Every Woman's Place,* then it might find concerted activity based on the assumption that the employees had approached their supervisor together with their complaint or had agreed to take action.

In any event, the Board should refine its logical outgrowth theory so that practitioners may advise clients accordingly. The Board should clarify its standard for concerted activity in order that employers will know whether they can rely on *Meyers* or whether they should dance to the tune of an *Alleluia* refrain.

The Board's decisions following *Fairmont* reflect a division among the Board concerning how the *Fairmont* analysis should be applied. The majority in *Fairmont* stated that the availability of alternative means of communication would not be determinative except in those cases in which the property right and the section 7 right asserted were relatively equal. In applying *Fairmont,* Chairman Dotson and Member Babson have consistently refused to consider the availability of alternative means of communication except in those situations in which the rights being asserted are relatively equal. Members Stephens and Johansen, on the other hand, have made the availability of alternative means of communication an integral part of their analysis in determining the strength of the section 7 rights being asserted.

The Board's decisions since *Fairmont* have developed a hierarchy of section 7 rights. Its decisions indicate that economic activity will be accorded the greatest protection while area-standards and informational picketing will be accorded the least protection.

A few factors appear critical in determining the strength of the property right being asserted. First, an employer's property claim will be significantly weakened if in the past it has permitted solicitation on its property by other groups. These cases demonstrate the necessity of developing and consistently applying a no solicitation and no distribution rule. Second, the employer's property claim will be significantly weakened if the employer opens its property to the general public and has no restrictions on access. Thus, an employer who restricts access to its property to customers rather than the general public will have a stronger property claim than an employer who opens its property to anyone regardless of whether they are customers. Finally, an employer such as a hospital or hotel that may have a higher duty of care to its patrons may have a stronger property claim than other employers who are not held to a higher standard of care.

Several facts would be crucial if the Board applied the *Fairmont* analysis to the second hypothetical presented at the start of this article.

First, the Board would have to determine whether the activity here is merely informational or if it also has an organizational objective. Unlike *L & L Shop Rite,* in this scenario the union did not make a specific disclaimer of any organizational objective. Because of this it is likely that the Board would find that the union was asserting a significant section 7 right by engaging in organizational activity.

In evaluating the property right asserted, most significant would be whether the management company selectively enforced its no solicitation policy. If the management company in the past had allowed nonprofit organizations and others to solicit in the retail shopping complex area then its property interest would be significantly weakened.

It is clear that Members Stephens and Johansen would consider the availability of alternative means of communication in assessing the strength of the section 7 right asserted. If the Board determined that the union was engaged in organizational activity, then its right to handbill in the retail shopping complex would be significantly weakened if there is a separate employee entrance for the cleaning company workers. On the other hand, if the Board found the union to be engaged only in informational activity, then there is no reason why the union could not effectively communicate its message on the public sidewalks outside of the complex.

The Board's application of the *Fairmont* test depends on the analysis of several facts. One of the most important of these facts, whether the respondent has selectively applied a no solicitation and no distribution policy, is within the control of the respondent. Accordingly, it is in the best interest of all employers to develop a no solicitation and no distribution policy and apply it consistently.[124]

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124. Since this article was written, the U.S. Court of Appeals for the District of Columbia ruled on Kenneth Prill's petition for review of the Board's ruling in *Meyers II.* Prill v. NLRB, No. 86-1675 (D.C. Cir. Dec. 31, 1987) (*Prill II*). In *Prill II,* the court of appeals held that the Board's interpretation of concerted activity that "encompasses [only] those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management" was a reasonable interpretation of the National Labor Relations Act. *Id.* at 7. The court stated, however, that the *Meyers* interpretation was not the only reasonable interpretation of the act.

The court in *Prill II* also held that the Board correctly applied the *Meyers* standard for concerted activity. Even though Prill's actions in complaining about truck safety could have benefited his fellow employees, Prill acted alone when he made these complaints. "Had Prill simply gotten together with his co-workers to complain about the violation of statutory safety provision, he would have been protected from dismissal under the Board's current reading of Section 7. . . ." *Id.* at 9.

The court of appeals' decision in *Prill II* does not reflect the concern expressed by the Board that employees not only must agree that they have a grievance, but that they should take action on their grievance. *See, e.g.,* Salisbury Hotel, Inc., 283 NLRB No. 101, 125 LRRM 1020 (1987). Apparently, the court of appeals would find concerted activity even if employees merely agree that they have a grievance. It would be inconsistent to apply the "logical outgrowth" theory of concerted activity in this instance absent a finding that the employees also had agreed that they should take some action on their grievance.

Good labour laws can hurt

Very soon after Prime Minister (as she was then) Chandrika Kumaratunga was first elected in 1994, she made an important speech setting out what appeared to be the economic parameters of her new government. One point she made which remains valid to this day is that those Lankans fortunate enough to be employed must not forget the many without jobs. That is a self-evident truth long ignored by most of us, ever conscious of our rights as employees and cavalier about our reciprocal obligations. The reality is that Sri Lanka has a corpus of labour legislation far in advance of the country's state of development and its economic strength and this is a disincentive to the job creation that the country desperately needs.

Saying this does not mean that we favour leaving employees at the mercy of rapacious employers who are a dime a dozen. Without the protection of the hard-won labour laws now in our statute, we have no doubt whatever that exploitation of workers will be rampant. But it is equally true that in Sri Lanka today, most employers think twice before hiring anybody. They are obsessed with the fear that given the existing regulatory framework, it would cost them dearly to get rid of an employee if economic or business conditions dictate downsizing. The result is that possible jobs that would benefit all segments – the unemployed, the businesses themselves and the national economy – are not created and, like in the senseless war that dragged on for decades in this country, everybody is the loser.

We make these remarks in the context of Labour Relations and Foreign Employment Minister Athauda Seneviratne's statement last week that a new compensation formula for employees losing their jobs considerably enhancing present benefits will come into force from March 15. The minister went on record saying that this scheme was among the ``best in the world'' giving a substantial 48 months (four years) salary up to a maximum of Rs. 1.25 million. Predictably, he tilted at the previous UNF administration saying this was a big improvement on what they had offered. While nobody will grudge Seneviratne, who cut his political teeth in the LSSP in its heyday, his moment of glory bestowing largesse to the working class, it is a sobering thought that much of the cost of this benevolence will have to be eventually borne not by fat cat employers but by all the people of this country including the unemployed.

Why do we say this? Anybody who follows the privatization process to which the present government is as committed as its predecessor, never mind the noises the JVP is making, would

know that the buyers of many state-owned enterprises that have been sold have downsized their workforces at considerable cost. These people do not fork out millions out of their own pockets on such exercises as may be simplistically assumed by the ignorant. They factor such costs into the bid prices they offer and the end result is that the state which comprises all the people, the majority poor and many unemployed, gets that much less in privatization proceeds. That means everybody pays a price. That is the reality that must not be forgotten when governments of whatever complexion, responsible for bloating public sector payrolls with unproductive workers, continue to add icing on an already unaffordable cake.

Columnist Mahoshada writing in this issue of our paper discusses the problem of poverty, employment and labour market reform and points out that this year's Global Competitiveness Report published by the World Economic Forum had cited labour regulations as the second ``most problematic factor'' on doing business in Sri Lanka. Unsurprisingly, political instability has been ranked first. What does this mean? It means that foreigners are wary about investing here because of the highly advanced labour laws prevalent that makes any hiring and firing business plan taboo. Nobody will quarrel with that. But to somebody who is unemployed, is it not better to have a job that hopefully pays a decent wage without the security of long-term tenure or no work at all? That is what Prime Minister Kumaratunga was talking about when she said that those already in employment while making demands must think also of those without jobs.

While we cannot and will not go back to the bad old days when indentured South Indian labour was brought here with tin tickets round their necks and made to march hundreds of miles from the Talaimannar coast to upcountry plantations owned by the British to work for a pittance a right balance must be struck and disincentives to job creation that are now in our labour laws be sensibly examined. Employment, perhaps next to peace, is the top national priority and realistic decisions must be made to ensure that jobs are maximized rather than minimized in our economy. Human nature is such that employers will try to get the best for themselves just as much as employees would. The role of the government and of enlightened public opinion should be to find the right balance that would benefit the most numbers.

The labour minister with his leftist/trade union background has exhorted the unions to agitate for workers' rights and educate the government on shortcomings in the labour sphere. We have in

these columns previously mentioned one such area screaming for attention – why are domestic servants and private chauffers (drivers) exempted from EPF and ETF benefits? We can hazard a cynical guess. Those are the people that influential personages both in the bureaucratic and political establishments employ. They don't want to add to their own little salary bills what they make others do. That, sadly, is the way of this world.

Hari Nandan Prasad & Anr

v.

Employer I/R To Mangmt. Of F.C.I.

(2014) 7 SCC 190

Bench: K.S. Radhakrishnan, A.K. Sikri

The two appellants have filed one combined Special Leave Petition, which arises out of a common judgment dated 27.6.2008 passed by the Division Bench of the Jharkhand High Court in two LPAs which had been filed by the respondent herein viz. Food Corporation of India (FCI). The two appellants were working on casual basis with the FCI. After certain time, their services were dispensed with. Both of them raised industrial dispute alleging wrongful termination which was referred to the Central Government-cum- Industrial Tribunal (CGIT). These proceedings culminated in two awards dated 12.12.1996 and 18.12.1996 respectively passed by the CGIT. In both these awards, termination of both the appellants was held to be illegal and they were directed to be reinstated with 50% back wages. The CGIT also ordered their regularization in service. FCI filed Writ Petitions in both the cases challenging these awards which were initially admitted sometime in the year 1988 and the operation of the awards was stayed. However, orders were passed under Section 17-B of the Industrial Disputes Act (ID Act) directing payment of full wages as last wages drawn to the appellants from the date of the award in each case. These Writ Petitions were ultimately dismissed by the learned Single Judge vide common judgment and order dated 19.5.2005. As pointed out above, this judgment of the learned Single Judge was challenged by the FCI by filing LPAs. These LPAs have been allowed by the Division Bench, thereby setting aside the orders of the learned Single Judge as well as awards passed by the CGIT. This is how two appellants are before us in this appeal.

3. Before we proceed further, we deem it appropriate to give the details of nature of employment of each of the appellants with the FCI and tenure etc. as well as the gist of the tribunal's awards.

Hari Nandan. He was engaged on daily wages basis as Labourer-cum-Workman, in the exigency of the situation, at Food Storage Depot, Jasidih by the Depot In- charge, FCI, Jasidih on 1st June 1980. On the ground that services of appellant No.1 were no more required, he was disengaged w.e.f. 1.3.1983. While doing so, no notice or notice pay or retrenchment compensation was given to him. Appellant No.1 raised industrial dispute which was referred to the CGIT by the Central Government vide reference order dated 1.10.1992, with the following terms of reference:

"Whether the action of the management of Food Corporation of India, in retrenching Shri Hari Nandan Prasad, Ex-Casual Workman, in contravention of Section 25-F of the I.D.Act, 1947 and denying reinstatement with full back wages and regularization of his service is legal and justified? If not to what relief the concerned workman is entitled to?"

5. The CGIT gave its award dated 12.12.1996 holding that the termination was in contravention of Section 25-F of the Industrial Disputes Act. The CGIT also, while ordering reinstatement of appellant No.1, held that he was also entitled to regularization of his services from the date of his stoppage from service dated 1.3.1983. Back wages to the extent of 50% were awarded. As far as direction for regularization is concerned, it was based on Circular issued by the FCI whereby any temporary worker employed for more than 90 days was entitled for regularization of his service. It was noted that as per the said Circular the Management had regularized the services of 70-75 similarly situated casual workers and therefore denying the same benefit to appellant No.1 amounted to discrimination.

Gobind Kumar Choudhary.

6. Appellant No.2 was engaged on daily wages as casual Typist at the District Office, FCI, Darbhanga against a vacancy of Class-III post on 5.9.1986. He worked in the capacity till 15.9.1990 when his name was struck off the rolls. He also raised industrial dispute which was referred to CGIT with following terms of reference:

"Whether the action of the Management of Food Corporation of India, Laaherisarai, Darbhanga is legal and justified in retrenching Shri Govind Kumar Chaudhary, who was working as Casual Typist, arbitrarily and in violation of Section 25-F of the I.D.Act, and denying reinstatement with full back wages and regularization of service is legal and justified? If not to what relief the concerned workman is entitled to?" In his case, the award dated 18.12.1996 was made by the CGIT on almost identical premise, as in the case of appellant No.1, supported by similar reasons.

7. The learned Single Judge while dismissing both the Writ Petitions filed by the FCI concurred with the findings and reasons given by the CGIT.

8. In the LPAs before the Division Bench, the primary contention of the FCI was that there could not have been any direction of regularization of services even on the admitted case of both the workmen, viz. merely on the ground that they had worked for more than 240 days in a calendar year as casual employees. It was also submitted that though the District Manager of the FCI was authorized to employ persons as temporary workers, such an authority was given for employing them for 7 days only and no

more, and in case of violation of this strict stipulation contained in the Circular issued by the FCI, the concerned officer could be proceeded against departmentally. It was further argued that even if such temporary employment was to continue beyond stipulated period of 7 days, since these two workmen had worked on daily wages basis, that too for a period of 3 years or so, there could not have been any regularization of these workmen in view of the judgments of this Court in the case of Delhi Development Horticulture Employees Union vs. Delhi Administration AIR 1992 SC 789 and Constitution Bench judgment in the case of Secretary, State of Karnataka vs. Uma Devi & Ors. (2006) 4 SCC 1. These contentions have impressed the Division Bench of the High Court, and accepted by it, giving the following reasons:

"The Tribunal has apparently misconceived the principles of law laid down in this context. In the case of Delhi Development Horticulture Employees Union vs. Delhi Administration (AIR 1992) SC 789) the Supreme Court has categorically laid down that temporary employees, even if they have worked for more than 240 days, cannot claim any right or benefit for automatic regularization of their services. Similar view has been taken in the case of Post Master General, Kolkata & Ors vs. Tutu Das (Dutta), reported in 2007 (5) SCC 317. More so, where no posts are created or no vacancies to sanctioned posts exists, only on the ground of working for more than 240 days, regularization cannot be directed. Even in cases where there are regular posts and vacancies, the procedure laid down for appointment has to be followed."

9. In so far as contention of the appellant predicated on Circular dated 6.5.1997 is concerned, on the basis of which they claimed that 70-75 persons had been regularized and discriminatory treatment could not be meted to them, this contention has been brushed aside by the High Court in the impugned judgment in the following manner:

"The, contention of Mrs.Pal that there has been discrimination as several persons were regularized on the basis of the Circular of the Management dated 6.5.1987, cannot be accepted. Reliance for this purpose on the case of U.P. State Electricity Board vs. Pooran Chandra Pandey reported in (2007) 11 SCC 92, is also of no help to her. Firstly, there were several conditions and criteria in the said Circular for regularization, but there is no finding that the respondents workmen in these appeals fulfilled such criteria. Secondly, in the case of U.P.State Electricity Board matter (supra) the employees of the Co-operative Society who were taken over by the Electricity Board claimed that the decision of the Electricity Board dated 28.11.1996 permitting regularization of the employees working from before 4.5.1990, will also apply to them as they were also appointed prior to 4.5.1990 in the Society. It was held that since the taken over employees were appointed in the Society before 4.5.1990, they could not be denied the benefit of the said decision of the Electricity Board. There is nothing to show that the appointment of the taken over employees was made by the Society without following the procedure in that behalf, whereas in the

present case, the respondents workmen were not appointed against vacant and sanctioned posts after following the procedure of appointment.

Furthermore, in paragraph 6 of the judgment of the Constitution Bench in the case ofSecretary, State of Karnataka vs. Uma Devi (2006) 4 SCC 1, it was held that no Government order, notification or circular can be substituted for the statutory rules framed under the authority of law. In para 16 of the judgment in the case of R.S.Garg vs. State of U.P. (2006 (6) SCC 430), it has been held that even the Government cannot make rules or issue any executive instructions by way of regularization. Similar view has been taken in the case of the Post Master General (supra). Therefore, the respondent workmen cannot claim regularization on the basis of the said Circular of the Management dated 6.5.1987, nor the said judgment of the U.P. Electricity Board (supra) is of any help to them."

10. Heavily relying upon the judgment in the case of Uma Devi (supra), the High Court has held that as both the appellants did not render 10 or more years of service, their cases do not come even in the exception carved out by the Constitution Bench in Uma Devi's case.

11. Another contention raised by the appellants before the High Court was that the ratio of Uma Devi's case had no relevance in the cases of industrial adjudication by the Labour Courts/Industrial Tribunals. However, even this submission was found to be meritless by the High Court taking support of the judgment of this Court in U.P. Power Corporation Vs. Bijli Mazdoor Sangh & Ors. (2007) 5 SCC 755.

12. We may record here that the Division Bench accepted that there was infraction of Section 25-Fof the I.D.Act in both the cases. However, they were held not entitled to reinstatement because of the reason that they were employed strictly as temporary workers, without any stipulation or promise that they would be made permanent and therefore reinstatement of such workers was not warranted and they were entitled to get monetary compensation only. As far as compensation is concerned, since both the appellants were paid the money equivalent to wages last drawn, for number of years when the Writ Petitions were pending, under Section 17 -B of the I.D. Act, the High Court felt that the appellants were duly compensated and no further amount was payable.

13. Challenging the validity of the approach of the High Court, the learned counsel for the appellants submitted that the entire thrust of the judgment of the High Court rests on the decision of this Court in Uma Devi's case which was impermissible as the said judgment is clarified by this Court subsequently in the case of Maharashtra State Road Transport Corporation & Anr. vs. Casteribe Rajya Parivahan Karmchari Sanghatana (2009) 8 SCC 556, wherein it is held, in categorical terms, that in so far as Industrial and Labour Courts are concerned, they enjoy wide powers under Section 30(1)(b) of the Industrial Disputes Act to take affirmative action in case of unfair labour practice and these powers

include power to order regularization/permanency. The Court has, further, clarified that decision in Uma Devi limits the scope of powers of Supreme Court under Article 32 and High Courts under Article 226 of the Constitution to issue directions for regularization in the matter of public employment, but power to take affirmative action under section 30(1)(b) of the I.D.Act which rests with the Industrial/Labour Courts, remains intact. It was, thus, argued that entire edifice of the impugned judgment of the High Court erected on the foundation of Uma Devi (supra) crumbles.

14. The learned counsel for the FCI, on the other hand, referred to the judgment in U.P. Power Corporation (supra) wherein this Court has taken unambiguous view that the law laid down in Uma Devi is applicable to Industrial Tribunals/Labour Courts as well. It was submitted that the judgment in U.P. Power Corporation (supra) was not taken note of in the subsequent judgment in Maharashtra State Road Transport Corporation (supra) and this Court should follow the earlier judgment rendered in U.P.Power Corporation's case. The learned counsel also relied upon the recent judgment of this Court in the case of Assistant Engineer, Rajasthan Development Corporation & Anr. vs. Gitam Singh (2013) 5 SCC 136 to contend that even when there is a wrongful termination of services of a daily wager because of non-compliance of the provisions ofSection 25-F of the I.D.Act, such an employee is not entitled to reinstatement but only monetary compensation. On the aforesaid basis, the learned counsel pleaded for dismissal of the appeal.

15. We have given considerable thoughts to the submissions made by the learned counsel for the parties on either side. It is clear from the aforesaid narratives that this case has two facets, which are reflected even in the terms of references as well on which the disputes were referred to the CGIT. First refers to the validity of the termination and the other one pertains to the regularization. Twin issues, which have, thus, to be gone into, are: (1) whether termination of service of the appellants was illegal?

Related issue here would be that if it is illegal, then whether in the facts and circumstances of this case, the appellants would be entitled to reinstatement in service or monetary compensation in lieu of reinstatement would be justified?

(2) whether the appellants are entitled to regularization of their services?

We would also record that both the issues, in the facts of this case, are somewhat overlapping which would become apparent, with the progression of our discussion on these issues.

Reg.: Validity of termination.

16. This issue hardly poses any problem. Admitted facts are that both the appellant had worked for more than 240 days continuously preceding their disengagement/termination. At the time of their disengagement, even when they had continuous service for more than 240 days (in fact about 3 years) they were not given any notice or pay in lieu of notice as well as retrenchment compensation. Thus, mandatory pre-condition of retrenchment in paying the aforesaid dues in accordance with Section 25-F of the I.D. Act was not complied with. That is sufficient to render the termination as illegal. Even the High Court in the impugned judgment has accepted this position and there was no quarrel on this aspect before us as well. With this, we advert to the issue of relief which should be granted in such cases, as that was the topic of hot debate before us as well.

17. Admittedly, both the workmen were engaged on daily wages basis. Their engagement was also in exigency of situation. In so far as appellant No.1 is concerned, he was disengaged way back in the year 1983. The dispute in his case was referred for adjudication to CGIT in 1992 only. There is a time lag of 9 years. Though no reasons are appearing on record for such an abnormal delay, it seems that he had raised the industrial dispute few years after his disengagement which can be inferred from the reading of the award of the CGIT as that reveals that after his disengagement he kept on making representations only and he took recourse to judicial proceedings only after Circular dated 6.5.1997 was issued as per which the FCI had decided to regularize the services of all casual workmen who had completed more than 90 days before 1996. Be that as it may, at this juncture what we are highlighting is that appellant No.1 had worked on daily wages basis for barely 3 years and he is out of service for last 30 years. Even when the Tribunal rendered his award in 1996, 13 years had elapsed since his termination. On these facts, it would be difficult to give the relief of reinstatement to the persons who were engaged as daily wagers and whose services were terminated in a distant past. And, further where termination is held to be illegal only on a technical ground of not adhering to the provisions of Section 25-F of the Act. Law on this aspect, as developed over a period of time by series of judgments makes the aforesaid legal position very eloquent. It is not necessary to traverse through all these judgments. Our purpose would be served by referring to a recent judgment rendered by this very Bench in the case of BSNL vs. Bhurumal 2013 (15) SCALE 131 which has taken note of the earlier case law relevant to the issue. Following passage from the said judgment would reflect the earlier decisions of this Court on the question of reinstatement:

"The learned counsel for the appellant referred to two judgments wherein this Court granted compensation instead of reinstatement. In the case of BSNL vs. Man Singh (2012) 1 SCC 558, this Court has held that when the termination is set aside because of violation of Section 25-F of the Industrial Disputes Act, it is not necessary that relief of reinstatement be also given as a matter of right. In the case of Incharge Officer & Anr. vs. Shankar Shetty (2010) 9 SCC 126, it was held that those cases where the

workman had worked on daily wage basis, and worked merely for a period of 240 days or 2-3 years and where the termination had taken place many years ago, the recent trend was to grant compensation in lieu of reinstatement. In this judgment of Shankar Shetty, this trend was reiterated by referring to various judgments, as is clear from the following discussion.

Should an order of reinstatement automatically follow in a case where the engagement of a daily wager has been brought to end in violation of Section 25-F of the Industrial Disputes Act, 1947 (for short "the ID Act")? The course of the decisions of this Court in recent years has been uniform on the above question.

In Jagbir Singh vs. Haryana State Agriculture Mktd. Board (2009) 15 SCC 327 delivering the judgment of this Court, one of us (R.M.Lodha,J.) noticed some of the recent decisions of this Court, namely, U.P.State Brassware Corpn. Ltd. Vs. Uday Narain Pandey (2006) 1 SCC 479, Uttaranchal Forest Department Corpn. Vs. M.C.Joshi (2007) 9 SCC 353, State of M.P. vs. Lalit Kumar Verma (2007) 1 SCC 575, M.P.Admn. vs. Tribhuban (2007) 9 SCC 748, Sita Ram vs. Moti Lal Nehru Farmers Training Institute (2008) 5 SCC 75, Jaipur Development Authority vs. Ramsahai (2006) 11 SCC 684, GDA vs. Ashok Kumar (2008) 4 SCC 261 and Mahboob Deepak vs. Nagar Panchayat, Gajraula (2008) 1 SCC 575 and stated as follows: (Jagbir Singh case, SCC pp.330 & 335 paras 7 & 14).

It is true that the earlier view of this Court articulated in many decision reflected the legal position that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in recent past, there has been a shift in the legal position and in a long line of cases, this Court has consistently taken the view that relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation even though the termination of an employee is in contravention of the prescribed procedure. Compensation instead of reinstatement has been held to meet the ends of justice.

It would be, thus, seen that by a catena of decisions in recent time, this Court has clearly laid down that an order of retrenchment passed in violation of Section 25-Falthough may be set aside but an award of reinstatement should not, however, automatically passed. The award of reinstatement with full back wages in a case where the workman has completed 240 days of work in a year preceding the date of termination, particularly, daily wagers has not been found to be proper by this Court and instead compensation has been awarded. This Court has distinguished between a daily wager who does not hold a post and a permanent employee.

Jagbir Singh has been applied very recently in Telegraph Deptt. Vs. Santosh Kumar Seal (2010) 6 SCC 773, wherein this Court stated: (SCC p.777, para 11) In view of the aforesaid legal position and the fact that the workmen were engaged as daily wagers about 25 years back and they worked hardly for 2 or 3 years, relief of reinstatement and back wages to them cannot be said to be justified and instead monetary compensation would subserve the ends of justice.

Taking note of the judgments referred to in the aforesaid paragraphs and also few more cases in other portion of the said judgment, the legal position was summed up in the following manner:

"It is clear from the reading of the aforesaid judgments that the ordinary principle of grant of reinstatement with full back wages, when the termination is found to be illegal is not applied mechanically in all cases. While that may be a position where services of a regular/permanent workman are terminated illegally and/or malafide and/or by way of victimization, unfair labour practice etc. However, when it comes to the case of termination of a daily wage worker and where the termination is found illegal because of procedural defect, namely in violation of Section 25-F of the Industrial Disputes Act, this Court is consistent in taking the view in such cases reinstatement with back wages is not automatic and instead the workman should be given monetary compensation which will meet the ends of justice. Rationale for shifting in this direction is obvious.

Reasons for denying the relief of reinstatement in such cases are obvious. It is trite law that when the termination is found to be illegal because of non-payment of retrenchment compensation and notice pay as mandatorily required under Section 25-F of the Industrial Disputes Act, even after reinstatement, it is always open to the management to terminate the services of that employee by paying him the retrenchment compensation. Since such a workman was working on daily wage basis and even after he is reinstated, he has no right to seek regularization (See: State of Karnataka vs. Uma Devi (2006) 4 SCC 1). Thus when he cannot claim regularization and he has no right to continue even as a daily wage worker, no useful purpose is going to be served in reinstating such a workman and he can be given monetary compensation by the Court itself inasmuch as if he is terminated again after reinstatement, he would receive monetary compensation only in the form of retrenchment compensation and notice pay. In such a situation, giving the relief of reinstatement, that too after a long gap, would not serve any purpose.

We would, however, like to add a caveat here. There may be cases where termination of a daily wage worker is found to be illegal on the ground it was resorted to as unfair labour practice or in violation of the principle of last come first go viz. while retrenching such a worker daily wage juniors to him were retained. There may also be a situation that persons junior to him wee regularized under some policy but the concerned workman terminated. In such circumstances, the terminated worker should not be denied reinstatement unless there are some other weighty reasons for adopting the course of grant of compensation instead of reinstatement. In such cases, reinstatement should be the rule and only in exceptional cases for the reasons stated to be in writing, such a relief can be denied".

18. We make it clear that reference to Uma Devi, in the aforesaid discussion is in a situation where the dispute referred pertained to termination alone. Going by the principles carved out above, had it been a case where the issue is limited only to the validity of termination, appellant No.1 would not be entitled to

reinstatement. This could be the position in respect of appellant No.2 as well. Though the factual matrix in his case is slightly different, that by itself would not have made much of a difference. However, the matter does not end here. In the present case, the reference of dispute to the CGIT was not limited to the validity of termination. The terms of reference also contained the claim made by the appellants for their regularization of service.

19. We have already pointed out that the two aspects viz. that of reinstatement and regularization are intermixed and overlapping in the present case. If the appellants were entitled to get their services regularized, in that case it would have been axiomatic to grant the relief of reinstatement as a natural corollary. Therefore, it becomes necessary, at this stage, to examine as to whether the order of CGIT, as affirmed by the learned Single Judge of the High Court directing regularization of their service, was justified or the approach of the Division Bench of the High Court in denying that relief is correct.

Re: Relief of Regularization

20. Before we advert to this question, it would be necessary to examine as to whether the Constitution Bench judgment in Uma Devi case have applicability in the matters concerning industrial adjudication. We have already pointed out above the contention of the counsel for the appellants in this behalf, relying upon Maharashtra State Road Transport case that the decision in Uma Devi would be binding the Industrial or Labour Courts. On the other hand, counsel for the FCI has referred to the judgment in U.P.Power Corporation for the submission that law laid down in Uma Devi equally applies to Industrial Tribunals/Labour Courts. It, thus, becomes imperative to examine the aforesaid two judgments at this juncture.

21. A perusal of the judgment in U.P. Power Corporation would demonstrate that quite a few disputes were raised and referred to the industrial tribunal qua the alleged termination of respondent Nos.2 and 3 in that case. Without giving the details of those cases, it would be sufficient to mention that in one of the cases the tribunal held that after three years of their joining in service both respondents 2 and 3 were deemed to have been regularized. The appellants filed the Writ Petition which was also dismissed. Challenging the order of the High Court, the appellants had approached this Court. It was argued that there could not have been any regularization order passed by the Industrial Court in view of the decision in Uma Devi. Counsel for the workmen had taken a specific plea that the powers of the industrial adjudicator were not under consideration in Uma Devi's case and that there was a difference between a claim raised in a civil suit or a Writ Petition on the one hand and one adjudicated by the industrial adjudicator. It was also argued that the labour court can create terms existing in the contract to maintain

industrial peace and therefore it had the power to vary the terms of the contract. While accepting the submission of the appellant therein viz. U.P. Power Corporation, the Court gave the following reasons:

"It is true as contended by learned counsel for the respondent that the question as regards the effect of the industrial adjudicators' powers was not directly in issue in Umadevi case. But the foundation logic in Umadevi case is based on Article 14 of the Constitution of India. Though the industrial adjudicator can very the terms of the contract of the employment, it cannot do something which is violative of Article 14. If the case is one which is covered by the concept of regularization, the same cannot be viewed differently.

The plea of learned counsel for the respondent that at the time the High Court decided the matter, decision in Umadevi case was not rendered is really of no consequence. There cannot be a case of regularization without there being employee-employer relationship. As noted above the concept of regularization is clearly linked with Article 14 of the Constitution. However, if in a case the fact situation is covered by what is stated in para 45 of Umadevi case the industrial adjudicator can modify the relief, but that does not dilute the observations made by this Court in Umadevi case about the regularization.

On facts, it is submitted by learned counsel for the appellants that Respondent No.2 himself admitted that he never worked as a pump operator, but was engaged as daily wage basis. He also did not possess the requisite qualification. Looked at from any angle, the direction for regularization, as given, could not have been given in view of what has been stated in Umadevi case."

22. It is clear from the above that the Court emphasized the underline message contained in Umadevi's case to the effect that regularization of a daily wager, which has not been appointed after undergoing the proper selection procedure etc. is impermissible as it was violative of Art.14of the Constitution of India and this principle predicated on Art.14 would apply to the industrial tribunal as well inasmuch as there cannot be any direction to regularize the services of a workman in violation of Art.14 of the Constitution. As we would explain hereinafter, this would mean that the industrial court would not issue a direction for regularizing the service of a daily wage worker in those cases where such regularization would tantamount to infringing the provisions of Art.14of the Constitution. But for that, it would not deter the Industrial Tribunals/Labour Courts from issuing such direction, which the industrial adjudicators otherwise possess, having regard to the provisions of Industrial Disputes Act specifically conferring such powers. This is recognized by the Court even in the aforesaid judgment.

23. For detailed discussion on this aspect, we proceed to discuss the ratio in the case of Maharashtra State Road Transport Corporation (supra). In that case the respondent Karamchari Union had filed two complaints before the Industrial Court, Bombay alleging that the appellant-Corporation had indulged in unfair labour practice qua certain employees who were engaged by the appellant as casual labourers for

cleaning the buses between the years 1980-1985. It was stated in the complaints that these employees were made to work every day at least for 8 hours at the depot concerned of the Corporation; the work done by them was of permanent nature but they were being paid a paltry amount; and even when the post of sweepers/cleaners were available in the Corporation, these employees had been kept on casual and temporary basis for years together denying them the benefit of permanency. After adjudication, the Industrial Court held that the Corporation had committed unfair labour practice under items 5 and 9 of Schedule IV to the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practice Act, 1971 (MRTU and PULP Act). As a consequence, it directed the Corporation to pay equal wages to the employees concerned which was being paid to Swachhaks and also pay arrears of wages to them. In the second complaint, the Industrial Court returned the finding that the Corporation was indulging in unfair labour practice under Item 6 of Schedule IV, by continuing these employees on temporary/casual/daily wage basis for years together and thereby depriving them the benefits of permanency. The direction in this complaint was to cease and desist from the unfair labour practice by giving them the status, wages and all other benefits of permanency applicable to the post of cleaners, w.e.f. 3.8.1982. The Corporation challenged these two orders of the Industrial Court before the High Court of Judicature at Bombay in five separate Writ Petitions. These were disposed of by the learned Single Judge vide common judgment dated 2.8.2001 holding that complaints were maintainable and the finding of the Industrial Court that the Corporation had indulged in unfair labour practice was also correct. The Corporation challenged the decision of the learned Single Judge by filing LPAs which were dismissed by the Division Bench on 6.5.2005. This is how the matter came before the Supreme Court. One of the contentions raised by the appellants before this Court was that there could not have been a direction by the Industrial Court to give these employees status, wages and other benefits of permanency applicable to the post of cleaners as this direction was contrary to the ratio laid down by the Constitution Bench of this Court in Umadevi (supra). The Court while considering this argument went into the scheme of the MRTU and PULP Act. It was, inter-alia, noticed that complaints relating to unfair labour practice could be filed before the Industrial Court. The Court noted that Section 28 of that Act provides for the procedure for dealing with such complaints andSection 30 enumerates the powers given to the Industrial and Labour Courts to decide the matters before it including those relating to unfair labour practice. On the reading of this section, the Court held that it gives specific power to the Industrial/Labour Courts to declare that an unfair labour practice has been engaged and to direct those persons not only to cease and desist from such unfair labour practice but also to take affirmative action. Section 30(1) conferring such powers is reproduced below:

“30. Powers of Industrial and Labour Courts.- (1)Where a court decides that any person named in the complaint has engaged in, or is engaging in, any unfair labour practice, it may in its order-

(a)declare that an unfair labour practice has been engaged in or is being engaged in by that person, and specify any other person who has engaged in, or is engaging in the unfair labour practice;
(b) direct all such persons to cease and desist from such unfair labour practice, and take such affirmative action (including payment of reasonable compensation to the employee or employees affected by the unfair labour practice, or reinstatement of the employee or employees with or without back wages, or the payment of reasonable compensation), as may in the opinion of the Court be necessary to effectuate the policy of the Act;
(c) where a recognized union has engaged in or is engaging in, any unfair labour practice, direct that its recognition shall be cancelled or that all or any of its rights under sub-section(1) of Section 20 or its right under Section 23 shall be suspended."

24. It was further noticed that Section 32 of the Act provides that the Court shall have the power to decide all connected matters arising out of any application or a complaint referred to it for decision under any of the provisions of this Act. The Court then extensively quoted from the judgment in Uma Devi in order to demonstrate the exact ratio laid down in the said judgment and thereafter proceeded to formulate the following question and answer thereto:

"The question that arises for consideration is: have the provisions of the MRTU and PULP Act been denuded of the statutory status by the Constitution Bench decision in Umadevi? In our judgment, it is not."

25. Detailed reasons are given in support of the conclusion stating that the MRTU and PULP Act provides for and empowers the Industrial/Labour Courts to decide about the unfair labour practice committed/being committed by any person and to declare a particular practice to be unfair labour practice if it so found and also to direct such person ceased and desist from unfair labour practice. The provisions contained in Section 30 giving such a power to the Industrial and Labour Courts vis-à-vis the ratio of Uma Devi are explained by the Court in the following terms:

"The power given to the Industrial and Labour Courts under Section 30 is very wide and the affirmative action mentioned therein is inclusive and not exhaustive. Employing badlis, casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent employees is an unfair labour practice on the part of the employer under Item 6 of Schedule IV. Once such unfair labour practice on the part of the employer is established in the complaint, the Industrial and Labour Courts are empowered to issue preventive as well as positive direction to an erring employer.

The provisions of the MRTU and PULP Act and the powers of the Industrial and Labour Courts provided therein were not at all under consideration in Umadevi. As a matter of fact, the issue like the present one pertaining to unfair labour practice was not at all referred to, considered or decided in Umadevi. Unfair labour practice on the part of the employer in engaging employees as badlis, casuals or temporaries and to continue them as such for years with the object of depriving them of the status and privileges of permanent employees as provided in Item 6 of Schedule IV and the power of the Industrial and Labour Courts under Section 30 of the Act did not fall for adjudication or consideration before the Constitution Bench.

Umadevi does not denude the Industrial and Labour Courts of their statutory power under Section 30 read with Section 32 of the MRTU and PULP Act to order permanency of the workers who have been victims of unfair labour practice on the part of the employer under Item 6 of Schedule IV where the posts on which they have been working exist. Umadevi cannot be held to have overridden the powers of the Industrial and Labour Courts in passing appropriate order under Section 30 of the MRTU and PULP Act, once unfair labour practice on the part of the employer under Item 6 of Schedule IV is established."

26. The Court also accepted the legal proposition that Courts cannot direct creation of posts, as held in Mahatma Phule Agricultural University vs. Nasik Zilla Sheth Kamgar Union (2001) 7 SCC 346. Referring to this judgment, the Court made it clear that inaction on the part of the State Government to create posts would not mean an unfair labour practice had been committed by the employer (University in that case) and as there were no posts, the direction of the High Court to accord the status of permanency was set aside. The Court also noticed that this legal position had been affirmed in State of Maharashtra vs. R.S.Bhonde (2005) 6 SCC 751. The Court also reiterated that creation and abolition of post and regularization are purely Executive functions, as held in number of judgments and it was not for the Court to arrogate the power of the Executive or the Legislature by directing creation of post and absorbing the workers or continue them in service or pay salary of regular employees. This legal position is summed up in para 41 which reads as under:

"Thus, there is no doubt that creation of posts is not within the domain of judicial functions which obviously pertains to the executive. It is also true that the status of permanency cannot be granted by the Court where no such posts exist and that executive functions and powers with regard to the creation of posts cannot be arrogated by the courts."

27. However, the Court found that factual position was different in the case before it. Here the post of cleaners in the establishment were in existence. Further, there was a finding of fact recorded that the Corporation had indulged in unfair labour practice by engaging these workers on temporary/causal/daily

wage basis and paying them paltry amount even when they were discharging duties of eight hours a day and performing the same duties as that of regular employees.

28. In this backdrop, the Court was of the opinion that direction of the Industrial Court to accord permanency to these employees against the posts which were available, was clearly permissible and with the powers, statutorily conferred upon the Industrial/Labour Courts under Section 30(1)(b) of the said Act which enables the Industrial adjudicator to take affirmative action against the erring employees and as those powers are of wide amplitude abrogating within its fold a direction to accord permanency.

29. A close scrutiny of the two cases, thus, would reveal that the law laid down in those cases is not contradictory to each other. In U.P. Power Corporation, this Court has recognized the powers of the Labour Court and at the same time emphasized that the Labour Court is to keep in mind that there should not be any direction of regularization if this offends the provisions of Art.14 of the Constitution, on which judgment in Umadevi is primarily founded. On the other hand, in Bhonde case, the Court has recognized the principle that having regard to statutory powers conferred upon the Labour Court/Industrial Court to grant certain reliefs to the workmen, which includes the relief of giving the status of permanency to the contract employees, such statutory power does not get denuded by the judgment in Umadevi's case. It is clear from the reading of this judgment that such a power is to be exercised when the employer has indulged in unfair labour practice by not filling up the permanent post even when available and continuing to workers on temporary/daily wage basis and taking the same work from them and making them some purpose which were performed by the regular workers but paying them much less wages. It is only when a particular practice is found to be unfair labour practice as enumerated in Schedule IV of MRTP and PULP Act and it necessitates giving direction under Section 30 of the said Act, that the Court would give such a direction.

30. We are conscious of the fact that the aforesaid judgment is rendered under MRTP and PULP Act and the specific provisions of that Act were considered to ascertain the powers conferred upon the Industrial Tribunal/Labour Court by the said Act. At the same time, it also hardly needs to be emphasized the powers of the industrial adjudicator under the Industrial Disputes Act are equally wide. The Act deals with industrial disputes, provides for conciliation, adjudication and settlements, and regulates the rights of the parties and the enforcement of the awards and settlements. Thus, by empowering the adjudicator authorities under the Act, to give reliefs such as a reinstatement of wrongfully dismissed or discharged workmen, which may not be permissible in common law or justified under the terms of the contract between the employer and such workmen, the legislature has attempted to frustrate the unfair labour practices and secure the policy of collective bargaining as a road to industrial peace.

31. In the language of Krishna Iyer, J:

The Industrial Disputes Act is a benign measure, which seeks to pre-empt industrial tensions, provide for the mechanics of dispute- resolutions and set up the necessary infrastructure, so that the energies of the partners in production may not be dissipated in counter-productive battles and the assurance of industrial justice may create a climate of goodwill." (*Life Insurance Corpn. Of India v. D.J.Bahadur 1980 Lab I*C 1218, 1226(SC), per Krishna Iyer,J.).

In order to achieve the aforesaid objectives, the Labour Courts/Industrial Tribunals are given wide powers not only to enforce the rights but even to create new rights, with the underlying objective to achieve social justice. Way back in the year 1950 i.e. immediately after the enactment of Industrial Disputes Act, in one of its first and celebrated judgment in the case of *Bharat Bank Ltd. V. Employees of Bharat Bank Ltd.* [1950] LLJ 921,948-49 (SC) this aspect was highlighted by the Court observing as under:

"In settling the disputes between the employers and the workmen, the function of the tribunal is not confined to administration of justice in accordance with law. It can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It has not merely to interpret or give effect to the contractual rights and obligations of the parties. It can create new rights and obligations between them which it considers essential for keeping industrial peace."

32. At the same time, the aforesaid sweeping power conferred upon the Tribunal is not unbridled and is circumscribed by this Court in the case of New Maneckchowk Spinning & Weaving Co.Ltd.v. Textile Labour Association [1961] 1 LLJ 521,526 (SC) in the following words:

"This, however, does not mean that an industrial court can do anything and everything when dealing with an industrial dispute. This power is conditioned by the subject matter with which it is dealing and also by the existing industrial law and it would not be open to it while dealing with a particular matter before it to overlook the industrial law relating to the matter as laid down by the legislature or by this Court."

33. It is, thus, this fine balancing which is required to be achieved while adjudicating a particular dispute, keeping in mind that the industrial disputes are settled by industrial adjudication on principle of fair play and justice.

34. On harmonious reading of the two judgments discussed in detail above, we are of the opinion that when there are posts available, in the absence of any unfair labour practice the Labour Court would not give direction for regularization only because a worker has continued as daily wage

worker/adhoc/temporary worker for number of years. Further, if there are no posts available, such a direction for regularization would be impermissible. In the aforesaid circumstances giving of direction to regularize such a person, only on the basis of number of years put in by such a worker as daily wager etc. may amount to backdoor entry into the service which is an anathema to Art.14 of the Constitution. Further, such a direction would not be given when the concerned worker does not meet the eligibility requirement of the post in question as per the Recruitment Rules. However, wherever it is found that similarly situated workmen are regularized by the employer itself under some scheme or otherwise and the workmen in question who have approached Industrial/Labour Court are at par with them, direction of regularization in such cases may be legally justified, otherwise, non-regularization of the left over workers itself would amount to invidious discrimination qua them in such cases and would be violative of Art.14 of the Constitution. Thus, the Industrial adjudicator would be achieving the equality by upholding Art. 14, rather than violating this constitutional provision.

35. The aforesaid examples are only illustrated. It would depend on the facts of each case as to whether order of regularization is necessitated to advance justice or it has to be denied if giving of such a direction infringes upon the employer's rights

36. In the aforesaid backdrop, we revert the facts of the present case. The grievance of the appellants was that under the Scheme contained in Circular dated 6.5.1997 many similarly placed workmen have been regularized and, therefore, they were also entitled to this benefit. It is argued that those who had rendered 240 days service were regularized as per the provision in that Scheme/Circular dated 6.5.1987.

37. On consideration of the cases before us we find that appellant No.1 was not in service on the date when Scheme was promulgated i.e. as on 6.5.1987 as his services were dispensed with 4 years before that Circular saw the light of the day. Therefore, in our view, the relief of monetary compensation in lieu of reinstatement would be more appropriate in his case and the conclusion in the impugned judgment qua him is unassailable, though for the difficult reasons (as recorded by us above) than those advanced by the High Court. However, in so far as appellant No.2 is concerned, he was engaged on 5.9.1986 and continued till 15.9.1990 when his services were terminated. He even raised the Industrial dispute immediately thereafter. Thus, when the Circular dated 5.9.1987 was issued, he was in service and within few months of the issuing of that Circular he had completed 240 days of service.

38. Non-regularization of appellant No.2, while giving the benefit of that Circular dated 6.5.1987 to other similar situated employees and regularizing them would, therefore, be clearly discriminatory. On these facts, the CGIT rightly held that he was entitled to the benefit of scheme contained in Circular dated 6.5.1987. The Division Bench in the impugned judgment has failed to notice this pertinent and material

fact which turns the scales in favour of appellant No.2. High Court committed error in reversing the direction given by the CGIT, which was rightly affirmed by the learned Single Judge as well, to reinstate appellant No.2 with 50% back wages and to regularize him in service. He was entitled to get his case considered in terms of that Circular. Had it been done, probably he would have been regularized. Instead, his services were wrongly and illegally terminated in the year 1990. As an upshot of the aforesaid discussion, we allow these appeals partly. While dismissing the appeal qua appellant No.1, the same is accepted in so far as appellant No.2 is concerned. In his case, the judgment of the Division Bench is set aside and the award of the CGIT is restored. There shall, however, be no order as to costs.

APPLICATION OF UTILITARIAN, EGALITARIAN AND LIBERTARIAN PRINCIPLES IN DECIDING RIGHTS AND LIABILITIES OF PARTIES OF UNEQUAL STRENGTH

LABOUR LAW AND THE NEW INEQUALITY[*]

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The different sorts of equality are finally inseparable but up to a certain point they are sufficiently distinguishable, and one may speak of political equality, equality before the laws and economic equality. Without the last, the first and second exist only measurably, and they tend to disappear as it shrinks.

William Dean Howells

RISING ECONOMIC INEQUALITY

Why is the issue of economic inequality so important? Simply put, because more unequal societies tend to produce greater levels of social dysfunction. They commonly exhibit more crime, higher levels of mental illness, more illiteracy, lower life expectancies, higher rates of incarceration, lower degrees of civic engagement, higher teenage pregnancy rates, diminished social mobility and opportunities, lower levels of interpersonal trust, lower levels of general health, and weaker social shock absorbers for the poor.[1] The issue is not simply one of extremes in wealth and poverty. Higher levels of economic inequality create a continuous gradient of differential social outcomes throughout the separate income layers within a society, so that not only are poor people less healthy than people with middlelevel incomes, but people in the middle are less healthy than those at the top. Nor does becoming a wealthier society guarantee proportionally better social outcomes simply because of its wealth. Among western industrialized societies, social progress in improving the health of its citizens flattens out once a certain level in living standards has been obtain; after reaching that level, differences in national health outcomes among wealthy countries can be explained not by comparative per capita income or wealth levels, but by domestic levels of economic egalitarianism. In both Canada and the United States, for example, it is the most egalitarian provinces and states, rather than the richest, that are the healthiest measured by life expectancy.[2]

As well, there is also the issue of economic inefficiencies: widening inequalities create macro-economic impediments to growth by excluding certain groups from the benefits of an expanding economy, by diminishing the purchasing power of the middle and lower income stratums that sustains economic growth, by increasing the social costs of policing low-income groups, and by having economic and social policy-making captured by wealthy groups with all of its resulting misallocations.[3]

Canada's recent history provides a cogent illustration of rising economic inequality. The following figure is a table displays the share of aggregate incomes going to the entire spectrum of Canadian income earners, who are divided up into five income quintiles, from top to bottom, over the years between 1951 and 2005. You will notice that, between 1951 and 1981, the bottom quintile of income earners improved their share of aggregate income marginally, the share of the middle three quintiles grew slightly (with the highest of these quintiles receiving all of the increase), and the top income quintile's share declined by 1.2 percentage points. The fruits of the post-war economic boom in Canada were distributed in a fashion that primarily benefited the upper end of the Canadian middle class, but otherwise marginally compressed the differences in income between the top and bottom quintiles. This compression stayed relatively stable through these years.

After 1981, the trend begins to reverse the compression of the initial postwar years. The share of aggregate national income for the bottom 20 percent steadily declines between 1981 and 2000, the middle three quintiles lose almost 5 percentage points of their share from 1981, and the share claimed by the top income quintile jumps more than 5 percentage points. The Organization of Economic Co-operation and Development has said that, among its nation members, Canada has had the second fastest growth in income inequality since the 1990s.[4]

Figure 1:
Share of Aggregate Incomes Received by Each
Quintile of Families and Unattached Individuals (%)

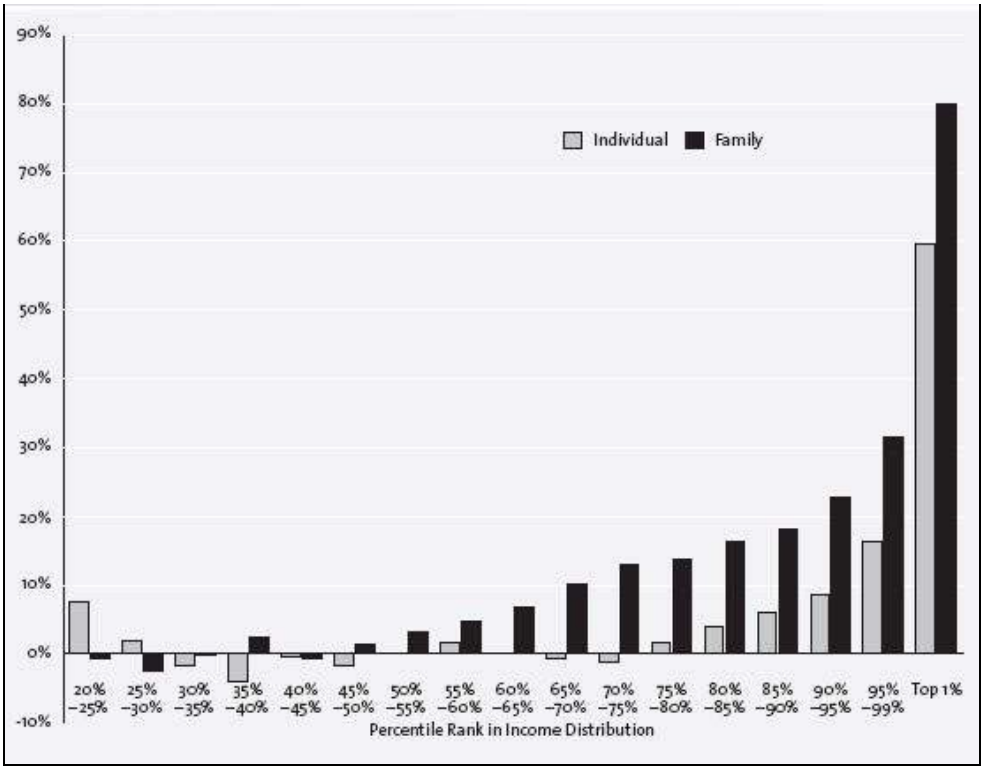
	1951	1961	1971	1981	1991	1996	2001	2005
Bottom 20% (poorest)	4.4	4.2	3.6	4.6	4.5	4.2	4.1	4.1
Second 20%	11.2	11.9	10.6	11	10	9.6	9.7	9.6
Middle 20%	18.3	18.3	17.6	17.7	16.4	16	15.6	15.6
Fourth 20%	23.3	24.5	24.9	25.1	24.7	24.6	23.7	23.9
Top 20% (richest)	42.8	41.1	43.3	41.6	44.4	45.6	46.9	46.9

Source: L. Osberg, A Quarter Century of Economic Inequality in Canada; 1981-2006 (Ottawa: Canadian Centre for Policy Alternatives, 2008), at p. 7.

Our next graph, Figure 2, provides a more detailed breakdown of where the income shares have been going since the early 1980s, confirming the redirection of

aggregate income that we witnessed in Figure 1. The income groups are now broken down by 5 percent groupings, instead of the 20 percent groupings in the last graph. The income gains acquired by the richest quintile, which has been the biggest beneficiary of economic redistribution in the recent era, have been heavily weighted towards the very top of this quintile. While the top 20 percent on individual income earners enjoyed a 17 percent increase in real taxable income between 1982 and 2004, the top 10 percent received a 22 percent increase, the top 5 percent gathered a 31 percent increase, and the top 1 percent acquired an 80 percent increase. (Separate figures which examine the compensation of chief executive officers in Canada reinforce this observation. In 1998, Canada's top executives earned 106 times as much as the average annual employee wage. By 2005, this ratio had grown to 240 times.)[5] In contrast, the bottom half of the individual income earners on the income spectrum, in terms of their share of the expanding pie, lost ground.

Figure 2:
Percent Change in Real Taxable Income 1982–2004



Source: L. Osberg, A Quarter Century of Economic Inequality in Canada; 1981-2006 (Ottawa: Canadian Centre for Policy Alternatives, 2008), at p. 9.

The following graph, Figure 3, provides us with an even clearer demonstration of the re-direction of the recent benefits of our economic growth. This is an historical graph which illustrates the progression of a specific income group between 1920 and 2000 in

both Canada and the United States. This graph shows the share of annual income going to the top ½ of 1 percent on income earners in both countries. Economists choose this particular group because its fortunes are illustrative of the pushes and pulls of economic inequality in the broader society. The historical fortunes of this top income-earning stratum, both upwards and downwards, are remarkably similar in both countries.

Figure 3 documents that, at the end of the Gilded Age just before 1940, the share of national income going to the top 0.5 percent stood at around 13 percent in both countries, before declining precipitously. The post-war Great Compression that followed lasted until the mid-1980s, with the share of income going to these groups falling to 5 percent. After the mid-1980s, it began to steadily move up again, the United States more dramatically than Canada. By 2000, the share captured by the richest 0.5 percent in Canada had reached 10 percent, while in the U.S., their share had climbed back to 13 percent.

Figure 3:
The Top 0.5% Income Share in Canada and the United States 1920–2000

Source: L. Osberg, A Quarter Century of Economic Inequality in Canada; 1981-2006 (Ottawa: Canadian Centre for Policy Alternatives, 2008), at p. 26.

Figure 4 is from a 2006 Statistics Canada study, and focuses on wealth inequality, rather than income inequality. This table tells a similar story to the income inequality trends: over the past quarter century, the levels of wealth inequality in Canada have

widened. Figure 5 divides the population into groupings of 10, by income, from bottom to top. Between 1984 and 2005, the share of wealth owned by the bottom nine groupings all fell. The only group whose share rose was the highest grouping.

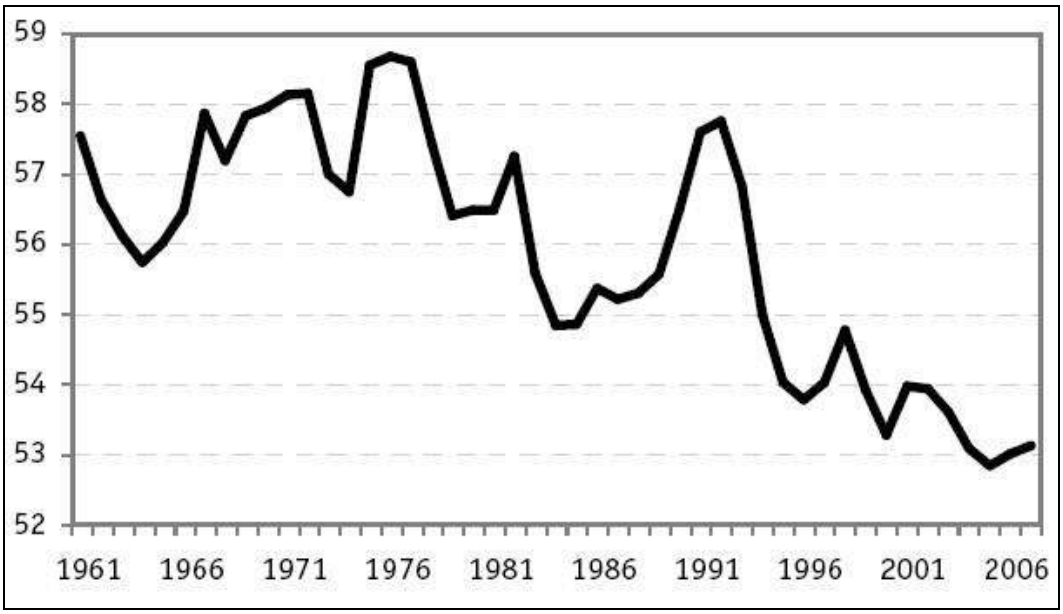
Figure 4:
Share of Total Wealth

	Share		
	1984	1999	2005
All families			%
Bottom 10%	-.05	-.06	-.06
Second	0.1	0.0	0.0
Third	0.5	0.4	0.2
Fourth	1.7	1.3	1.1
Fifth	3.5	2.8	2.5
Sixth	5.6	4.7	4.4
Seventh	8.2	7.4	6.9
Eighth	11.5	11.0	10.5
Ninth	17.5	17.4	16.8
Top 10%	51.8	55.7	58.2

Source: R. Morissette & X. Zhang, "Revisiting Wealth Inequality" (2006), 7:12 Perspectives on Labour and Income (Statistics Canada).

There is one last part of the statistical portrait that I wish to draw before leaving this theme. This has to do with the declining share of the Gross Domestic Product (GDP) that has been captured by Canadian wage earners since 1961. As Figure 5 shows, labour held almost 57 percent of the GDP in 1961. This rose to a peak of 59 percent in 1976, fluctuated between 57 percent to 54 percent in the 1980s and 1990s, before bottoming out at 53 percent in 2005, its lowest mark in a half century. This occurred in the midst of a growing Canadian economy with rising labour productivity. This is the sort of economic climate that orthodox economic theory would have average wages rising in real dollars to capture a greater share of the GDP. And, as labour's share has been declining, a recent study for the Institute for Competitiveness and Prosperity in Ontario has noted that corporate profits as a share of GDP are currently at a historical high.[6]

Figure 5:
Labour's Share, Canada, Total Compensation as a Share of GDP, 1961-2007 (current dollars, per cent)



Source: A. Sharpe, J-F. Arsenault & P. Harrison, "Why Have Real Wages Lagged behind Labour Productivity Growth in Canada?" (2008), 17 International Productivity Monitor 16, at p. 19.

Between 1980 and 2005, labour productivity (the increase in value produced by a unit of labour) rose 37 percent, while the growth in real average wage levels through this time period was virtually flat. In 2005 constant dollars, the average annual salary of a full-time year-round Canadian employee was $41,348 in 1980, and it had risen by only $53 in 2005 to $41,403. Had medium wages of this worker increased at the same rate as labour productivity (37 percent), she or he would have been earning $56,800 in 2005.[7] As our various charts have suggested, whether wages and income rise with productivity is not a natural consequence of a free market economy, but rather quite strongly tied to the relative bargaining strength of employees.

DECLINING UNIONIZATION LEVELS

In its most recent report on the global workplace, the International Labour Organization postulated that a hydraulic relationship exists between unionization and inequality. Countries that have higher unionization rates tend to have lower economic inequality patterns. And as unionization rates decline, inequality levels tend to climb. The International Labour Organization stated that recent economic trends show:

> […] a clear negative correlation between unionization and inequality: the countries in which income inequality is on average lower in the period 1989-2005 tend to be those in which a greater proportion of workers are affiliated to trade unions.[8]

It is not simply that trade unions raise wages and benefits for their members over the prevailing labour market rates, although they do perform this task. Rather, the prevailing social science literature tells us that unions have at least four significant effects on the labour market and the broader economy that contribute to more egalitarian social outcomes. One does not have to be a cheerleader for unions to acknowledge the institutional role they have historically played in democratizing the economy and stimulating the spread of social wealth and rising productivity through the middle and lower income stratums.

First, beyond improving the economic return to their own members, unions raise the wages and benefits of non-unionized workers in related industries, in part because non-unionized employers seek to dampen the appeal of unionization.[9] The best example of this can be seen in the Canadian auto and auto-parts industries, where the non-unionized Japanese car manufacturers in Ontario pay salary rates to their employees that closely parallel those paid to the unionized North American auto companies located in Ontario, precisely to maintain their non-unionized status. Second, unions tend to raise the wages for their lower paid members and compress the overall wages scales within a unionized workplace, so that the lowest paid workers rise in relative terms and the wage differentials diminish.[10] This not only erodes low income levels in the unionized labour force – in 2002, a third of Canadian non-union workers were defined as low paid, but only eight per cent of unionized workers were so classified – but it also works to improve the economic well-being of historically disadvantaged groups such as women and visible minorities, who are disproportionately found at the lower end of the Canadian labour market.[11]

A third significant contribution of unions towards greater economic egalitarianism has been to dampen the differential levels between executive pay and the wage rates in the mainstream labour force. A 2007 study has concluded that unionized firms generally pay lower levels of total CEO compensation than non-unionized firms, with an increasing impact upon the very highest executive levels.[12] And fourth, unions in a dense-enough clustering within a society increase the influence of other social forces – such as non-governmental organizations, liberal religious institutions, academics, policy forums and critical journalism – in favour of more egalitarian economic policies of redistribution. The recent ILO study that I quoted above has found that unionization levels are closely linked with broader virtuous social circles:

> The countries where union density rates are higher are also the ones in which union benefits are more generous, the taxation system is more progressive, collective bargaining more centralized and labour law is closer to international norms and better implemented.[13]

Thus, unions perform at the macro-social level what they also do at the workplace and sectoral level: compress overall wages and benefits, lift up the bottom, spread out the middle and dampen down the top.[14] In a recent study, the World Bank

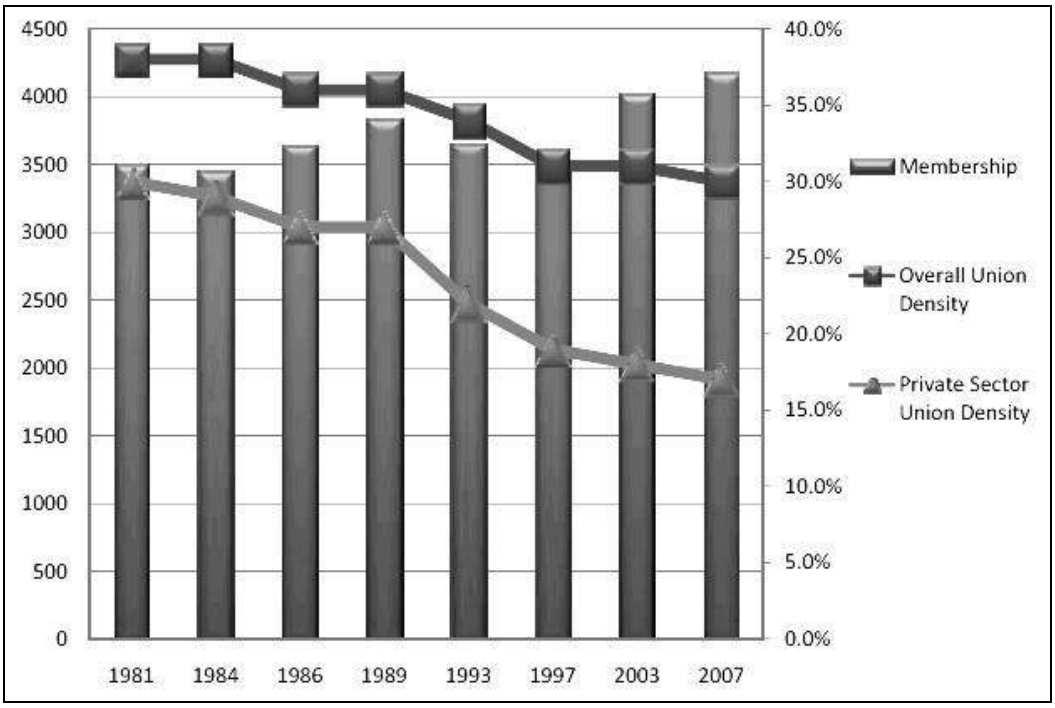
has said that this has been accomplished without impairing national economic performance or social prosperity.[15]

All of these features were certainly true during the halcyon days of the Great Compression. They remain true today, but in a distinctly more diminished fashion. In recent years, the unionization levels throughout most of the advanced industrialized world have been steadily eroding. In many of these countries, unions reached their apex in terms of density in the 1970's and 1980's and have been sliding down since. In Canada, declining unionization rates have been cited as a significant contributing factor to falling average wages and shrinking pension benefit coverage among workers,[16] which in turn contribute to widening inequality.

Figure 6 illustrates that the unionization rate in Canada has been falling steadily since the mid-1980s, just as the economic inequality levels in the country were beginning to rise. What the prior table on comparative union density rates did not tell us about Canada is that union membership (as a percentage of the total workforce) rose from 32 per cent in 1970 to as high as 38 per cent by 1981, before its steady decline to the 2007 figure of 29 per cent. Private sector unionization in Canada has diminished even farther, sliding from 29 per cent in 1981 to 17 percent today. If it had not been for the high and fairly stable unionization levels in the public sector – approximately 71 percent of public workers are union members – the decline would have been much greater. Both the 29 percent overall unionization rate and the 17 percent rate in the private sector are the lowest figures since the 1950's.[17] Keep in mind that this decline has occurred even as Canadian unions were significantly increasing the number of new members in their ranks: between 1997 and 2007, union membership grew by almost 19 percent in absolute numbers, but with total employment rising by almost 25 per cent, the density of unions slumped.[18]

Figure 6:

Trends in Union Membership and Density



Source: P. Kumar, "Whither Unionism: Current State and Future Prospects of Union Renewal in Canada" (Kingston, Ont.: Industrial Relations Centre, 2008, Discussion Paper # 2008-04)

Another way to illustrate the relationship between declining unionization rates and rising economic inequality in Canada is to compare these rates at the provincial level. This is a helpful measurement, as provinces have sufficient governmental jurisdiction within Confederation over social and, to a lesser degree, economic policy-making to be able to contribute, positively or negatively, to their economic inequality levels. Using 1998 statistics (the most recent useful comparative figures available), Figure 7 lists the 10 provinces with their unionization levels on the left-hand column and their inequality ratios (based on their after-tax income upper and lower quintile ratios) on the right, with their respective rankings in brackets.

Figure 7 tells us that, as a distinct trend, the provinces with the highest unionization rates have also been the most egalitarian as measured by their inequality levels. With the Canadian after-tax inequality ratio average set at 5.40, the five provinces with the highest unionization levels (Newfoundland, Quebec, Manitoba, British Columbia and Saskatchewan) were all below the national inequality ratio, while three of the provinces with the lowest unionization rates (Alberta, Ontario and Nova Scotia) are at or above the national ratio for inequality. (Prince Edward Island and New Brunswick, the smallest and third smallest provinces by population, are statistical outliers.)

Figure 7:

Comparative Provincial Unionization Levels and After-Tax Inequality Ratios

Province	Unionization Rate, and Rank – 1998	After Tax Inequality Ratio of Highest and Lowest Quintiles, and Rank – 1998
Newfoundland	39.7% (1)	4.90 (4)
Prince Edward Island	26.3% (9)	4.20 (1)
Nova Scotia	28.9% (6)	5.40 (8)
New Brunswick	26.6% (8)	4.90 (4)
Quebec	35.7% (2)	4.90 (4)
Ontario	28.0% (7)	5.50 (9)
Manitoba	34.9% (3)	4.70 (3)
Saskatchewan	33.6% (5)	4.60 (2)
Alberta	23.0% (10)	6.10 (10)
British Columbia	34.8% (4)	5.10 (7)
National Average	30.7%	5.40

Sources: R. Morissette, G. Schellenberg & A. Johnson, "Diverging Trends in Unionization" (2005) 6:4 Perspective on Labour and Income (Statistics Canada) 5, Table 3, at p. 8; and D. Sanga, "Income Inequality within Provinces" (Winter 2000), 12:4 Perspectives on Labour and Income (Statistics Canada) 33, at p. 35.

STAGNATING LABOUR LAWS

Legislatively, the past 25 years in Canada has been a period of labour law retrenchment. Since the mid-1980s, the provincial legislatures have enacted, more commonly than not, statutory provisions on union certification and the protection of collective bargaining that have made union organizing and negotiating more difficult.[19] Chief among these amendments have been the change in six jurisdictions, including three of the four largest provinces by population, from a card-count certification process to a mandatory election process when determining whether a union has the majority support of the employees in a workplace for representational purposes. Much less frequently over this time period have been the occasions when labour laws have been amended to protect or enhance the organizing capabilities of unions. And even when many of these enhancements occurred – British Columbia in 1992, Ontario in 1993 and Saskatchewan in 1994 – they were rolled back by subsequent governments.[20] It may well

be that some of the initial labour law reforms that strengthened unions were poorly thought out, or packaged in such a way as to unwittingly invite a fierce counter-reaction.[21] But with greater certainty, it can also be said that the conservative political trend which has been antithetical to unions at both the provincial and federal levels in Canada has shaped the recent legislature climate towards industrial relations. Whatever the preferred explanation, the unmistakable trend in recent years has been towards the statutory diminishment of the vitality of our labour laws.

This should concern us all. Labour and employment rights and the laws that buttress them are not the accumulation of privileges by a vigourous lobby of special interests, but the expression of core constitutional and human rights that benefit, directly and indirectly, the majority of citizens living in a modern democratic society. At the international level, the three foundational documents of the International Bill of Rights – the Universal Declaration of Human Rights,[22] the International Covenant of Economic, Social and Cultural Rights,[23] and the International Covenant of Civil and Political Rights[24] – all promote the right of employees to a collective voice at work as a fundamental human rights guarantee. At the national level, the Canadian Parliament has stated that collective bargaining is a positive social good which ensures that the benefits of economic growth are fairly distributed to all.[25] And constitutionally, the Supreme Court of Canada has recognized the importance of collective bargaining by sheltering it within our Charter of Rights and Freedoms.[26]

In this last part of the Lecture, I want to focus on one area of concern, respecting union certification, which I think is illustrative of the worrisome legislative trends in Canada in recent times respecting our labour laws. Because of our limited time, other patterns that could also have been usefully explored are not, such as the regular reliance by Parliament and the provincial legislatures on back-to-work legislation to end lawful strikes,[27] or the dogged refusal by some Canadian governments to extend collective bargaining to specific occupational groups, such as police officers working for the Royal Canadian Mounted Police[28] or Ontario agricultural workers.[29]

Prior to 1984, the federal jurisdiction and nine of the ten provinces utilized the card-check system in their labour legislation.[30] Since 1984, five provinces have set aside the card-check system and turned to the mandatory secret ballot process: British Columbia (which adopted the mandatory certification election process in 1984; reverted to the card-check process in 1992, and returned to mandatory elections in 2002); Alberta (1988); Newfoundland (1994); Ontario (1995); and Saskatchewan (2008).[31] In each case, the legislative changes were driven not by any evidence-based studies which found that the card-check system was functionally deficient in measuring majority employee support, nor by a rational selection from among different rights-enhancing industrial relations models. Rather, the most likely explanation is that these changes were the ideological preference of provincial governments led by parties with an antipathy towards collective workplace rights and other equalizing institutions. The unspoken expectation of these governments was that a mandatory election process for union certification would result in lowered unionization rates. And these expectations

have been borne out. In 2004, the five provinces that required mandatory certification elections at that time had a combined unionization rate of 30.5 percent, which was almost 14 percent lower than the 34.7 percent average unionization rate for the five provinces that did employ the card-check process.[32]

The steadily shifting political preference by conservative provincial governments for the mandatory election process has prompted a number of Canadian industrial relations academics to investigate the impact of these changes on unionization levels. The two most common provincial laboratories for these social scientists have been Ontario and British Columbia. In recent times, both provinces have experienced political pendulum swings, with liberal or social democratic governments maintaining or enacting the card-check method, and conservative governments legislating mandatory certification elections. The advantage of these pendulum swings is that they have given social scientists a relatively rich amount of certification data to quantify and compare the contributions of both methods to relative unionization levels in the specific time periods.

Ontario has been frequently studied on this issue. The province's labour legislation had a card-check system since the late 1940s, through Progressive Conservative (1947-85), Liberal (1985-90) and New Democratic Party (1990-1995) governments. Significant labour law reforms were enacted by the NDP in 1993 which maintained the card-check approach, but enhanced other aspects of the certification process. The election of the Progressive Conservative government in 1995 saw major changes to the Ontario Labour Relations Act, including the introduction of mandatory certification elections for the first time in Ontario. The Liberal government that came to office in 2003 has maintained the mandatory election system, with the exception that the card-count process was restored for the construction industry.

There have been four leading academic investigations into the comparative impact of the two different certification-determination methods in Ontario's recent history. Each of them has found that the card-check process measurably enhanced the certification success and activity rates of unions, while the mandatory elections provisions stunted union representation efforts.

Felice Martinello, in research published in 2000, concluded that the combined effect of the NDP government in the early 1990s and its labour law reforms resulted in a significant increase in union certification activity and success rates, while the subsequent PC government and its labour legislation resulted in a marked decrease in certification activity and success rates.[33] Two years later, Susan Johnson's investigation focused expressly on the change from card-check to mandatory elections. Similar to Martinello, she found that the post1995 legislative switch to elections had a substantial downward impact on union certification success rates. Johnson also extended her analysis to a cross-country review, and concluded that mandatory vote provisions among the various provinces reduced the union certification success rates by nine percent.[34] Sara Slinn in 2004 found that the introduction of mandatory certification votes in 1995 had "a highly

significant negative impact" upon the probability of certification success for unions in Ontario, amounting to a 21 percent lower likelihood of certification under the mandatory vote procedure.[35] And Timothy Bartkiw's 2008 published research supported these earlier findings, leading him to conclude that "labour laws continue to matter despite shifts in economic internationalization and industrial structure."[36]

Similar results have been found in the British Columbia context. Chris Riddell has shown that from the late 1970s up until 1984, the union certification success rate under the card-check process was in the high 80 percent and low 90 percent range. Mandatory certification elections were introduced in 1984, and the success rate tumbled to the 70 percent range until 1993, when the card-check process was re-introduced through labour legislation reforms under a new provincial government. The certification success rate returned to the 90 percent level almost immediately and remained there until 2002, when another government re-introduced the mandatory election procedure and the rates fell back to the 70 percent level.[37] Professor Riddell also found that employer tactics to suppress union certification efforts have been twice as effective under mandatory election laws as under the card-check process, suggesting that certification elections create an environment more conductive to anti-union tactics.[38]

These findings are both worrisome and reassuring. On the one hand, they should trouble us, because the recent legislative trends to blunt the effectiveness of labour law demonstrates that Canada's decades-old international human rights commitments to protect and enhance the collective voice of employees in the workplace have not yet become broadly accepted among our political classes. But, on the other hand, these findings provide an odd reassurance. If labour laws do play a prominent role in increasing or decreasing the levels of unionization within a province or a country, then we retain the capability as political actors to respond meaningfully to the economic forces in front of us. We are not just the objects of invisible hands, but also the subjects of our own destiny.

NOTES

* This is a much shortened excerpt from the Ivan Cleveland Rand Memorial Lecture that I gave at the Faulty of Law, University of New Brunswick on 5 February 2009. The full Lecture is available through a free download at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1411700. The full Lecture has also been published at: (2009), 59 University of New Brunswick Law Journal 14-41.

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1. R. Wilkinson & K. Pickett, The Spirit Level (London: Penguin, 2009).
2. R. Wilkinson, The Impact of Inequality (New York: The New Press, 2005), at chap. 4.
3. World of Work 2008 – Income Inequalities in the Age of Financial Globalization (Geneva: ILO, 2008); and World Development Report 2006 – Equity and Development (Oxford: Oxford University Press, 2006).
4. Growing Unequal? Income Distribution and Poverty in OECD Countries (Paris: OECD, 2008).
5. A. Yalnizyan, The Rich and the Rest of Us: The Growing Face of Canada's Growing Gap (Ottawa: Canadian Centre for Policy Alternatives, 2007), at p. 28.
6. Institute for Competitiveness and Prosperity, Prosperity, Inequality and Poverty (Toronto: ICP, 2007, Working Paper No. 10), at p. 25.

7. A. Sharpe, J-F. Arsenault & P. Harrison, "Why Have Real Wages Lagged behind Labour Productivity Growth in Canada?" (2008), 17 International Productivity Monitor 16.
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9. A. Jackson, Work and Labour in Canada (Toronto: Canadian Scholars' Press Inc., 2005), at Chap. 8.
10. D. Card, T. Lemieux and W.C. Riddell, "Unionization and Wage Inequality: A Comparative Study of the U.S., the U.K. and Canada" (2004), 25 Journal of Labor Research 519.
11. Jackson, supra, note 10.
12. R. Gomez & K. Tzioumis, "What do Unions do to CEO Compensation?" (2007), Centre for Economic Performance Discussion Paper no. 720.
13. World of Work 2008, supra, note 3, at p. 86.
14. For recent economic evidence of this thesis, see the essays in J. Bennett & B Kaufman (eds), What do Unions do? A Twenty Year Perspective (New Brunswick, NJ: Transaction Publishers, 2007).
15. A 2003 study conducted by the World Bank has found no persuasive evidence that union density impairs the economic or employment performance of Western countries. See T. Aidt and Z. Tzannatos, Unions and Collective Bargaining; Economic Effects in a Global Environment (Washington: The World Bank, 2003). .
16. R. Morissette, G. Schellenberg & A. Johnson, "Diverging Trends in Unionization" (2005) 6:4 Perspective on Labour and Income (Statistics Canada) 5, at p. 8.
17. For recent reports that document the historical and current Canadian unionization rate, see: P. Kumar, "Whither Unionism: Current State and Future Prospects of Union Renewal in Canada" (Kingston, Ont.: Industrial Relations Centre, 2008, Discussion Paper # 2008-04); and "Unionization" (2008), 9:8 Perspectives on Labour and Income (Statistics Canada) 17.
18. Kumar, ibid, at p. 5.
19. I emphasize the provincial legislatures because approximately 89 percent of the Canadian labour force is under the labour law jurisdiction of the provinces. The last major reforms to the Canada Labour Code, in 1998, modestly enhanced the organizing capacity of unions in the federally-regulated workplace.
20. There has been statutory reform of labour laws that remains in place today – the federal level in 1998, in Manitoba earlier this decade, in Ontario in 2005 – but it would be a fair comment to say that these changes have been modest and incremental.
21. See: K. Burkett, "The Politicalization of the Ontario Labour Relations Framework in the 1990s" (1998), 5 Canadian Labour and Employment Law Journal 168; and J. McCormack, "Comment on the Politicalization of the Ontario Labour Relations Framework in the 1990s" (1999), 6 Canadian Labour and Employment Law Journal 343.
22. Article 23(4): "Everyone has the right to form and to join trade unions for the protection of his interests."
23. Article 8(1)(a): "The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests."
24. Article 22(1): "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests."
25. Canada Labour Code, R.S. 1985, c.L-2, Preamble: "Whereas the Parliament of Canada desires to continue and extend its support to labour and management in the co-operative efforts to develop good relations and constructive collective bargaining practices, and deems the development of good

industrial relations to be in the best interests of Canada in ensuring a just share of the fruits of progress to all"
26. Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia, [2007] 2 S.C.R. 391, at para. 86: "Recognizing that workers have the right to bargain collectively as part of their freedom to associate reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the Charter."
27. See generally D. Fudge, Collective Bargaining in Canada: Human Right of Canadian Illusion (2nd ed.) (Black Point, N.S.: Fernwood Publishing, 2006); and L. Panitch and D. Swartz, From Consent to Coercion (3rd ed.) (Aurora, Ont.: Garamond Press, 2003).
28. See Delisle v. Canada (Deputy Attorney General), [1999] 2 S.C.R. 989, where the Supreme Court of Canada upheld the constitutionality of federal legislation that excluded RCMP officers, who belong to the largest police force in the country, from a statutory collective bargaining regime. But see Mounted Police Association of Ontario v. Canada (Attorney-General) (Ont. S.C., 6 April 2009).

29. See the litigation surrounding Dunmore v. Ontario (Attorney General), [2001] 3 S.C.R. 1016 and Fraser v. Ontario (Attorney-General), 2008 ONCA 760 (CanLII) (Leave to appeal to the Supreme Court of Canada granted, 2 April 2009).
30. Nova Scotia was the only jurisdiction up until that point to require a certification election for every bargaining unit certification application.
31. Manitoba enacted the mandatory election process in 1997, but reverted to the card-check system in 2000.
32. R. Morissette, G. Schellenberg & A. Johnson, "Diverging Trends in Unionization" (2005) 6:4 Perspective on Labour and Income (Statistics Canada) 5, Table 3, at p. 8.
33. F. Martinello, "Mr. Harris, Mr. Rae and Union Activity in Ontario" (2000), 26 Canadian Public Policy 17.
34. S. Johnson, "Card Check or Mandatory Vote? How the Type of Union Recognition Procedure Affects Certification Success" (2002), 112 The Economic Journal 344.
35. S. Slinn, "An Empirical Analysis of the Effects of the Change from Card-Check to Mandatory Vote Certification" (2004), 11 Canadian Labour and Employment Law Journal 259, at p. 299.
36. T. Bartkiw, "Manufacturing Descent? Labour Law and Union Organizing in the Province of Ontario" (2008), 39:1 Canadian Public Policy 111, at p. 120.
37. C. Riddell, "Using Social Science Research Methods to Evaluate the Efficacy of Union Certification Procedures" (2005), 12 Canadian Labour and Employment Law Journal 313. Also see C. Riddell "Union Certification Success Under Voting Versus Card-Check Procedures: Evidence from British Columbia, 1978-1998" (2004) 57 Industrial and Labor Relations Review 493; and C. Riddell "Union Suppression and Certification Success" (2001) 34 Canadian Journal of Economics 396.
38. Riddell, "Using Social Science Evidence…", ibid.

Karl Marx on Equality

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We live in a world in which wealth, power, resources, life-prospects are very unevenly distributed. American society today is by many measures even more unequal than the capitalist order against which Karl Marx wrote in revolutionary protest in the mid-nineteenth century. As of 2004, the wealthiest 1% in the U.S. owned more than five times as much as the total owned by the bottom half of the wealth distribution, and this inequality has continued to grow: In 2009-2010, as we began to recover from the banker-made financial disaster from which the bankers made billions, the top 1% of US income earners captured 93% of the income growth.[1] The United States is the most unequal of all developed nations, but the inequality between it and poorer countries is even greater. The trend to increasing inequality began in the 1970s; it is accelerating.

The maldistribution could reflect no conceivable measure of desert or distributive justice. It arises not from a "free" market (whatever that might be), but from a market characterized by monopolies and oligopolies, collusion, bought political influence and cronyism, some of it criminal even under our extremely lax laws and regulations. This system of inequality is not merely self-perpetuating but self-reinforcing. Political institutions are largely in the hands of those who benefit most from the inequality, and they are constantly being used to widen, intensify and multiply the disparities between the privileged and the disadvantaged.

It is understandable, therefore, that some among that tiny minority of us malcontented and politically impotent intellectuals who are outraged by this situation should have been busy exploring the idea that social, political and economic equality is something greatly to be valued, either for its own sake or because it is indispensable for the attainment of other social goods

which our society so conspicuously lacks. A little over twenty years ago, G. A. Cohen expressed the egalitarian intuition this way: "I take for granted that there is something justice requires people to have equal amounts of, not no matter what, but to whatever extent is allowed by values which compete with distributive equality."[2] Many others would not put it that way, but nevertheless consider themselves egalitarians, holding that equality should be valued either for its own sake or as a way of promoting other important goods, such as community, political democracy, and personal liberty and self-respect.[3]

Karl Marx opposed the systematic inequalities in the society around him. He also explicitly advocated, at least for the near future, many social measures that egalitarians also support: For example, a graduated progressive income tax, abolition of the right of inheritance, equal liability of all to labor, and universal free public education (CW 6:505).[4] So it is natural for us to think of Marx as an egalitarian of some sort. But Marx definitely did not share the egalitarian intuitions I have just been describing. My task today will be to try to understand why he did not.

Marx and Engels on the meaning of equality

We should begin by noting a subtle difference between the writings of Marx and those of Engels whenever the concepts of equality and inequality come up. Marx, quite frequently, and with very few exceptions, mentions 'equality' only to make the point that it is an exclusively *political* notion, and, as a political value, that it is a distinctively *bourgeois* value (often associated with the French revolutionary slogan: *liberté, égalité, fraternité*). Far from being a value that can be used to thwart class oppression, Marx thinks the idea of equality is actually a vehicle for bourgeois class oppression, and something quite distinct from the communist goal of the abolition of classes (CW 3:79, 163-164, 312-313, 4:39-41, 5:60 ; 6:228, 511; *Capital* 1:280).

Engels, on the other hand, while also repeating these claims, is sometimes more positive in his attitude toward equality. Then he distinguishes 'political equality' or 'equality of rights' from 'social equality' or 'real equality' (CW 3:393-394, 6:5-7, 19, 28-29, 6:346, 10: 414, 24:286-287, 25:19-20, 592). There are a few similar passages, though only a few, that are either by Marx or co-authored (CW 3:79, 163, 5:479). But the differences between Marx and Engels can be seen to narrow when Engels explains further the proletarian demand for "social" or "real" equality:

> "The demand for equality in the mouth of the proletariat has therefore a double meaning. It is either – as was the case especially at the very start, for example in the Peasant War – the spontaneous reaction against the crying social inequalities, against the contrast between rich and poor, the feudal lords and their serfs, the surfeiters and the starving; as such it is simply an expression of the revolutionary instinct, and finds its justification in that, and in that only. Or, on the other hand, this demand has arisen as a reaction against the bourgeois demand for equality, drawing more or less correct and more far-reaching demands from this bourgeois demand, and serving as an agitational means in order to stir up workers against the capitalists with the aid of the capitalists' own assertions; and in this case it stands or falls with bourgeois equality itself. In both cases the real content of the proletarian demand for equality is the demand for the *abolition of classes*. Any demand for equality which goes beyond that necessarily passes into absurdity" (CW 25:99).

Here Engels regards the proletarian demand for equality as standing or falling with the bourgeois demand, and, when it goes beyond the demands of bourgeois equality, as drawing conclusions of doubtful validity. The real meaning of this demand, he thinks, to the extent that this demand has any validity, is the demand for the abolition of classes. In fact, Engels regards the proletarian demand for equality as valid only at a stage of development which he regards as now past:

> "The idea of socialist society as the realm of *equality* is a one-sided French idea resting upon upon the old 'liberty, equality, fraternity' – an idea which was justified as *stage of development* in its own time and place but which, like all the one-sided ideas of the earlier socialist schools, should now be overcome, for it produces only confusion in people's heads and more precise modes of presentation of the matter have been found" (CW 24:73).[5]

Marx and Engels distinguish "abolition of classes" from "equalization of classes," regarding the latter as a recipe for "harmony between Capital and Labor" (of course on Capital's terms, since those terms define the production and class relation). They reject "equalization of classes" on that ground (CW 23:88).

In treating the notion of equality, then, Engels as well as Marx holds fundamentally to two ideas: *first*, that equality is properly speaking only a political notion, and even a specifically bourgeois political notion; and *second*, that the real meaning of the proletarian demand for equality, to the extent that it has a meaning, is the demand for the abolition of classes – and that this demand is a better developed and more precise expression of proletarian aspirations. To understand Marx's reasons for rejecting the common intuition that social justice, in some desirable sense of the term, requires equality, we need to explore further these two ideas.

Equality as a political concept

Bourgeois equality before the law. The Marxian idea that equality is a political notion is itself a complex idea – as complex as Marx's understanding of the political itself. The most basic bourgeois equality, as Marx understands it, is a form of 'procedural equality'[6], namely, *equality before the law*: the legal system must not accord some estates more privileges than others (as was still true in the feudal-aristocratic political orders of early modern Europe) (CW 6:228, 24:286). Thus we find in Kant, for instance, the identification of equality with "independence of being bound by others to more than one can in turn bind them" (MS 6:237, cf. 6:314, TP 8:291-294, 297, EF 8:349-350). This equality, Kant says, "is quite consistent with the greatest inequality in terms of the quantity and degree of their possessions" (TP 8:291-292).[7] Kant's own arguments that the poor have a right that the wealthy should be taxed to support them are based not on considerations of equality but rather of their right to freedom and independence as their own

master (*sui iuris*) (MS 6:325-326, TP 8:295). Fichte's even more far-reaching demands for economic redistribution are based not on equality but on the right to be able to live independently from one's own property (NR 3:212-215, GH 3:402-403.) [8] Both Kant and Fichte here are following Rousseau, who argues that equality is necessary only because freedom cannot exist without it (*Social Contract*, II, 11 [1, 2], p. 78).[9] The wisest philosophers in this tradition thus do not regard inequality in possessions, benefits or opportunities as bad in itself, but do think it necessary to limit it for other ends, especially freedom (independence of the arbitrary will of another). Marx disagrees with this bourgeois tradition on many points, but fundamentally agrees with it on this one.

Bourgeois equal justice. The assumption that equality is a bourgeois notion, involving only equality before the law and formal equality in contractual dealings is what underlies, I believe, Marx's own theoretical requirement in *Capital* that surplus value must be explained on the assumption that equal values are exchanged between formally free and equal economic agents (see *Capital* 1:271, 301). Marx's claim that the sphere in which the capitalist purchases labor power is "a veritable Eden of the innate rights of man… liberty, equality, property and Bentham" (*Capital* 1:280), is quite literally meant, however ironical its intent.

More generally, it ought to be hard to miss the fact – and also impossible to interpret it away – that Marx does not regard capitalist exploitation of labor as unjust, or as any violation of the laborer's rights.[10] In Marx's view, the only rights that could come into question here are those corresponding to the bourgeois mode of production (*Capital* 1:301, cf. *Capital* 3:460-461). Right (*Recht, droit*), for Marx, as for Rousseau, Kant and Fichte, is a concept essentially associated with political and legal institutions, which, on Marx's historical materialist theory, are merely the legal-political superstructure that arises out of its real foundation in the existing mode of

production (CW 29:263). To attempt to apply under the conditions of bourgeois society any standards of right but those corresponding to the capitalist mode of production is, in the words of Engels quoted above, to make "a demand that necessarily passes into absurdity."

We can see such views in action in Marx's critique of the Gotha Program's demands for "a just distribution," and "a distribution of the proceeds of labor to all members of society with equal right." On the Program's demand for a "just distribution," Marx comments with a series of pointed rhetorical questions:

> Do not the bourgeois assert that the present distribution is 'just' [*gerecht*]? And is it not in fact the only 'just' distribution on the basis of the present day mode of production? Are economic relations regulated by concepts of right [*Rechtsbegriffe*], or do not, on the contrary, relations of right arise out of economic ones? (CW 24:8586).

Marx takes the answers to these questions to be plain: Of course the bourgeois *do* assert that the present distribution is just – and Marx agrees with them that it *is* the only just distribution on the basis of the present day mode of production. He agrees, because the materialist conception of history says that economic relations are *not* regulated by concepts of right, but, on the contrary, relations of right *do* arise out of economic ones. Marx then continues:

> "Right can never be higher than the economic structure of society and its cultural development conditioned thereby…Any distribution whatever of the means of consumption is only a consequence of the distribution of the conditions of production themselves. The latter distribution, however, is a feature of the mode of production itself… If the elements of production are [distributed as they are under the capitalist mode of production], then the present day distribution of the means of consumption results automatically" (CW 24:87-88).

This means that the only standards of distribution that can apply in capitalist society are those that result in the capitalist distribution of wealth. As Marx puts it in *Value, Price and Profit*: "To clamor for *equal or even equitable remuneration* on the basis of the wages system is the same as to clamor for *freedom* on the basis of the slavery system" (CW 20:129).

The defects in any equal standard. As we have seen, Cohen takes it to be self-evident that justice requires something to be distributed in equal amounts (setting aside values that might compete with equality), but egalitarians involve themselves in squabbles and perplexities as soon as they ask what the equal standard should be. Some think it should be welfare, others wealth or income, others opportunity or capabilities. Other philosophers recognize that there are multiple dimensions on which equality might be measured. Inequalities, especially on the side of disadvantage, tend to form clusters: Low income often goes along with poor education, poor health, lack of control over one's circumstances, lack of political influence, and so on. There are obviously causal interconnections here too, but how do they work? Sometimes, however, these bad circumstances also come apart, and if we equalize along one dimension, we may fear we are unfairly neglecting those who are disadvantaged along other dimensions. These considerations lead people to ask: Which of these forms of disadvantage should be included in our measures of inequality, and how much weight should be given to each, in deciding what society should try to equalize for its members? Then still other philosophers worry about equalizing in matters for which individuals ought to take responsibility for the actions that make them better or worse off than others. It might be good to equalize, they argue, but not in *these ways*.

Do we really have any idea at all what it is that justice requires that it should be equal for everyone? Even if we doubt that we do, the view still seems to be commonly held that if we could only find the right equal standard, equality of something is still the demand of justice -- or at least one of its demands.[11] Marx's response to all this is simply to reject the egalitarian intuition, and deny there is any equal standard that could be used to formulate some ideal demand of justice. At the same time, Marx recognizes that some equal standard is likely to be applied in fact as long as the (still essentially bourgeois) notions of right and equality are in play.

He accepts that this will have some consequences that can be regarded only as unsatisfactory. (Justice is not for Marx, as it is for Rawls, the first virtue of social institutions – it is simply a feature they display when viewed from a legal and political standpoint.)

The *Critique of the Gotha Program* also deals with the system of distribution Marx expects to prevail under the first phase of post-capitalist society: "a co-operative society based on common ownership of the means of production."

> The individual producer receives back from society – after the deductions have been made ["for replacement means of production, expansion of production, reserve or insurance funds to provide for accidents and funds for those unable to work"] exactly what he gives to it. What he has given to it is his individual quantum of labor… He receives a certificate from society that he has furnished such and such an amount of labor…and with this certificate he draws from the social stock of means of consumption as much as costs the same amount of labor…[Equal right] *is therefore a right of inequality in its content, like every right*" (CW 24:86).

Marx then emphasizes that this is still "equal right" only in the bourgeois sense of the term, even if the standard is no longer bourgeois. It remains unsatisfactory *precisely because* it applies an equal standard.

> "Right by its very nature can consist only in the application of an equal standard; but unequal individuals (and they would not be different individuals if they were not unequal) are measurable by an equal standard only insofar as they are brought under an equal point of view, are taken from one definite side only, for instance, in the present case, are regarded *only as workers* and nothing else is seen in them, everything else being ignored. Further, one worker is married, another is not; one has more children than another, and so on and so forth. Thus with an equal performance of labor, and hence an equal share in the social consumption fund, ne will receive more than another. To avoid all these defects, right instead of being equal would have to be unequal. But these defects are inevitable in the first phase of communist society" (CW 24:86).

To avoid the defects that are inevitable in any system of equal justice, Marx thinks, right instead of being equal would have to be unequal. And he looks forward to a more distant future in which he hopes people will not have to think in terms of right or justice at all:

> "In a higher phase of communist society, after the enslaving subordination of the individual to the division of labor, and therewith also the antithesis between mental and physical labor has vanished; after labor has become not only a means of life but life's prime need; after the productive forces have also increased with the all-round development of the individual, and all the springs of co-operative wealth flow more abundantly – only then can the narrow horizon of bourgeois right be crossed in its entirety and society inscribe on its banners: *From each according to his abilities, to each according to his needs!*" (CW 24:86-87).

This last slogan is now popularly associated with Marx himself, but at the time, and for Marx's intended audience, it would have been associated with Louis Blanc.[12] Its source may also be the New Testament: "And all that believed were together, and had all things common; and sold their possessions and goods, and parted them to all men, as every man had need" (*Acts* 2:44-45). The slogan might therefore just as well be attributed to St. Luke as to Louis Blanc or Karl Marx -- and also held up to Bible-believing Christians as a principle to which their faith commits them. Be that as it may, Marx uses it here precisely because it is *not* a principle of equal right in any sense: Neither people's abilities nor their needs are equal: a society that lived according to Louis Blanc's slogan would not be applying an equal standard either in what it asks of individuals or in what it distributes to them. Further, Marx does not see such distribution in terms of people's rights; for it applies only "after the narrow horizon of bourgeois right [has been] crossed in its entirety."

Marx's deeper critique of the political. Egalitarianism is usually a political notion in another way that hasn't yet been made fully explicit. When people say that justice requires treating people equally from some point of view, or that people have a right to equal amounts of something, the assumption (whether tacit or explicit) is that this treatment or this doling out are going to involve actions of the political state. The basic notion of bourgeois equality is equality before the law. In bourgeois society, this means equality in political terms that correspond to the

laws of the bourgeois economy. As Engels puts it: "Political equality -- what is it but the declaration that class differences do not concern the state, that the bourgeois have as much right to be bourgeois as the workers to be proletarian?" (CW 23:418-419).

It is usually taken for granted that economic redistribution, through tax policy, education policy, land reform and other measures will be carried out through laws and their administration. In whatever way people are being treated as equals, they are going to be regarded as equals fundamentally as citizens of some political entity, such as a nation state – only by some extension of this can one speak of equality in international terms. Marx's deepest reasons for questioning the notions such as right, justice and equality, is that these notions apply to people only in their specifically political identity. But ever since his early essay *On the Jewish Question*,
Marx had the deepest reservations about that way of considering human beings.[13]

Marx's teacher Bruno Bauer argued that Jews should not seek political emancipation until they first emancipate themselves from their religion (as indeed Christians too must do if they are genuinely to be emancipated). In his review essay, Marx objects that Bauer has not understood the nature of political emancipation itself, and its relation to human emancipation (CW 3:149).[14] Human emancipation must belong to that sphere which Hegel called 'civil (or bourgeois) society' (*bürgerliche Gesellschaft*), which is where human beings lead their truly human life.

> "The political state [says Marx] stands in the same opposition to civil society, and prevails over the latter in the same way as religion prevails over the narrowness of the secular world…[Here] the human being…leads a twofold life, a heavenly and an earthly life: life in the *political community*, in which he considers himself a *communal being*, and in *civil society*, in which he acts as a private individual, regards other men as means, degrades himself into a means, becomes the plaything of alien powers…In the state, where the human being is regarded as a species-being, he is the imaginary member of an illusory sovereignty, is deprived of his real individual life and endowed with an unreal universality" (CW 3:154).

When people think of their communal life in terms of rights and justice, they are thinking of their social nature as their political nature, which relegates their real social life in civil society to the status of a private, atomistic and merely self-interested life – the sort of life it actually assumes in bourgeois capitalist society. Their rights as members of the state, therefore, are seen by them not as a positive social or species-life, but only as a set of powers they have over against other human beings – the power to free themselves from the control of others, or to obtain from others, via state coercion, what they can claim by right.

> "None of the so-called rights of man, therefore, go beyond egoistic man, man as a member of civil society, that is, the individual withdrawn into himself, into the confines of his private interests and private caprice, and separated from the community. In the rights of man he is far from being conceived as a species-being; on the contrary, species-life itself, society, appears as a framework external to individuals, a restriction on their original independence. The sole bond holding them together is natural necessity, need and private interest, the preservation of their property and their egoistic selves" (CW 3:164).

The political life of human beings, therefore, is not their real social life, and political emancipation is not human emancipation. Equality, along with right, justice and other conceptions of a merely political nature, are necessarily inadequate expressions of the human aspiration to membership in a free community. This is why these conceptions are also inadequate to genuine human emancipation. This is the point, therefore, at which we should turn to the second of the two Marxian ideas mentioned above – that the true meaning of 'equality' when used by the proletariat is the demand for the *abolition of classes*.

Class society

It is probably natural for us to think of the Marxian notion of a classless society in egalitarian terms. Accordingly, we naturally interpret the Marxian notion of class oppression or

exploitation as a particularly odious form of inequality, and we see the remedy for it (whatever name Marx may choose to give it) as egalitarian in substance and content. The rest of my remarks today will be devoted to explaining why these natural thoughts are profoundly mistaken, at least as an interpretation of Marx.

Marx does not tell us very much about what a classless society would be like. He scorns the enterprise of "writing recipes for the cook-shops of the future" (*Capital* 1:99) and insists that communism "is not an ideal to which reality has to adjust itself. We call communism the real movement which abolishes the present state of things" (CW 5:49). Marx takes this position because, to a perhaps surprising extent, he accepts Hegel's view that "the owl of Minerva begins its flight only at dusk"[15] – in other words, that future human history is necessarily largely opaque to us, though Marx thinks we can perceive those tendencies in the present toward future developments, and choose to align ourselves with those we favor. We learn little in Marx about the socialist, communist or classless society of the future, except through what we learn from him about the class society of the present day, and those aspects of human life he thinks depend on social classes and class antagonisms.

Marx began a Chapter on classes in Volume 3 of *Capital*, but the draft breaks off after only a couple of paragraphs. The only point he makes is the negative one that classes are *not* to be distinguished merely on the basis of different sources of revenue (e.g. landowner: rent, capitalist: profit, worker: wages). "From this standpoint, physicians and officials, for instance, would also form two classes…The same would hold for the infinite fragmentation of interests and positions into which the division of social labor splits laborers and capitalists" (*Capital* 3:1025-1026). Elsewhere, however, Marx tells us more about classes. They arise out of production relations, he says, because these relations "create masses with a common situation, common interests" (CW

6:211). But such masses, with opposing interests, become classes, in Marx's view, only when they engage in some kind of common action sufficient to make them potent forces in history – either in the role of ruling class or revolutionary class, or at least as a subordinate player in the struggles between the main classes that determine a historical epoch or the revolutionary transition between epochs. The common situation of a class, that give its members shared interests, makes it into a class potentially or in itself; it becomes a class actually or for itself, or "constitutes itself as a class," only when it acts as a class, through common social, political or intellectual deeds (CW 6:211, CW 11: 187). "Only then do the interests it defends become class interests" (CW 6:211). Class interests, moreover, always consist in an opposition to other class interests. "Separate individuals form a class only insofar as they have to carry on a common battle against another class" (CW 5:77). The very existence of classes is constituted by a class struggle (CW 6:482). A class society, in its very concept, is one in which the interests of some are irreconcilably opposed to the interests of others. In such a society, any conception of general interests, or of universal values or principles having normative authority for all members of society, is necessarily an illusion: typically, it is the illusion of the ruling class. This is why "law, morality, religion, are [to the clearsighted proletarian, only] so many bourgeois prejudices, behind which lurk in ambush just as many bourgeois interests" (CW 6:494-495).

The process by which a class arises out of a set of production relations is a process necessarily involving people's ideas and consciousness, and also a process involving activities (especially political ones) that pertain to the social superstructure rather than to the economic foundation of society. For this reason, it is a fundamental misunderstanding to think that Marx regards only economics as determining human history, and treats politics, law, morality, religion as merely "epiphenomenal". The language of "superstructure" and the Marxian phrase "social

being determines consciousness" are not about the effectiveness or ineffectiveness of that to which these terms apply, but instead about their opacity to those individuals that act in terms of them. The point is that superstructural activities are not typically understood for what they are by those subject to them: class-consciousness does not typically employ the concept of 'class' at all. The most characteristic concept it employs, in fact, is precisely that of *general* or *universal* interests, principles, laws, norms or values: for example, those of right or justice, morality, or the common interests of society on which the authority of a political state is thought to rest. This happens when the interests of a particular class "develop in spite of the persons into common interests, standing independently over against the individual persons and in this independence assuming the form of *general* interests" (CW 5:245).

> "On the different forms of property, on the social conditions of existence, here arises a whole superstructure of different and characteristic feelings, illusions, modes of thinking and views of life. The whole class creates and shapes them from its material foundations and out of the corresponding social relations. The single individual, to whom they flow through tradition and education, can imagine that they are the real motives and starting point for his action" (CW 11:128).

And as far as his own psychological motives are concerned, he may be right in imagining this. It is not a matter of self-deception about his own motives, as if he were mistaking selfish class interests for the true values that he thinks are motivating him. The illusion rather consists in not understanding the true social source and power of these ways of thinking, ascribing to them an objective meaning and authority they don't have -- because, in fact, nothing ever has it.

It is *not* Marx's view that bourgeois conceptions of justice, right, morality are merely class interests usurping the place of the true or genuine standards (which, we might think, Marx would identify with proletarian standards, or the standards that will apply in some future communist society after classes have been abolished). Marx holds instead that the whole concept of general

interests, universal principles or values, anything that might claim authority over individuals in the name of some common interest or objective truth about right or morality, is never anything but the interests of some particular class falsely claiming such an authority. The very concept of universal moral authority, in Marx's view, is a product of class society and would have no application were it not for its mystifying and ideological use in class struggles. A class interest falsely claiming universal validity or authority is the closest thing there ever is, or ever could be, to anything actually having such validity or authority.

This is why, in Marx's view, individuals do sacrifice their individual egoistic interests to class interests (those of their own class, or even sometimes of a class hostile to them). And this is just as true of proletarian class interests as of any others. The difference is – and here Marx gives to capitalism a great deal of credit – that in modern bourgeois society "man is at last compelled to face with sober senses, his real conditions of life and his relations with his kind" (CW 6:487). It therefore becomes possible for communist consciousness to accept the fact that it struggles, and even makes individual sacrifices, not in the name of any universal interest or objective principle of right or justice, but simply on behalf of the class interests of a revolutionary class: "Communists know very well that under determinate relations egoism as well as self-sacrifice is a necessary form of the successful interaction of individuals… [Both] are sides of the personal development of individuals, equally generated by the empirical conditions of life" (CW 5:246247). Nor does Marx think that egoism is in general any more or less "rational" than selfsacrifice on behalf of the interests of some class. Both motives are equally products of the social conditions of life, and once individuals come to understand this, it is up to them, as free individuals, to decide by which their actions should be motivated.

Marx thinks that social relations of the past – in the modern world, especially bourgeois social relations – have created the prejudice, or illusion, that egoism is more "rational" than selfsacrifice for a revolutionary cause, as well as the equally mystified illusion that self-interest can be rationally overridden only by some universal or objective interest or value. Neither egoism nor class interest has more "natural" authority than the other -- nor, for that matter, does either have any *natural* authority at all. Such talk belongs entirely to the historically conditioned illusions to which class society has made us susceptible. All such motivational patterns have only the rational authority that the clearsighted thinking of individuals might give them. What Marx is saying in the above passage is that communists, once they come to understand social life and history materialistically, will be freed from all such illusions. This is the liberation that becomes possible for us when we face with sober senses our true relations with our kind.

Marx and Stirner

There is nevertheless a temptation to seek in Marx (or read into him) some conception of a system of rightful distribution that will govern future communist society – what Engels once referred to as "a human morality which stands above class antagonisms" (CW 25:88). Marx, however, never uses such phrases, and to the imagined charge that "communism abolishes…all religion and morality, instead of constituting them on a new basis," the *Manifesto* replies only that "the Communist revolution is the most radical rupture with traditional property relations; no wonder that its development involves the most radical rupture with traditional ideas" (CW 6:504). The response, in other words, is that the "abolition of all morality" is part of that radical rupture.

The unpublished manuscript of *The German Ideology*, which Marx and Engels willingly left (as Marx says) to the gnawing criticism of the mice (CW 29:263), devotes well over three hundred pages of often tedious polemic to attacking Max Stirner's 1844 book *The Unique Individual and His Property.*[16] It is seldom appreciated how far they had gone in the earlier pages of *The German Ideology* (and how far Marx himself went in all his writings) toward accepting some of Stirner's more radical ideas. Stirner's book was a critique of everything that he thought served to enslave the individual personality, to subject it to any form of 'hierarchy' or the 'dominion of thoughts', which deprive it of what is authentically its own. This critique begins with religion, but extends to all morality, even including all ideals of human flourishing, and takes in all forms of social authority, family, community, state or party, which might claim precedence over the egoism of the unique individual.

Marx clearly rejected some basic elements of Stirner's creed, such as his designation of 'egoism' as the free individual's orientation and his rejection of all social ties that could not be seen by the egoist as merely forms of his own "self-enjoyment". But Marx accepted the idea that all interests, ideals and principles that claim universal authority are to be rejected as *ideology* in a sense equated with "the dominion of thoughts" and are therefore false impositions on human freedom (CW 5:24, 43-45, 59-61). This false universality is now interpreted by Marx and Engels as an expression of a society divided into warring classes; it is the way class interests try to impose themselves on us as having some sort of transcendent or sacred authority (CW 5:46-47, 61-63). A society that has transcended class antagonisms, therefore, would not be one in which some truly universal interest at last reigns, to which individual interests must be sacrificed. It would instead be a society in which individuals freely act as the truly human individuals they are. Marx's radical *communism* was, in this way, also radically *individualistic*.

> "Only within the community has each individual the means of cultivating his gifts in all directions; hence personal freedom becomes possible only within the community. In the previous substitutes for community, in the state, etc., personal freedom has existed only for the individuals who developed under the conditions of the ruling class, and only insofar as they were of this class" (CW 5:78).

The motivations of free individuals in a genuine community might be described either as egoistic or altruistic, or rather, as Marx puts it in his excerpt-notes of 1844, they would be both at once, because for social individuals there is a natural harmony or even identity between what actualizes me, fulfills my needs, and what actualizes others or fulfills their needs, and at the same time actualizes the species being that belongs simultaneously to myself and others: "In the individual expression of my life I would have directly created your expression of your life, and therefore in my individual activity I would have directly *confirmed* and *realized* my true nature, my human nature, my communal nature" (CW 3:228).

> "Communism differs from all previous movements in that it overturns the basis of all earlier relations of production and for the first time treats all naturally evolved premises as the creations of hitherto existing human beings, strips them of their natural character and subjugates them to the might of the united individuals" (CW 5:81). "It is the association of individuals…which puts the conditions of the free development and movement of individuals under their control" (CW 5:80).

There is no reason to think that Marx believed that the abolition of class society would do away with all sources of conflict between individuals, or bring them into total agreement on how to direct their collective future. Post-class society for him is not the end of history but only the end of human "pre-history" (CW 29:264). But Marx thinks that in all past society (beyond the most primitive stages of economic development), these conflicts and disagreements have been determined in both form and content by the pervasive fact of class conflict. What people have represented to themselves as a "war of all against all" or "unsociable sociability" arising from human nature itself is, for Marx, as it was also for Rousseau, not a fact of nature but a social

product. But human history has been even more deeply a history of human co-operation than of the antagonistic forms this co-operation has assumed. Marx holds that humanity has the chance to retain the social co-operation without class conflict, because "all previous historical movements were movements of minorities, or in the interest of minorities. The proletarian movement [however] is the self-conscious independent movement of the immense majority in the interest of the immense majority" (CW 6:495). This is why he thinks the proletariat has the opportunity to abolish class society and begin *human* history.

Coming to terms with Marx on equality

My aim so far has been to present *Marx's* views, and draw out their implications for what he thinks about the causes of social inequality and about ideals of social equality. I have even been trying to defend these views, at least in a limited and conditional way, by arguing that they make coherent sense, and by presenting Marx's reasons for holding them. But since I don't myself accept the entire Marxian story, I suppose I owe it to you in conclusion to say something about where I myself stand in relation to all of this. Since I began seriously studying Marx in the mid-1960s, I have always found his basic critique of capitalism entirely convincing. Nothing that has happened in the past half century has budged me a single iota from that conviction. But I have never been attracted only to that part of Marx I found compelling or credible. The following are the best explanations for that curious fact that I am able to come up with:

Next to the sick, abominable unthinking hostility toward Marx's ideas that prevails in much of the world, and especially in this hopelessly benighted land, the most contemptible obstacle to their sympathetic reception has always been the dogmatic pseudo-religious attitude of uncritical acceptance found among many of his self-appointed followers, especially those that have been

best organized and most resolute. I think I am drawn to the most radical and adventurous of Marx's teachings -- those a sensible person can be least comfortable adopting uncritically -- precisely because I want to distance myself from this second way Marx's thought has been abused just as much as from the first way.

Then too, Marx's critical attitudes toward right and justice, and his radical rejection of all universal moral standards, have always had, if not a direct appeal, at least a special kind of attraction for me. I am attracted to these radical ideas because, even as I find myself unable to swallow them whole, they do seem to me to make a kind of sense. They certainly involve a form of metaethical antirealism -- if not about all values, then at least about those values associated with right and morality. I find it refreshing that Marx frankly and openly accepts the radical rejection of all morality that plainly and necessarily goes with any such metathical position. Here, very much to his advantage, Marx stands in sharp contrast to the squalid dishonesty found among ethical 'emotivists,' 'projectivists,' 'fictionalists', 'quasi-realists' and others who embrace essentially the same view, but then proceed to quibble and prevaricate in cowardly evasion of the radical conclusions that obviously do follow from their bleak moral nihilism.

As far back as I can remember, I have always thought, contrary to Marx, that there are objective standards of right and ethics, which are not mere masquerades worn by class interests (or by any other sort of subjective conation, feeling or attitude). For almost as long, I have thought that Marx's correct account of capitalist relations and capitalist society can be used to show that the capitalist exploitation of labor violates the rights of workers – not on any grounds of equality, but because workers have a right to lead their lives free from the coercive power that capitalists have always exercised over them in really existing capitalism. I accept the idea that human beings have dignity, and that this makes them equal *as persons*. But this does not imply

that they must be treated alike, or that there is anything of which all people must be given equal shares. Louis Blanc's slogan appeals to me, as it did to Marx, in large part because of its directly anti-egalitarian implication that society should *not* treat people equally. It is self-evident that any decent society should demand more of those who have more to give, and provide more to those whose needs are greater. It is not the least of the evils of capitalism that it has corrupted people, making this truth seem less self-evident to many of them than it is. Those to whom it does not shine as brightly as the sun ought to have to go and live in the wilderness, deprived of all the advantages of social life, until their vision clears. Further, in order to protect the freedom that human dignity requires, it seems equally evident that a decent society should be aggressive in protecting the freedom of vulnerable, which demands sharp restriction of the freedom[17] of those in a position to take advantage of them.[18]

But to return to my settling accounts with Marx: It has taken me a long time to realize that my biggest disagreement him is over capitalism, of which his opinion was *far too favorable*. Marx thought capitalism was a transitional economic form, whose historic mission was to elevate the productive powers of humanity – albeit at terrible human cost – to the point where they would offer abundance to all in a higher and freer society. For a long time after his death it looked as if he might be right. But I fear this is no longer the way capitalism can appear to us. Now it looks like only a quagmire, a quicksand, in which our species – unable or unwilling to extricate itself – may eventually be doomed to perish miserably, or at least to suffer from want and misery, due to the long-term effects – the unsustainable way of life – brought on by the very technology Marx thought was capitalism's great liberating gift to humanity. Capitalism, however, has so degraded our humanity – blinding us to the insight of Louis Blanc (or of the New Testament), reducing us to abject slavery to capitalism's inhuman social forms -- that the

prospect of our extinction may no longer offer any cause for regret -- unless we find it in the comfortless words of Willa Cather: "Even the wicked get worse than they deserve."[19]

Notes

[1] This was an estimate prepared in 2004 by Arthur B. Kennickell on behalf of the Federal Reserve Board: http://www.wealthandwant.com/issues/wealth/50-40-5-4-1.htm Since such inequalities have been growing steadily since then, it is a very conservative estimate of how things are now. For further statistics, see http://inequality.org

[2] G. A. Cohen, "On the Currency of Egalitarian Justice," *Ethics* 99 (1989), p. 906. Cf. Richard Arneson, "Equality and Equal Opportunity for Welfare," *Philosophical Studies* 56 (1989), Larry Temkin, *Inequality* (Oxford: Oxford University Press, 1993), and Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge: Harvard University Press, 2000).

[3] See David Miller, "Arguments for Equality," *Midwest Studies in Philosophy* (1982), and "Equality and Justice," *Ratio* 10 (1997); T. M. Scanlon, "Equality of Resources and Equality of Welfare: A Forced Marriage? *Ethics* 97 (1986); Amartya Sen, *Inequality Reexamined* (Cambridge, MA: Harvard University Press, 1992); Martin O'Neill, "What Should Egalitarians Believe?" *Philosophy and Public Affairs* 36 (2008); and D.M. Hausman and M.S. Waldren, "Egalitarianism Reconsidered," *Journal of Moral Philosophy* 8 (2011).

[4] Writings of Marx and Engels will be referred to using the following system of abbreviations:

CW *Marx Engels Collected Works*. New York: International Publishers, 1975- . Cited by volume: page.
Capital Marx, *Capital*. tr. B. Fowkes and D. Fernbach. New York: Vintage, 1977-1981. Cited by volume: page.

[5] Marx did include in the *Rules of the International Workingmen's Association*, as among aims of the Association, the following words: "…equality of rights and duties and the abolition of class rule" (CW 20:14, 23:3). It seems clear that he accepted "equality of rights and duties" because others insisted on it, and he thought it did no harm if followed immediately by "the abolition of class rule', which he took to be a better expression of the same aim.

[6] As John Rawls long ago pointed out, the procedural interpretation of equality – "treating like cases alike" – is very weak in its demands. Depending on the grounds that may be offered to justify inequalities, it is consistent with caste systems or even slavery. Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), pp. 507-508. Marx clearly thinks that procedural conceptions of equality tailored to bourgeois legal and political institutions will merely support the class oppression to whose divisions these bourgeois institutions correspond.

[7] Kant's writings will be cited according to the following system of abbreviations:

Ak *Immanuel Kants Schriften*. Ausgabe der königlich preussischen Akademie der Wissenschaften. Berlin: W. de Gruyter, 1902 -. cited by volume:page number in this edition.

Ca Cambridge Edition of the Writings of Immanuel Kant (New York: Cambridge University Press, 1992-) This edition provides marginal Ak volume:page citations.

EF *Zum ewigen Frieden: Ein philosophischer Entwurf* (1795) , Ak 8
Toward perpetual peace: A philosophical project, Ca Practical Philosophy

MS *Metaphysik der Sitten* (1797-1798), Ak 6
Metaphysics of morals, Ca Practical Philosophy

TP *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis* (1793), Ak 8
On the common saying: That may be correct in theory but it is of no use in practice, Ca Practical philosophy

[8] Fichte's writings will be cited according to the following system of abbreviations:

SW *Fichtes Sammtliche Werke*, edited by I. H. Fichte. Berlin: deGruyter, 1970. Cited by volume: page number.

GH *Der geschlossene Handelstaat* (1800), SW 3

NR *Grundlagen der Naturrecht* (1796), SW 3
Foundations of Natural Right, ed. F. Neuhouser, tr. M. Baur. New York: Cambridge University Press, 2000.

[9] "If one inquires into precisely what the greatest good of all consists in, which ought to be the end of every system of legislation, one will find that it comes down to these two principal objects: *freedom* and *equality*. Freedom, because any individual dependence is that much force taken away from the state; equality, because freedom cannot subsist without it… As for wealth, no citizen should be so very rich that he can buy another, and none so poor that he is compelled to sell himself" (p. 78). Rousseau, *On the Social Contract*, is cited by page number from *The Social Contract and other later political writings*, ed. and tr. V. Gourevitch. Cambridge: Cambridge University Press, 1997.

[10] See Allen Wood, *Karl Marx*, 2nd edition. London: Taylor and Francis, 2004, Chapters 9-10 and 16.

[11] But if for some x, whatever x may be, justice truly demands that everyone have an equal amount of x, then it looks like an injustice to let any other value permit us to distribute more of x to some than to others. I am not sure how egalitarians should deal with that problem.

[12] "*À chacun selon ses besoins, de chacun selon ses facultés*" is usually attributed to Louis Blanc, then one cites his book *L'Organisation du travail* (1839), 5th edition: Paris: Au bureau de la société de l'industrie fraternelle, 1847. But this is not a direct quotation from that work. "*De chacun selon ses moyens, à chacun selon ses besoins*" is rather a quotation from Louis Blanc's 1851 pamphlet *Plus de Girondins*.

[13] There is a brief but very good discussion of this essay, with which the following paragraphs are largely in agreement, in Jonathan Wolff, *Why Read Marx Today?* Oxford: Oxford University Press, 2002, especially pp. 4047. Compare Wood, *Karl Marx*, pp. 51-58, 63-66.

[14] "We do not say to the Jews as Bauer does: You cannot be emancipated politically without emancipating yourselves radically from Judaism. On the contrary, we tell them: Because you can be emancipated politically without renouncing Judaism, political emancipation is not human emancipation" (CW 3:160).

[15] Hegel, *Elements of the Philosophy of Right*. ed. A.W. Wood, tr. H. B. Nisbet, Cambridge: Cambridge University Press, 1991, p. 23.

[16] The standard English title of Stirner's book is *The Ego and Its Own*, trans. David Leopold (Cambridge: Cambridge University Press, 1995). This title is no doubt meant to capture the fact that Stirner describes his position as 'egoism'. But 'Einzige' means 'individual' or 'unique', and it is essential to Stirner's view that the free individual is entirely unique, self-defined, not subject to any universal standards, whether of right, morality or even general human self-actualization, flourishing and well-being. Marx adopts from Stirner the idea that free individuals are not subject to universal standards; in a classless society they will be merely the (social) individuals they are.

[17] "A Yankee comes to England, where he is prevented by a Justice of the Peace from flogging his slave, and he exclaims indignantly: 'Do you call this a land of liberty, where a man can't larrup his nigger?'" (CW 5:210). In the American south, freeing slaves was seen as (what it also actually was) a curtailment of the liberty of slaveholders. Today in the U.S., by the same reasoning as that used by the Yankee in the above quotation, it is universally regarded by the economically dominant political party (the party of corporations and the top 1%) as an encroachment on natural liberty (the liberty of employers, or the freedom of the "free market") when workers seek to organize and bargain collectively, or when the state seeks to regulate working conditions so workers are protected from injury. But in the political world – Marx would say: in all class society -- there can be no such thing as promoting 'liberty' in general. Protecting one person's liberty necessarily requires curtailing another's. The question is only whom we choose to emancipate and whose liberty we choose to curtail. Our monstrously unequal society, like a society based on slavery, systematically favors the liberty of the victimizers over that of the victims.

[18] Some egalitarians may try to take account of the point I am making by means of what is commonly called 'luck egalitarianism.' For example, see Richard Arneson, "Luck Egalitarianism Interpreted and Defended," *Philosophical Topics* 32 (2004). I am sure the "luck egalitarians" mean well, and the policies they advocate in practice are probably policies I would also favor. But, to begin with, it is not *luck* at all, but rather a structural necessity of modern capitalism, that it leaves the majority of workers helpless and at the mercy of capital. See G. A. Cohen, "The Structure of Proletarian Unfreedom," in John Roemer (ed.) *Analytical Marxism*. Cambridge: Cambridge University Press, 1986. So "luck egalitarianism" (taken literally) seems committed to leave capitalist oppression intact (since this oppression is not a result of luck). Perhaps, however, the idea is that it is luck that determines who is assigned to which class, and the luck egalitarians want somehow to compensate for that. But can they do so, while leaving class society intact? It looks as if "luck" in luck egalitarianism is being understood in such a way that luck egalitarianism requires society to treat people *unequally* in whatever way turns out to be necessary to make up for the unequal distribution of "luck" (in whatever arbitrary way the luck egalitarian chooses to define this latter term). In that case, I submit that luck egalitarianism is not a form of *egalitarianism* at all, but rather an open-ended invitation to treat people *unequally* in whatever ways seem fairer to us than any kind of *equal* treatment would seem. So why try to sell these polices under the "egalitarian" brand? I fear that once again, the fraudulent pitch is being made to the oppressors that in a just society they would not be treated any worse than the oppressed. Are we hoping that if we use the word 'equality,' they won't notice that their advantages are being taken away from them with the direct aim of protecting those they victimize? (Oppressors, however, never have been and never will be stupid enough to fall for such a ruse.) If it were really true, on the other hand, that oppressors and oppressed were being treated *equally*, then the 'just' society would merely be countenancing the oppression. However, the capitalist should no more be treated equally with the worker than the loan shark, the price-gouger, the blackmailer or the human trafficker should be treated equally with those *they* oppress. You have to admit that capitalism itself is like these other exploitative relations. You have to barge right in and take the freedom to exploit away from the oppressors, so as to give to their victims the freedom not to be exploited. But you won't get the exploiters to agree to this no matter what evenhanded sounding words you use. So don't try to whitewash what you are doing by pretending that everyone is being treated the same. Marx thought that 'equality' is a hopelessly political notion. When you use the idea of equality in this way, 'equality' becomes a "political" notion in yet another very recognizable sense of the term: like political rhetoric in general, it stinks of euphemism and mendacity.

[19] Willa Cather, *One of Ours* (1922) (West Valley, UT: Waking Lion Press, 2006), p. 206: "'Claude, my boy,' the doctor spoke with sudden energy, 'If I ever set foot on land again, I am going to forget this voyage like a bad dream. When in normal health, I'm a Presbyterian, but just now I feel that even the wicked get worse than they deserve.'"

LEFT-LIBERTARIANISM, MARKET ANARCHISM, CLASS CONFLICT AND HISTORICAL THEORIES OF DISTRIBUTIVE JUSTICE

Roderick T Long[*]

A frequent objection to the 'historical' (in Nozick's sense) approach to distributive justice is that it serves to legitimate existing massive inequalities of wealth. It is argued that, on the contrary, the historical approach, thanks to its fit with the market anarchist theory of class conflict, represents a far more effective tool for challenging these inequalities than do relatively end-oriented approaches such as utilitarianism and Rawlsianism.

Historical vs End-state

Resolving disputes over control of resources is a central function of any legal system; indeed, for many theorists – including Cicero and Locke – the protection of legitimate property claims is the chief *raison d'être* of having a legal system in the first place.[1] Determining what principles should govern the recognition and adjudication of property claims is the province of distributive justice.

In *Anarchy, State, and Utopia*, Robert Nozick famously distinguishes between two approaches to distributive justice (or, to use his preferred terminology, justice in holdings): a present-oriented or end-oriented approach that looks at how resources are currently distributed without taking the past into account, and an historical approach that assesses the justice of present-day distributions by looking to the causal process by which they arose.[2]

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1 'The primary concern of any administrator of a republic must be to see that each person shall keep what belongs to him, and that private persons shall not have their goods taken by public enactment ... For it was above all for the sake of ensuring that each shall retain his own that republics and states were set up. For while [mere] human association is a natural impulse, nevertheless it was in the hope of maintaining custody of their possessions that people sought the protection of cities ... For this, as I noted above, is the special function of a state and a city: to secure to each person free and unmolested custody over his own possessions.' Cicero (1994), II. 73, 78; translation mine.

'The great and *chief end* therefore, of Men's uniting into Commonwealths, and putting themselves under Government, *is the Preservation of their Property*.' *Second Treatise of Government* IX. 124; Locke (1988), pp 350–51.

2 Nozick (1974), Ch 7.

Of course, that's a somewhat oversimplified characterisation of the distinctions, *plural*, that Nozick is making in that section. Readers of Nozick often conflate the approaches he dubs *end-state*, *patterned* and *current-time-slice*, yet Nozick explicitly notes, first, that not all end-state theories are current-time-slice theories, and second, that some patterned theories are actually historical theories (as opposed to being *either* end-state or current-time-slice theories).[3] We should also avoid conflating *historical* theories in general with the narrower class of *entitlement* theories and the still narrower specifically *neo-Lockean* theory that Nozick defends. And it is a still further mistake to assume that, for example, utilitarian and Rawlsian approaches – to mention two of Nozick's chief targets – automatically count as end-state approaches, at least in any straightforward sense; after all, a utilitarian will happily take historical considerations into account if doing so tends to maximise social welfare, and the Rawlsian will as happily take historical considerations into account if doing so tends to maximise the welfare of the least advantaged. (Indeed, just this is arguably the point of Rawls' defense of the difference principle.)

But, having pointed out these complexities, I now propose to ignore them – because there is still a useful, broad distinction between approaches to distributive justice that emphasise final patterns of holdings (a description that often applies – albeit, as we've seen, contingently – to actual utilitarian and Rawlsian theorising), and those that emphasise the process by which such patterns arise; and for the thesis I propose to defend, broad differences in emphasis are more important than the precise details of particular theories and principles. In particular, my present concern is less with what a given principle directly entails and more with the role it plays in people's way of conceptualising their social environment.

A frequent objection to – and for others, perhaps, an attractive feature of – the historical approach is that it serves to legitimate, and even exacerbate, existing massive inequalities of wealth. David James, for example, writes that 'the incremental inequalities that result over time from Nozick's theory will almost certainly lead eventually to a situation in which a few wealthy individuals (or corporations) control or own all the levers of power'.[4] Will Kymlicka argues that Nozickian libertarianism is a bad deal for those who 'enter the market after others have appropriated all the available property' – that it 'restricts the self-determination of the propertyless worker' and 'makes her a resource for others'.[5] Brian Barry accuses Nozick of 'proposing to starve or humiliate ten percent or so of his fellow citizens ... by eliminating all transfer payments through the state'.[6] And in a section titled 'Nozick *contra* Equality', Jonathan Wolff writes that 'it is likely – some would say certain – that in a libertarian society massive

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3 Nozick (1974), pp 155–56; cf Schmidtz (2005), p 159.

4 James (2011), para 11.

5 Kymlicka (1990), p 121

6 Barry (1975), p 331.

inequalities would develop,'[7] and reports his dismay, on first reading *Anarchy, State, and Utopia*, at discovering that Nozick's 'initial commitment to liberty seemed to lead, not to equality, as I had assumed, but to inequality'.[8]

I shall argue that, on the contrary, the historical approach – thanks to its fit with the market-anarchist theory of class conflict – represents a far more effective tool for challenging these inequalities than do relatively end-oriented approaches such as utilitarianism and Rawlsianism, *even when the latter approaches would condemn the inequalities just as much as the historical approach does*.

My aim here is relatively limited. I am not concerned primarily to show that (a) the historical approach is correct (although, as will be evident, I think it is); nor am I primarily concerned to show that (b) existing inequalities of wealth are to be condemned (although, as will again be evident, I think they are). My aim is rather to show that egalitarian thesis (b), far from being an objection to libertarian thesis (a), is actually supported by (a), and indeed is more effectually supported by (a) than it is by the sorts of reasons usually advanced on (b)'s behalf by critics of (a). Of course, for those who already accept thesis (a), my arguments will provide reason to accept thesis (b); and conversely, for those who already accept (b), my arguments will provide reason to accept (a). So, in that sense, I am after all providing positive arguments on behalf of *each* thesis – but these arguments are not designed to move anyone who has no prior attachment to *either* thesis. Providing arguments that might do *that* is a task beyond the scope of the present article.

I will proceed in three stages. First, I will show how, in the light of market-anarchist class theory, an historical approach condemns existing inequalities rather than legitimating them. Second, I will argue that its condemnation is more effective – in a sense of 'more effective' to be explained – than that of its end-oriented rivals. Finally, I will address a common objection to the feasibility of implementing this conception of distributive justice in the context of a market-anarchist legal system.[9]

Market-Anarchist Class Theory

Let's first consider the charge that the historical approach serves to legitimate existing massive inequalities of wealth. It is true, of course, that the historical approach *would* legitimate these inequalities *if* they had emerged by a series of just transfers from just original appropriations (or else

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7 Wolff (1991), p 123.

8 Wolff (1991), p vii.

9 By 'market anarchism', I mean the view that all legitimate functions of the state can and should instead be provided via a competitive market. Early defenses include Molinari (2009), Tandy (1867) and Tucker (1897); more recent defenses include Barnett (1998), Benson (2011), Chartier (2013), Friedman (1989), Rothbard (1998, 2006) and Skoble (2008); a famous critique is Nozick (1974). Anthologies on the subject include Stringham (2006, 2007), and Long and Machan (2008).

from a series of transfers and appropriations whose injustices had all been properly rectified). But then, it is equally true that the utilitarian and Rawlsian approaches would legitimate such inequalities, *if* the inequalities promoted social advantage (aggregate or mutual, respectively). So why is this hypothetical urged more strongly against the historical approach than against the utilitarian and Rawlsian approaches – especially since few people believe that the antecedent is satisfied in *any* of the three cases?

I suspect it is because of the widespread assumption that the historical approach, if strictly adhered to, would be likely to eventuate in a distribution of holdings *broadly comparable* to existing inequalities (even if the specific holdings would in many cases belong to different people from those to whom they currently belong), whereas such an assumption is less commonly made concerning utilitarianism, and still less commonly concerning Rawlsianism.

Even Nozick himself seems to think of his arguments as legitimating an economic landscape broadly comparable to our own, for while he insists that applying his historical principles of justice would probably require a radical redistribution of existing holdings – a point seldom stressed by either his defenders or his critics – he does not appear to envision its entailing any radical change in the overall *structure* of wealth distribution.[10] For example, he takes for granted that the implementation of his neo-Lockean entitlement theory will involve the dominance of traditional 'capitalist' firms (as opposed to, say, workers' cooperatives).[11] More on this anon.

Kevin Carson has coined the terms 'vulgar libertarianism' and 'vulgar liberalism' for the tendencies, respectively, to treat the benefits of the free market as though they legitimated various dubious features of actually existing 'capitalist' society (vulgar libertarianism), and to treat the drawbacks of actually existing 'capitalist' society as though they constituted an objection to the free market (vulgar liberalism).[12] Vulgar libertarianism and vulgar liberalism share a common assumption: that the present (or, sometimes, the past) economic realities of Western 'capitalist' countries constitute at least an approximate stand-in for a genuine free market, so that the two stand or fall as a package, but vulgar libertarianism and vulgar liberalism are opposed in their evaluations, with one endorsing and the other rejecting the package in question.

By contrast, left-libertarianism denies the shared assumption, holding instead that the differences between actually existing 'capitalism' and a genuine free market are so great that a defence of the latter provides not a legitimation but rather a radical condemnation of the basic structure of the former.

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10 Nozick (1974), pp 230–31.

11 Nozick (1974), pp 250–53. For my reasons for placing the terms 'capitalist' and 'capitalism' (in their ideological sense) in scare-quotes throughout, see Long (2006a), where I argue that the term as ordinarily used essentially presupposes an identification of free markets with corporate privilege, and so cannot coherently be used (except in scare-quotes or with some other qualifier) by those who deny this presupposition. For further criticism of prevailing usage, see Chartier (2010) and Johnson (2011).

12 Carson (2005a, 2005b, 2006b).

By left-libertarianism, I mean the position that Carson has described as agreeing 'with the Greens and other left-wing decentralists on the evils to which they object in current society and on their general view of a good society,' but 'with free market libertarians on their analysis of the cause of such evils and how to get from here to there' or, in summary form, 'green ends with libertarian means'.[13] In historical terms, I mean the movement that, while having its roots in the individualist anarchism of the nineteenth century (particularly such figures as Thomas Hodgskin, Lysander Spooner, Benjamin Tucker and Voltairine de Cleyre), emerged or re-emerged in the 1960s through the rapprochement between free-market libertarianism and the New Left (as represented by Murray Rothbard's journal *Left & Right*, as well as the early years of its successor, *Libertarian Forum*), was continued in the 1970s by Samuel Konkin's 'Movement of the Libertarian Left' and broadened in recent years into the Alliance of the Libertarian Left.[14] Left-libertarianism in this sense should not be confused with the more recent use of the term to describe the neo-Georgist position of such theorists as Peter Vallentyne, Hillel Steiner and Michael Otsuka (though overlap between these two forms of left-libertarianism is certainly possible).

Left-libertarianism relies on what has come to be called libertarian class theory or market-anarchist class theory.[15] This theory originates with the circle of liberal, near-anarchist French social theorists – most notably Charles Dunoyer, Charles Comte (son-in-law of Jean-Baptiste Say) and Augustin Thierry – who published in the journal *Le Censeur* (1814–15) and its successor *Le Censeur Européen* (1817–19).[16] When Marx wrote, 'No credit is due to me for discovering the existence of classes in modern society or the struggle between them; long before me, bourgeois historians had described the historical development of this class struggle and bourgeois economists the economic anatomy of the classes',[17] it was primarily to the *Censeur* group that he was referring. The theory received further development by the English market-anarchist economist Thomas Hodgskin (most notably in his 1832 essay *The Natural and Artificial Right of Property*

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13 Carson (2009a), pp 1–2.

14 For the historical movement, see Brooks (1994); for the contemporary movement, see Chartier and Johnson (2011).

15 For the historical origins of libertarian or market-anarchist class theory, see especially Hart (1994), but also Liggio (1977); Raico (1977, 1993); Stedman-Jones (2006); Weinburg (1978); Long (2008f); and Hart (1979). For more recent treatments, see Conger (2006); Carson (2004, 2006a, 2007, 2009a); Chartier and Johnson (2011); Grinder and Hagel (1977); Hoppe (1990); Long (1998, 2007, 2008a, 2008b); and Richman (2006). Although most market anarchists accept some version of libertarian class theory, this does *not* mean that most market anarchists are left-libertarians (although the converse seems to hold); it is fair to say, though, that market-anarchist class theory tends to be *especially* central to those versions of market anarchism that are also left-libertarian.

16 For the near-anarchism of the *Censeur* group, see Raico (1993) and Hart (1994); cf Gabriel (2006).

17 Letter to J Weydemeyer, 5 March 1952, p 69; in Marx and Engels (1965), pp 67–70.

Contrasted), and still later by the contributors to *Liberty*, Benjamin Tucker's 1881–1908 American journal of market anarchism.[18] Unlike later and more familiar theories that identify classes in terms of their possession of economic resources – for example, control, or lack of control, over the means of production – the market-anarchist theory identifies classes in terms of their *means of acquiring* such resources – so an historical element is built in from the start.

In its primordial formulation, market-anarchist class theory distinguishes two principal classes. One is the productive or 'industrial' class, composed of those who earn their living through production and voluntary exchange; this traditionally included both workers and capitalists, though different versions of the theory would emphasise one or the other according to the radicalism or conservatism of the author. The other is the parasitic (or as Herbert Spencer would later call it, the 'militant') class: those who earn their living by plundering the producers; while this class includes freelance criminals such as highway robbers, it finds its primary embodiment in the holders and beneficiaries of political power. The core of this class was originally the military aristocracy, who simply continued the practices of their bandit ancestors under the cloak of law; but in the eyes of market-anarchist class theorists, the passing of political authority from nobles to commoners did not change the fundamental nature of the state as an engine for advancing the interests of the politically favoured at the expense of the general populace. When Marx called the July Monarchy 'a joint-stock company for the exploitation of France's national wealth' on behalf of the bourgeois elite, and at the expense of production and commerce, he was only echoing what free-marketers had been saying for decades.[19]

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[18] Hodgskin (1832); Tucker (1897); Brooks (1994). One can find similar ideas in John Calhoun's 1849 *Disquisition on Government* (Calhoun (1992), pp 3–78) – although this is somewhat ironic, as Calhoun was a proponent of slavery, whereas virtually every adherent of this theory *other* than Calhoun took it to entail a straightforward condemnation of slavery. Calhoun's idiosyncratic emphasis, as the marker of differentiation between productive and parasitic classes, on whether one is a net payer or a net receiver of *tax revenue*, to the exclusion of any consideration of other forms of privileged parasitism, may well have been motivated by the need to find some semi-plausible way of shoehorning slaveholders into the productive or industrial category, rather than into the parasitic category to which libertarian class theorists customarily assigned them.

[19] *Class Struggles in France*, I; Marx (2003), p 38. The relation of the Marxist theory of classes to its libertarian predecessor is complex. The official Marxist doctrine – at least according to Engels – is that a private-property economy is sufficient to generate a capitalist ruling class without the need for state patronage. Yet Marx's own account of 'primitive accumulation' stresses the role of state violence and privilege in *establishing* the power of the *bourgeoisie*, just as his own case studies of contemporary class conflict stress the role of state violence and privilege in *maintaining* it – thus giving Marx's theory an historical/causal, state-oriented dimension that brings it more closely into alignment with the libertarian one. For Engels' implicit disagreement with Marx on these points, see Carson (2004).

Early versions of the theory vacillated as to whether the criterion of membership in the parasitic class was *living by forcibly expropriating others' labour* or simply *living off others' labour*, thus leaving ambiguous the status of people who live off voluntary charity; the French liberals in particular sometimes assigned beggars and priests (whether state-funded or not) to the parasitic class. But modern versions of market-anarchist class theory generally distinguish the two classes according to Franz Oppenheimer's distinction between economic and political means:

> There are two fundamentally opposed means whereby man, requiring sustenance, is impelled to obtain the necessary means for satisfying his desires. These are work and robbery, one's own labor and the forcible appropriation of the labor of others ... I propose ... to call one's own labor and the equivalent exchange of one's own labor for the labor of others, the 'economic means' for the satisfaction of needs, while the unrequited appropriation of the labor of others will be called the 'political means'.[20]

Hence the industrial class lives by the economic means and the parasitic class by the political. By Oppenheimer's definitions, charity recipients would not count as belonging to either class; but if one defines the economic means more broadly as the method of *voluntary* transactions, then charity recipients would belong to the industrial class. Recipients of tax-funded welfare won't be assigned to the parasitic class either, so long as the extent to which they benefit from governmental handouts is exceeded – as left-libertarians think it generally is – by the extent to which they are immiserated by governmental regulations.

Marx claimed that the chief advance of his version of class theory over that of the 'bourgeois economists' was that he foresaw an end to class conflict, but in fact he was anticipated here too.[21] Unlike Saint-Simon and Auguste Comte, sometime fellow travellers of the *Censeur* group, who proposed maintaining a powerful state apparatus but with a change of personnel (kicking out the nobility and replacing them with representatives of the industrial class), the main *Censeur* contributors rejected the state apparatus itself as a fundamentally militant or parasitic institution incompatible with industrial life, and one that was destined to be eroded by economic forces and ultimately replaced by a society without privilege – a stateless, classless, free-market utopia.[22]

Dunoyer, for example, described states as 'monstrous aggregations ... formed and made necessary by the spirit of domination', and prophesied that the 'spirit of industry will dissolve them' and thereby 'municipalise the world',

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[20] Oppenheimer (1975), Ch 1.

[21] Letter to J Weydemeyer, 5 March 1952, p 69; in Marx and Engels (1965), pp 67–70.

[22] This more famous Comte does not appear to have been related to Charles Comte of the *Censeur*; at any rate, John Stuart Mill, writing to Auguste Comte (26 April 1845), refers to Charles Comte as 'your homonym' rather than, for example, 'your kinsman'. Lévy-Bruhl (1899), pp 412–16.

as 'centers of actions ... multiply' until the entire human race constitutes 'a single people composed of an infinite number of homogeneous groups bound together without confusion and without violence by ... the most peaceful and the most profitable of relationships'.[23] Thierry likewise predicted that industry would 'deprive power of its income, by offering at less cost the services which power makes people pay for', with the result that 'the loose but indissoluble chains of interest will replace the despotism of men and of laws; the tendency towards government, the first passion of the human race, will cede to the free community. The era of empire is over, the era of association begins.'[24] This vision of the militant mode of social organisation yielding to the industrial would inspire both Molinari's phrase 'the diffusion of the state within society' and Proudhon's 'the dissolution of the state within the economic organism'.[25]

In its modern form, market-anarchist class theory identifies the ruling class in Western democracies as a partnership between the state on the one hand and the private, mostly corporate, beneficiaries of state privilege on the other – big government and big business, or statocrats and plutocrats – and the dominant form of economic and political organisation as one of corporatism. Given the concentrated character of corporate interests and the dispersed character of the broader public interest, corporatism is regarded as a virtually inevitable result of democratic institutions, as per Butler Shaffer's definition of democracy as 'the illusion that my wife and I, combined, have twice the political influence of David Rockefeller'.[26] (Hence market-anarchist class theorists' scepticism toward all forms of monopoly government, not just undemocratic ones.) Vast inequalities of wealth are difficult to achieve or maintain in a free market, since successful ventures are quickly imitated; competition serves as a levelling factor. But such inequalities can most definitely be achieved and maintained when competition is restricted by regulation.[27]

Like the alliance between church and state in the Middle Ages, the parties to the present ruling alliance do not have identical interests, and there is some jockeying for power as each side strives to become the dominant partner (with political parties of the establishment 'left' and establishment 'right' tending to promote the economic interests of statocracy and plutocracy respectively); hence the appearance of conflict between government and business is not wholly illusory.

Nevertheless, again as with church and state, the partners' commitment to the long-term success of the partnership – that is, to maintaining power – ordinarily takes precedence over their commitment to the issues that divide

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23 Dunoyer (1825), pp 366–67, translation mine.

24 Quoted in Raico (1993), pp 208–9.

25 Molinari (1884), p 393; Proudhon (1923).

26 Shaffer (2011).

27 One way of legally blocking imitators is the mechanism of 'intellectual property'. For arguments that intellectual property constitutes a form of plutocratic privilege incompatible with free-market principles (and of no great benefit to intellectual innovators themselves), see Kinsella (2008); Boldrin and Levine (2008); Carson (2007, 2009a); Long (2008e).

them. Big government needs big business – as a source of financial backing. And big business needs big government – to protect it from market competition. As libertarian and New Left historians alike have documented with regard to the United States in particular, most of the major regulatory interventions in that country's history, including those most trumpeted and/or vilified as 'anti-business' – most notably those of the 'Progressive Era' and the 'New Deal' – were not only welcomed by, but vigorously lobbied for and in many cases actually drafted by, the corporate elite as a means of eliminating smaller competitors (who were less able to handle the regulatory burdens) or as a means of regimenting workers and consumers.[28]

It should thus be no surprise that the tobacco company Philip Morris has embraced restrictions on cigarette advertising, or that corporate giant Walmart has embraced government-funded health care, to select two examples from the recent North American news; both laws will have a greater impact on these firms' smaller competitors than on the firms themselves.

Most of my examples come from the North American context, with which I am most familiar, but such examples are easily duplicated in other countries. In Australia, for example, in November 2011, the national accounting firm BDO projected that a new mining tax, the Mineral Resources Rents Tax, which had been negotiated between the government and the country's three largest mining companies (BHP Billiton, Rio Tinto and Xstrata) without participation from smaller mining companies, was 'entirely weighted in favour of the mining companies central to its formulation' inasmuch as it 'allowed the largest mining companies a deduction on their overall MRRT tax liability', a deduction 'not available to smaller or intending producers'.[29] Thus, 'despite an assumed revenue of $7.46 billion per annum, Rio Tinto would have zero net MRRT liability in the first five years', while 'a $480m emerging iron ore miner would pay $13m in the second year, and $54m in the third' and 'the small miner would have an effective tax rate of 40.18 per cent'.[30]

Big business is no fan of free-market competition, which tends to exert downward pressure on prices and upward pressure on salaries; hence it actively lobbies for, and generally gets, government privileges.[31] Sometimes these are direct and overt, taking the form of subsidies, bailouts, protectionist

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28 Kolko (1963), (1965); Weinstein (1976); Shaffer (1997); Childs (1971); Grinder and Hagel (1977); Radosh and Rothbard (1972); Stromberg (1972); Ruwart (2003); Johnson (2004, 2005); Buhle (1999). This doesn't mean that business hostility to President Franklin D Roosevelt and his administration was illusory, but what hostility there was concerned much smaller stakes than is ordinarily assumed. The Roosevelt administration was giving the corporate elite cartelisation on the state's terms rather than cartelisation on their own; still, the recipients vastly preferred either mode of cartelisation to the free-market alternative.

29 Swanepoel (2011).

30 Thornton (2011). I thank an anonymous referee for bringing the MRRT example to my attention.

31 For some of the ways that Walmart, for example, owes its success to government privilege rather than market competition, see Mattera and Purinton (2004). The benefit to Philip Morris from tobacco subsidies is obvious.

tariffs, grants of monopoly privilege and seizures of private property for corporate use via eminent domain – as well, of course, as military interventions to protect corporate interests. But many of the business lobby's greatest government privileges are much less direct. Regulatory imposition of uniform quality standards, for example, relieves firms from having to compete in terms of quality, thus granting them the benefits of cartelisation without the costs of policing the cartel agreement or the risk of having the cartel undermined by upstart competitors. (And when the quality standards thus imposed are high, lower-quality but cheaper competitors are priced out of the market – an additional boon to the beneficiaries.) Inflationary monetary policies on the part of central banks also tend to benefit those businesses that receive the newly created money first in the form of loans and investments, when they are still facing the old, lower prices, while those to whom the new money trickles down later, only after they have already begun facing higher prices, systematically lose out.

The widespread assumption that big business and big government are fundamentally at odds, and that big business supports a free market, serves to maintain the ruling partnership in power; indeed, 'vulgar liberalism' and 'vulgar libertarianism' (in Carson's sense) represent the dominant ideologies of the establishment left and establishment right, respectively. The establishment left disguises its government intervention on behalf of the rich as government intervention on behalf of the poor, while the right disguises its government intervention on behalf of the rich as an opposition to government intervention *per se* – and each side has an interest in maintaining the myth propagated by its nominal opponent. For those who are repelled by the realities of corporate capitalism are lured into becoming opponents of the free market and foot soldiers for the left wing of the ruling class, while those who are attracted by free-market ideals are lured into becoming defenders of corporate capitalism and foot soldiers for the right wing of the ruling class. Either way, the partnership as a whole has its power reinforced.

Thus, for example, in the recent debate in the United States over health care, both sides benefited by portraying the choice as one between a free-market *status quo* and a proposal for government intervention (as opposed to what it really has been: a debate between two different styles of *equally* intrusive government intervention – the 'right-wing' status quo of massive government intervention on behalf of insurance companies and the medical establishment, *versus* a 'left-wing' scheme to shift the balance of power a few notches away from the plutocracy and toward the statocracy). This renders invisible and inaudible any proposal for an *actual* free-market health-care program, such as the turn-of-the-century mutual-aid system that was beginning to put working-class patients in charge of their own health-care decisions before government regulators and the American Medical Association joined forces to dismantle it. This also explains why the establishment right in the United States has been so weak in challenging the establishment left's factually ludicrous claim that the policies that led to the recent economic crisis were *laissez-faire* and involved 'too little regulation'; the only way the right could successfully rebut this charge was by admitting that they had been

pursuing a thoroughgoing campaign of monetary manipulation on behalf of the financial elite, thus blowing their cover as free-market advocates. This may explain why they decided to focus their energies on the health-care debate instead.[32]

It is often assumed that the domination of the economic landscape by large firms is to be explained simply by their successful exploitation of economies of scale. But, as Carson has stressed, in addition to economies of scale there are *diseconomies* of scale, which beyond a certain point will offset the economies and put a limit to the firm's growth – unless the firm can make use of governmental privilege.

For example, the augmentation of productive capacity associated with larger size requires a wider area of distribution for the increased product; thus, as production costs fall, distribution costs rise, until the latter overtake the former. But this check on firm growth can be overcome once the government enables the firm to socialise its distribution costs. At the extreme, such socialisation can take the form of opening foreign markets via gunboat, but its many milder forms include public funding for highways. As is well known, long-distance shipping via heavy trucks is responsible for the vast majority of wear and tear on the public highways, yet firms that rely on such shipping typically do not bear a proportionate share of the tax burden for building and maintaining highways. Hence such firms are able to grow beyond their natural size by getting taxpayers to pick up the tab for their transportation costs – while the more economical alternative of local production for local use is rendered artificially expensive, inasmuch as it is compelled to subsidise its competition.[33] And such artificial incentives for excessive firm size are exacerbated by the fact that the state generally taxes transactions between, but not within, firms – thus encouraging firms to move more functions within rather than contracting them out.[34]

Moreover, as firms grow artificially larger and more hierarchical, the separation between those who give the orders and those who do the work increases, thus making it harder for any of the firm's participants to know what is actually going on; moreover, the increasing insulation of decisions from market feedback not only makes information harder to obtain but also lowers the cost of abusive or inane behaviour by managers, thus giving us the corporate wonderland familiar to readers of the comic strip *Dilbert*. Thus the lowering of transaction costs associated with firm centralisation is offset by the costs of the growing informational chaos within, rendering such firms unable to compete against smaller, flatter rivals – unless competition from such rivals can be curtailed, as it quite effectively is, by government regulations such as licensing fees, zoning, uniform quality standards, capitalisation requirements and so on – all of which place a disproportionate burden on smaller companies and

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32 On health care, see Long (1994, 2008a); Beito (1999). On the causes of the economic crisis see Long (2008a); Woods (2009).

33 For further details, see Carson (2007, 2009a).

34 Arthur (2010).

independent entrepreneurs.[35] In particular, the establishment of workers' cooperatives as an alternative to the hierarchical firm has been rendered artificially difficult both by these regulations and by ostensibly pro-union regulations whose real – and successful – intent has been to divert the labour movement's goals away from worker control of industry and towards the mere pottage of higher wages within the existing 'capitalist' framework.[36]

In his arguments against workers' cooperatives, Nozick himself seems to slide into a bit of vulgar libertarianism, taking their scarcity on the prevailing corporatist market as evidence of their inefficiency – as though the prevailing corporatist market were a reasonable proxy for *laissez-faire*. Nozick discusses some genuine incentival problems faced by worker-owned firms, but does not address the incentival (and informational) problems faced by traditional hierarchical firms.[37] If worker-owned firms are efficient, he asks, why don't we see more of them? He seems not to consider one obvious answer: as Carson reminds us, 'The state subsidizes the large, hierarchical, capitalist enterprises against which cooperatives compete, thus rendering them artificially profitable and competitive against alternative forms of organization.'[38]

Konkin, by contrast, is of the opinion that 'the whole concept of "worker–boss" is a holdover from feudalism' rather than a natural outgrowth of the free market, and speculates that 'independent contractors' might replace 'wage workers' for 'all steps of production', an idea that goes back to Herbert Spencer.[39] David Friedman, though not usually considered a *left*-libertarian, has expressed similar sentiments.[40] More recently, Carson has devoted two lengthy books to an attempt to show that workers' cooperatives would tend to displace traditional 'capitalist' firms under a free market.[41] Moreover, both Rothbard (during his left-libertarian phase) and Karl Hess have argued that by strict neo-Lockean standards of land ownership, most of the property claims of the corporate elite are illegitimate and might justifiably be homesteaded by their employees to form workers' cooperatives.[42] In any case, the historical approach to justice in holdings leads naturally toward a presumption in favour of worker control of industry; as David Schmidtz puts it, 'Nozickians tend to see rewards (ie products) as created by workers, and thus as presumptively belonging to workers.'[43]

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35 Long (2008a, 2008c); Carson (2007, 2009a).

36 Johnson (2004, 2005).

37 Nozick (1974), pp 250–53.

38 Carson 2009a, p 518.

39 Konkin (1983), p 25, n 8; Spencer (1912), Book VIII, Chs 20–21.

40 Friedman (1989), pp 144–45.

41 Carson (2007, 2009a).

42 Hess (1969); Rothbard (1965, 1969a, 1969b); Rothbard (1998), Chs 9–11. For those left-libertarians (eg Carson) whose views on land ownership are neo-Proudhonian rather than neo-Lockean, the extent to which existing corporate property claims are illegitimate is, of course, still greater.

43 Schmidtz (2005), p 170. I don't mean to suggest that Schmidtz himself, in this passage, was intending to draw a connection to worker control of industry.

What is distinctive about historical theories of a broadly Nozickian sort is not so much that they focus on the *past* as that they focus on *means* of acquisition, including not just past but ongoing acquisition. Given the extensive involvement of state violence in the process by which the corporate elite not only achieved its wealth in the past but continues to maintain and augment it in the present, it is clear that the massive inequalities of wealth that characterise present-day 'capitalist' society are radically inconsistent with any approach to justice in holdings that is even remotely Nozickian. The charge that Nozick-style historical theories serve to legitimate the existing pattern of wealth distribution is thus shown to be even more baseless than Nozick himself was prepared to realise.

Historical vs End-state, Revisited

However, the claim that I have undertaken to defend is not merely that such inequalities can be challenged using an historical approach, but that the historical approach represents a *more* effective tool for challenging them than do relatively end-oriented approaches such as utilitarianism and Rawlsianism. Of course, such inequalities can presumably be challenged on utilitarian and Rawlsian grounds too. So in what do I take the greater effectiveness of the historical critique to consist?

The historical critique might be judged superior on the grounds that it is *correct* while its end-oriented rivals are mistaken. In fact, I do regard the historical approach to justice as correct, on independent, mostly non-consequentialist grounds; however, as explained above, I am not making that argument here. For those who regard the results of voluntary interaction as a proxy for either aggregate or mutual advantage or both, the fact that present distribution fails the historical test might be taken as *evidence* that it fails the utilitarian or Rawlsian tests as well – but that is not my argument either.[44]

Rather, the advantage, as I see it, of the historical challenge to existing inequalities – that is, what makes it serve more effectively *the very ends that egalitarians take to be a reason to reject it* – is that it lays bear the class structure of society, and the roots of such inequalities in state violence. Merely pointing to the fact that some people have a lot more than others is less compelling as a critique; it invites the response, 'So what? Those who have more aren't hurting anybody; you're just appealing to envy.' By contrast, being able to show that those who enjoy a higher socio-economic status have to a considerable extent achieved and maintained that status by forcibly expropriating and oppressing the less affluent provides for a far more effective indictment.

I don't mean to be claiming merely that appeal to the historical approach is more *rhetorically* effective; that would be a weak defence, since strategies can, after all, be rhetorically effective for all sorts of dubious reasons. I am aiming at a stronger claim than one of greater rhetorical effectiveness – yet at a weaker claim than one of simply being the correct theory.

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[44] For an argument for regarding the results of voluntary interaction as a proxy for mutual advantage (one I do not necessarily endorse), see Rothbard (1956).

My point is that the historical critique correctly identifies what is surely a *morally relevant fact*, and one that end-oriented critiques tend to ignore: namely, that in many cases those who have more are getting it *at the expense* of those who have less. Now, of course, utilitarian and Rawlsian approaches may also make the claim that, in some sense, those who have more have it at the expense of those who have less, but in order to substantiate that claim without appealing to historical – that is, causal – considerations, they have to defend a baseline of equality. My present argument is not that such a defence is impossible, but only that the need to defend it places an additional and somewhat recondite burden on end-oriented challenges to inequalities, whereas the historical challenge, by identifying past and ongoing acts of violent expropriation rather than merely pointing to the existence of differential shares, provides a much more straightforward, intuitive and unambiguous basis for condemning the present structure of wealth distribution in 'capitalist' society. Thus the need to ground critiques of inequality, far from being a reason to reject historical theories of distributive justice in favour of end-oriented ones, is actually a reason to do precisely the opposite.

In other words, my critique of Nozick's critics is an internal one: my argument is that the historical approach is superior not because it makes a better case against inequalities I happen to oppose, but because it makes a better case against inequalities that *Nozick's critics* oppose.

Anarchy and Historical Justice

Most market anarchists accept both market-anarchist class theory and a historical, broadly neo-Lockean theory of distributive justice.[45] We have seen how these two commitments are a good fit with each other; but how do they relate to the commitment to market anarchism itself?

Market-anarchist class theory is taken to support market anarchism inasmuch as it shows that at least some of the evils that people turn to states to prevent are actually enabled – virtually inevitably so – by the state, while the sources of productivity lie in market rather than state mechanisms. And neo-Lockean theories of distributive justice are taken to support market anarchism in two ways. On the one hand, the ideal of equality built into such theories clashes with the monopolistic rights claimed by the state (for where all are equal, how can members of a particular institution claim rights to exercise exclusive authority over the rest of society?). On the other, it is argued that, thanks to the incentival and informational advantages of competition over monopoly, markets are likelier than states to produce outcomes in line with neo-Lockean justice.[46]

But here a potential difficulty arises. The task of a market-anarchist legal system is to adjudicate disputes and secure compliance in accordance with neo-Lockean principles of private property and free exchange. Yet the economic

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45 Not all market anarchists accept market-anarchist class theory (for an exception, see Friedman (1989), pp 152–55); nor are all proponents of this variety of class theory market anarchists (Calhoun obviously isn't). But the overlap is great enough to make the label appropriate.

46 For the neo-Lockean ideal of equality, see Long (2005); for the other arguments, see the sources cited in n 4.

mechanisms on which such a legal system relies are themselves characterised by private property and free exchange. Doesn't this mean that a market anarchist legal system has to create its own preconditions? Mustn't private property and free exchange *already* be protected and secure in order for there to be a competitive market in rights-protection – the market from which the protection and security of property and exchange are meant to *arise*?

Any practical anxiety attendant on this bootstrapping problem may be assuaged by consideration of the fact that in a variety of historical cases, stateless legal systems fairly similar to those advocated by market anarchists have been relatively successful in protecting private property and free exchange, but the theoretical puzzle remains.[47]

We may begin to shed some light on this puzzle by noticing that it arises just as much for state legal systems as for stateless ones. After all, the building and maintenance of states constitute an expensive project; this presupposes a society with a fair degree of productivity and prosperity already – which in turn requires the sort of social order and secure expectations associated with a successful property system (whether neo-Lockean or otherwise).

Thus *any* legal system to protect property claims (of any sort) depends on a background level of property protection not dependent on law.[48] And indeed, inasmuch as those in charge of enforcing the decisions of a legal system are nearly always vastly outnumbered by the populace they are supposed to be controlling, such enforcement can never be the principal source of social order in any case.[49] Legal systems at their best only reinforce, and at their worst subvert and attack, forms of social order arising from informal conventions and understandings.[50] Not just as a normative judgment but also as an explanatory and methodological counsel do market anarchists proclaim that the era of empire is over and the era of association begins.

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47 See Bell (1992), Friedman (1979), Anderson and Hill (2004), and Benson (2011).

48 For empirical confirmation of the same point, see Ellickson (1994).

49 For elaboration, see Long (2006b, 2008d).

50 Compare Thomas Paine – not himself an anarchist, but certainly an inspirer of anarchists (reading *The Rights of Man* was what convinced William Godwin of the desirability and viability of a stateless society) and a forerunner of market-anarchist class theory: 'Great part of that order which reigns among mankind is not the effect of government. It has its origin in the principles of society and the natural constitution of man. It existed prior to government, and would exist if the formality of government was abolished. The mutual dependence and reciprocal interest which man has upon man, and all the parts of civilised community upon each other, create that great chain of connection which holds it together. The landholder, the farmer, the manufacturer, the merchant, the tradesman, and every occupation, prospers by the aid which each receives from the other, and from the whole. Common interest regulates their concerns, and forms their law; and the laws which common usage ordains, have a greater influence than the laws of government. In fine, society performs for itself almost everything which is ascribed to government.' (*Rights of Man*, Part 2, Ch 1)

ILLUSION, REALITY, AND THE PURSUIT OF JUSTICE AND THE COMMON GOOD[1]

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Introduction

Alasdair MacIntyre has defined truth as the balancing of 'the mind's judgment of a thing to the reality of that thing' (MacIntyre in Lutz 2004, p.9). In today's western political climate, there seems to be no shortage of judgments in regards to how we realize justice and promote the common good. However, our judgments—as MacIntyre's definition suggests—do not constitute 'truth' unless they are appropriately balanced with reality.

This article aims to explore reality and illusion as it relates to justice and the common good. Specifically, attention will be given to the liberal paradigm and its modern expression. Under this paradigm, it is suggested that the presence of self-interest, choice, and the freedom to exercise preference are sufficient and necessary to produce the common good—a belief invoked so often since Adam Smith's *Wealth of Nations* that it 'has almost the status of a metaphysical principle'(Gorringe 1994, p.34). The notion of a common good, however, presupposes social awareness and collective mindfulness. This paper argues that the pursuit of communal goods or any general notion of the common good requires attributes beyond what can be found in our current liberal arrangement, making such a pursuit illusory under this paradigm. In the sections below, it is argued that the liberal endowments of equality, fairness, and rights are insufficient to engender communal considerations. The paper ends with the suggestion that liberty and the pursuit of the common good does not produce—so much as it requires—a socially-conceived identity. This assertion, it is argued, better aligns with the *reality* of justice and the common good.

[1] Source: *eSharp*, Issue 19: Reality/ Illusion(2012) pp. 183-202, URL: http://www.gla.ac.uk/esharp

The Liberal Society: Equality, Fairness and Rights

The idea of justice, a ubiquitous and multi-faceted term, is generally understood to mean 'rendering unto each their due.' The origination of justice as 'each their due' hails back to ancient Greek philosophers and finds its greatest development in Aristotle.[2] It was Plato who credited Simonides, as quoted by Polemarchus, as defining justice in this way: 'it is to give each what is owed' (Plato in Bloom 1991, Section 1.331e; p.7).

While contemporary society has not departed from the formal understanding of justice ('each their due')—modernity and its philosophical attributes, often unique to the traditions before it, have led to a fundamental departure from Aristotelian proportion in favor of liberal notions of equality relative to individuals and their rights. This is a major assertion of MacIntyre's 1988 work: *Whose Justice? Which Rationality?* Here, MacIntyre traces western conceptions of justice from Aristotle to Thomas Aquinas (13th Century) and onto David Hume (18th Century), making the case that they each appeal to a particular tradition by which to engage moral theory. Following Hume and the Scottish Enlightenment, liberal thinking emerged under the belief that practical reasoning can occur outside the boundary of tradition and requires only the presence of facts in order to apprehend the correct principles of justice (MacIntyre 1988, p.332). While MacIntyre asserts that such a tradition-independent project is illusory, he notes 'central features' that have emerged from this movement. Michael Sandel (2005, p.161) explains the first feature as the idea that 'society is best arranged when it is governed by principles that do not presuppose any particular conception of the good,' or what MacIntyre describes as a commitment 'to there being no overriding good' (MacIntyre 1988, p.377). Furthermore, this idea makes the pursuit of the common good difficult, if not impossible, as liberalism asserts that 'individuals are free to pursue private goods, and this is possible only by restricting the pursuit of the common good' (MacIntyre in Lutz 2004, p.14).

[2] It is important to note here that this description of justice is used in the context of distributive justice, which is often defined as fairly distributing benefits and burdens in society. However, the dictum 'each their due' is also present in forms of retributive justice (punishments and penalties) and compensatory justice (compensation for being wronged by others).

John Rawls, described as providing American liberalism with its fullest philosophical expression (Sandel 2009, p.20), gives the justification for this anti-Aristotelian shift: 'Human good is heterogeneous because the aims of the self are heterogeneous' (Rawls in MacIntyre 1988, p.337). Society is now understood as a collection of rational subjects defined by their choices and preferences—a 'central' value of liberal modernity (MacIntyre 1988, p.337). This has implications for the liberal rendering of justice. Formal justice as 'each their due' must be expressed, in substantive terms, among the competing claims of individuals, bereft of any antecedent notions of what is 'good' for man or society, and this gives way to a form of egalitarian justice. Individuals are understood as possessors of their own schedule of preferences which deserves equal respect. Sandel (2005) defines the tenets of justice under the roof of liberal principles:

> This liberalism says, in other words, that what makes the just society just is not the *telos* or purpose or end at which it aims, but precisely its refusal to choose in advance among competing purposes and ends. In its constitution and its laws, the just society seeks to provide a framework within which its citizens can pursue their own values and ends, consistent with a similar liberty for others (Sandel 2005, p.157).

The aforementioned framework of equality and rights necessary for the individual to conceive of his or her own ends is the liberal design promoted to apprehend freedom. In other words, a stable democracy that promotes the ingredients of equality and rights stands as the appropriate fertilizer for individual liberty since one may pursue their ends accordingly under this ideal.

However, we may appropriately ask, while this formula for 'freedom' may indeed be sufficient to unencumber persons in society from seemingly prohibitive interventions (including other persons), is it sufficient to advance freedom *unto* other individuals in society? Would this develop what political philosopher Jonathan Wolff has called the 'human society'—where 'A proper human life is one which is lived, at least in part, for the sake of others'? (Wolff 2002, p.44) In other words, it is one thing to be free of others (where they threaten to preclude my pursuit of the good), but it is another to allow my identity to be bound up in the people, places, and things that constitute

my social setting. Thus, in reality, can a framework that understands individuals as the basic unit of society—unencumbered and dis-attached from others— choose what might be understood as communal goods?

Relative to the above questions, there are three points of skepticism worth consideration. First, liberalism's overture to impartiality does not necessarily advance communal ends. The idea of total equality promotes a vision of each person as an island in themselves, unrestrained and unencumbered by others. Second, impartiality—a primary means of achieving fairness—will do little to shore up competing claims of justice, offering social resolutions ranging from the difficult to unrealizable. Finally, the rights necessary to buttress the individual as the basic unit of society presuppose, and perhaps reinforce, a 'conflict' society where societal members must seek freedom *from*, not freedom *unto*, other members. At this point, greater attention will be given to each point of skepticism.

Equality and Community

The substance of justice, in its more liberal understanding, is undergirded by the idea of individual equality, a departure from Aristotelian proportion. Because principles of justice must assess and weigh the various preferences put forth by individuals in society, a standard for the 'tallying and weighing' of preferences and choices must be presented and justified. This, says MacIntyre, is the role of egalitarianism in modern justice. He writes:

> The goods about which it is egalitarian in this way are those which, it is presumed, everyone values: freedom to express and to implement preferences and a share in the means required to make that implementation effective. It is in these two respects that *prima facie* equality is required (MacIntyre 1988, p.344).

In contemporary ethical parlance, then, what is 'fair' is no longer what is proportional, it is what is equal. Further, this understanding is pervasive. Modern western society has witnessed, most notably, the competing traditions of utilitarianism, welfare egalitarianism, and libertarianism. While these traditions differ in their articulation of what makes for a just society, they each presuppose an idea of fairness as strict equality within a modern liberal understanding, in contrast to Aristotelian proportion. Karen Lebacqz (1986) writes: 'For all their differences, these three philosophical theories operate within a common "liberal" tradition. They share significant

assumptions regarding the role and place of the individual as the bearer of moral value and the use of reason as the grounds for any theory of justice' (Lebacqz 1986, p.12). In modern terms, then, justice in a liberal society means 'ensuring equal opportunity, giving equal pay for equal work, guaranteeing equal protection under the law, or avoiding favoritism and scapegoating among one's children or students' (Hochschild 1981, p.46). In a word—it promotes *impartiality*. What, we might ask, is illusive about this idea of equality? What is lost in equating justice and equality?

Hochschild (1981) offers good reason for skepticism in the liberal hope of equality and impartiality as a means of determining what is just. Recall that under the liberal project of justice, equality is based upon the equal nature of each individual to pursue their own good and author their own moral and social meanings (Sandel 2005, p.163). This is different from an equality of human dignity recognized in persons while also recognizing their *inequality* or their unequal nature as it relates to their history, culture, background, and personal attributes. An equality of individuals, writes Hochschild, is a 'more profound danger' because it is at risk of failing to treat individuals as inherently valuable. She writes: 'Equality does not reward—and may not even recognize—individual excellence or idiosyncrasy. But scarce abilities or unconventional traits make people unique and of value to the community' (Hochschild 1981, p.56). In other words, to suggest that we are each equal in our traits and features is to falsely suggest that persons are their own islands without want or need of others. In reality, we impoverish ourselves when we view each other as equals at the expense of recognizing our differences, particularly as those differences contribute to a more unified whole within a community context. Hochschild asks: 'Can we endorse, then, a norm that authorizes society to ignore all individual characteristics in the name of respecting the individual?' (Hochschild, 1981, p.56). The answer, perhaps, depends upon an antecedent answer to the question: 'What kind of society do I desire?' Should our desire mirror Wolff's expression of the 'human society'—a society where we experience freedom through our relations with other social members—then we might remark that justice as 'respecting the individual' is insufficient as equality without community becomes 'mindless uniformity'

(Hochschild 1981, p.63). This is because, as MacIntyre states, liberal notions of justice re-imaged the self as the 'individual qua individual' (or the individual as an individual) as opposed to the Aristotelian vision of the 'individual qua citizen' or 'individual qua enquirer into his or her good and the good of his or her community' (MacIntyre 1988, p.339). Thus, in the modern liberal rendering, respect for the other is given attention only insofar as that respect does not conflict with the primacy afforded to myself. This places the prohibitive conjunction 'if' on social relationships and undermines the other as a source of fulfillment.

Impartiality

The concept of a just society requiring fairness finds its greatest expression in the work of John Rawls. Combining social contract theory with Kantian deontology, Rawls offers a picture of ideal principles of justice necessary for social institutions. Rawls encourages an exercise where reflection about justice and distribution occurs behind a *veil of ignorance*. It is behind this veil that we reflect on an ideal society without knowledge of our own natural and social contingencies we may potentially inherit once the veil is lifted. Paramount to this exercise is the presence of fairness which, as Sen remarks, 'can broadly be seen as a demand for impartiality' (Sen 2009, p.54).

However, the notion of fairness also casts an illusory shadow upon overtures toward justice and the common good. Understood within the liberal tradition, fairness is not enough to solve the problem of deciding between competing theories of justice. Sen says that this is the problem of a 'unique impartial resolution' to claims of justice (Sen 2009, p.12). Rawlsian justice suggests that rational men will aim toward a society that is fair, and fairness requires impartiality. However, the presence of impartiality alone will not solve the plurality of views towards deciding what is just. Sen communicates this well in an illustration he calls *Three Children and a Flute*. He writes:

> Let me illustrate the problem with an example in which you have to decide which of three children—Anne, Bob and Carla—should get a flute about which they are quarrelling. Anne claims the flute on the ground that she is the only one of the three who knows how to play it (the others do not deny this), and that it would be quite unjust to deny the flute to the only one who can actually play it. If that is all you knew, the case for giving the flute to the first child would be strong.

> In an alternative scenario, it is Bob who speaks up, and defends his case for having the flute by pointing out that he is the only one among the three who is so poor that he has no toys of his own. The flute would give him something to play with (the other two concede that they are richer and well supplied with engaging amenities). If you had heard only Bob and none of the others, the case for giving it to him would be strong. In another alternative scenario, it is Carla who speaks up and points out that she has been working diligently for many months to make the flute with her own labour (the others confirm this), and just when she had finished her work, 'just then', she complains, 'these expropriators came along to try to grab the flute away from me'. If Carla's statement is all you had heard, you might be inclined to give the flute to her in recognition of her understandable claim to something she has made herself (Sen 2009, p. 13).

Each child makes a separate claim appealing to a particular philosophical tradition. Carla may receive the most sympathy from what Sen calls 'no-nonsense libertarians'; Bob, in the name of fairness, would be awarded the flute from the egalitarian; providing the flute to Anne, the only one who can play it, would most likely find support from the utilitarian position. This hypothetical dispute, according to Sen, represents how we arrive at principles that should govern the allocation of resources. He writes: 'They are about how social arrangements *should* be made and what social institutions *should* be chosen, and through that, about what social realizations would come about' (Sen 2009, p.15; Italics mine). Such normative appeals to how society and its resources are to be arranged highlight the problem: 'There may not indeed exist any identifiable perfectly just social arrangement on which impartial agreement would emerge' (Sen 2009, p.15).

To summarize, the liberal ideal holds fairness as the overarching social ethos to achieve justice. Fairness implies, and moreover, requires impartiality. Yet impartiality, as evidenced by the flute example, does not necessarily provide a clear, uncontested choice of what is just. Rather, a more realistic conception would suggest that it offers support to competing claims of justice—all of which yield differing outcomes. Sen writes: 'It is not simply that the vested interests of the three children differ (though of course they do), but that the three arguments each point to a different type of impartial and non-arbitrary reason' (Sen 2009, p.15). The conclusion is that this arrangement of justice and its ethos of fairness are not enough to bring

about a definable just solution. Alasdair MacIntyre, who offers an example similar to Sen's goes so far as to call the competing claims of justice, when viewed from the singular perspective of fairness, 'incommensurable' (MacIntyre 2007, pp.244-245). [3] This problem poses a complex challenge insofar as achieving societal resolution on matters of justice. If we were to extrapolate these arguments out into what a just society would look like (utilitarianism, welfare and egalitarianism, and libertarianism), all would offer rationale that can each be defended impartially, leaving Sen to suggest that 'if there is no unique emergence of a given set of principles of justice that together identify the institutions needed for the basic structure of the society, then the entire procedure of "justice as fairness"…would be hard to use' (Sen, 2009, p.57).

In deliberating upon our social arrangements, the Rawlsian ethos of fairness and the greater liberal attribute of impartiality, while aimed at addressing competing disputes and conceptions among members, fails because it never defines and defends the very understanding of fairness it attempts to consign to the basic institutions of society. In other words, such fairness is only supported by the 'rational' pursuit to ensure that my own ends are not compromised, as deliberated upon in the original position. However, fairness when left unqualified by an underlying sense of solidarity will not solve disputes but only engender them. If achieving 'fairness' is at risk of sustaining, not resolving, disputes between social participants, we might look to the assignment of rights as a means to shape, as Rawls believed, 'the division of advantages that arises through social cooperation' (Rawls 1993, pp.257-258). However, there is reason for skepticism as it relates to the primacy of 'rights' as a means to cultivate conditions of social cooperation.

Rights-Based Society is a 'Conflict' Society

The liberal vision, as it has been described, projects the role of government as an entity that strives for neutrality as it relates to moral and religious

[3] MacIntyre offers the example of Person A and Person B. A, who is a typical worker struggling to save enough to provide housing and education to his family, is now threatened by rising taxes and regards such a threat as unjust because he has a right to what he has earned. In contrast, Person B takes note of the 'arbitrariness of the inequalities in the distribution of wealth, income, and opportunity' and regards such inequality as unjust and thus supports redistributive taxation to finance welfare and social services—social opportunities for the poor that 'justice demands.'

questions so as to leave individuals 'free' to choose their own pursuits and values. Moreover, such an entity should 'offer a framework of rights, neutral among ends, within which its citizens may pursue whatever values they happen to have' (Sandel 2005, p. 39). However, the priority of liberty and rights leads to a potentially intractable problem insofar as pursuing or attaining the 'human society': the priority of rights cannot build, but can only undermine, any overtures towards community. This is not to suggest that an appeal to basic human rights is immoral or amoral. Understood abstractly, rightsbased language has a clear moral undertone and is cited as an ethical baseline in myriad social, political, and economic settings.

For many liberal traditions, particularly Rawls, a just society is one in which the basic social institutions will equally distribute fundamental rights (Sandel 2005, p.7). Thus, a violation of an individual's basic rights is unjust, according to Rawls, even if the other principles in his theory of justice are satisfied. Supposing, however, that one's 'good' was intricately bound to the good of others, or to a commitment to the common good and shared social meanings, it is questionable whether the primacy of 'rights' would foster such an ideal. Indeed, the goals of cultivating a common good among humanity as well as securing individual rights cannot be accommodated by a liberal conception of justice. Further, there is evidence that the aim toward the latter might undermine the success of the former. Daniel Bell offers a critique of liberalism's empty promise of justice for the common good *and* for individual rights:

> Yet, liberalism's justice does not live up to its promise; it does not deliver us from conflict. The peace modern justice delivers is not true peace, but only a simulacrum. It is the fortified peace (for the peace and justice of liberalism are always backed by the threat of force) that is better labeled a 'truce.' (Bell 2004, p.187).

To Bell's last point, it is important to note that the absence of conflict is not equivalent to the achievement of solidarity. When justice is not conceived 'as a general virtue concerned with nurturing a community's solidarity in a shared love,' it can only, at best, be defined as a procedure 'for regulating the distribution and exchange of goods in a society now understood as an aggregate of autonomous individuals' (Bell 2004, p.185). Indeed, the very

presence of rights-based language presupposes a certain degree of conflict within society; in reality, it is not a form of justice that presupposes community and solidarity.

This critique finds a powerful expression in the work of Karl Marx. In his essay, *On the Jewish Question* (1844), Marx presents the case that 'granting people rights of the sort we hope to enjoy in liberal regimes is not enough to bring about a truly human society' (Wolff 2002, p.13). Marx contends that the rights of man, expressed in North
American and French constitutional documents (he specifically cites the French Constitution of 1793), are best understood as political rights and are to be exercised within the 'political community' (Marx in Stenning 2008). The rights that Marx takes aim at include rights to liberty, equality, security and property. The right to liberty is more or less understood as a right to freedom. However, this freedom, contends Marx, is 'not based upon the connection of man with man, but rather on the separation of man from man' (Marx in Stenning 2008). Liberty, then, is the 'right to […] separation' (Marx in Stenning 2008). Regarding the right to property, Marx writes: 'The right of man to private property is therefore the right to enjoy and dispose of his property, at his will and pleasure, without regard for others, and independently of society: the right of self-interest' (Marx in Stenning 2008). Moreover, 'Each particular individual freedom exercised in this way forms the basis of bourgeois society. It leaves every man to find in other men not the realization, but rather the limits of his freedom' (Marx in Stenning 2008). Therefore, according to Marx, liberal society and its accompanying understanding of freedom as 'the right to do and perform that which injures none' takes on a hyper-individualistic conception of civil society. Thus, others within the community do not offer relational fulfillment and cooperative reciprocity, but rather, exist as a threat to securing 'rights.'

The right to 'equality' reinforces the same problem: 'Equality here in its non-political significance is nothing but the equality of the above described liberty, viz.: every individual is regarded as a uniform atom resting on its own bottom' (Marx in Stenning 2008). Marx cites Article 8 of the French Constitution of 1793 as it relates to the right to security: '*Security consists in the protection accorded by society to each of its members for the*

preservation of his person, his rights, and his property' (Marx in Stenning 2008; Italics his). Thus, according to Marx, none of man's rights can establish community because such rights indirectly promote and aim to protect a distinct form of 'egoism' among mankind. He writes:

> The sole bond which connects [the egoistic individual] with his fellows is natural necessity, material needs and private interest, the preservation of his property and his egoistic person (Marx in Stenning 2008).

Wolff offers a helpful summary of Marx's liberal critique:

> Liberty is the right to do as you wish as long as you don't harm others. Equality is the right to be treated by the law in the same way as everyone else. Security is the right to be protected from others, and finally, property is the right to extend this security to the enjoyment of your legitimate possessions. To be a citizen is to enjoy these rights. They are fought for and prized (Wolff 2002, p.44).

But these 'rights', important as they may seem, reinforce the belief that others exist as a threat to my rights, and not the fulfillment of them. As Wolff's description rightly shows, rights are 'fought for' thus implying a distinct other who is fought against. In other words, rights-based language presupposes conflict. While this may very well be a true aspect of human nature manifest in society, the presupposition of conflict in rights will not ameliorate this problem, as Bell's quote suggested, but only sustain and reinforce it, creating a greater degree of mistrust, conflict, and ultimately social distance with a loss of shared meaning among individual members of society.

The *Reality* of the Social Self

It has been argued that equality, fairness, and rights—features of a liberal society—are illusory attributes should one's good be connected to the good of others or to a communal life, defined as constituting shared social meaning, membership, and a socially-conceived identity. What, then, is missing? What is necessary to transform illusion to reality? Absent in this framework is the presence of a relationally-based ethos. To illustrate this, consider an example from one of the most basic social institutions: marriage. Regarding rights and liberty, the marital partners have the *right*, for example, to a pre-nuptial agreement (often used as a mechanism to secure and protect personal property in the event of a divorce). Indeed, given high divorce rates,

this would be a rational right to capitalize on should one understand marriage as a contract. But it is arguable that the singular attributes of rights and liberties would advance the norms of trust and sacrifice—characteristics often reflected in the pronouncement of marital vows.[4] Moreover, rights—untethered from a relationally-based ethos—would likely undermine such norms. This is because capitalizing on this right (pre-nuptial agreement) potentially undermines trust, cooperation, and goodwill toward the marital partner as it presumes, in some manner, a lack of loyalty and sacrifice and implies the potential of marital failure. Thus, not only are the original ends sought in marriage not advanced, they are compromised. In contrast, we might imagine that rights, liberty, or even fairness, bounded or controlled for by a relational maxim, would provide the gravity necessary for these social goods to be available and present to pursue ends, even ends such as trust and sacrifice, without undermining or compromising them. While this may violate the greater liberal fear of constraints upon individuality, it introduces a degree of gravity to the existing liberal values while still allowing for their healthy expression and use to pursue various ends.

This gravity is given a clear expression by sociologist Amitai Etzioni, who suggests that a good society requires both a moral order and a 'bounded' autonomy (Etzioni, 1996, p.34). What is meant to 'bound' autonomy according to Etzioni? Social order. While the relationship between order and autonomy is not considered to be zerosum (where more order undermines autonomy)—he does not consider the relationship to be 'zero-plus' either (where order and autonomy complement one another). Nor do these 'dual virtues' cancel each other out. A better description, he writes, would be a symbiotic relationship where the two forces enrich one another 'rather than merely work well together' (Etzioni, 1996, p.36).

Etzioni's work illustrates the necessity of social mindfulness to the existing attributes in the liberal framework. A 'bounded' autonomy is not a threat to personal autonomy or individuality. Rather, it is autonomy with consideration to others. It understands the person, not as an unfettered being,

[4] Jonathan Sacks offered a similar description of marital ends in his 1990 Reith Lectures in the UK. In his lectures, he describes the marital norms of 'loyalty and trust' (Sacks in Fergusson, 1998, p.142)

but as a socially situated self. It recognizes that individual actions have social consequences, and that such consequences may be helpful or harmful. In contrast to the depiction of persons as isolated individuals, detached from the social world constituting their surroundings, this conception of the person better reflects reality, and thus, allows for a more realistic articulation of justice and the common good.

Conclusions

In a paper addressing racial segregation in the United States, the late John Calmore wrote:

> Liberal struggles for economic entitlements and political rights, while deserving our support, must be reframed within a larger context that recognizes an equally central set of psychological, ethical, and spiritual needs—most important, the need to be part of a larger community of meaning and purpose that lets us transcend the self-interested materialism of the competitive marketplace and situate ourselves in an ethically and spiritually grounded vision of who we are and who we seek to become (Calmore 1993, p. 1515).

Every society wishes to establish justice—in a general sense—as a fundamental aspect of their social and political architecture. The design of this foundation has, over the years, evolved into a liberal articulation of the good society where space is carved out for individual autonomy, ingenuity, and industriousness so its members can author their own conception of the good. However, should one's good be bound up in the life of others—what Wolff has referred to as the 'human society'— it has been argued that the liberal endowments of equality, fairness, and rights are illusory goods to achieve this end. Sandel (1996) captures the essence of this illusion:

> But to deliberate well about the common good requires more than the capacity to choose one's ends and to respect others' rights to do the same. It requires a knowledge of public affairs and also a sense of belonging, a concern for the whole, a moral bond with the community whose fate is at stake (Sandel 1996, p.58).

Given the challenge 'equality' poses to community, the problems of fairness and impartiality, and the conflict that a rights-based society presupposes, we may reasonably conclude that a liberal society does not *produce* communal considerations and the common good so much as it *requires* it. Borrowing from Calmore's sentiment, the liberal appeal to fairness, equality, and rights—with all of its potential benefits—must be understood within a larger,

more morally rich, context. This context requires an identity beyond the self to more thickly-constituted conceptions: neighbor, member, partner, and citizen.

In contradistinction to the liberal expression of autonomy, a socially-conceived self provides what might best be understood as a *bounded* autonomy, where self-regard and individual expression is reined in by the gravity of shared-norms and communal ties and obligations. Moreover, a bounded autonomy is not a threat to individuality. Rather, it recognizes that, in reality, we are social members whose individuality and freedom cannot be so easily separated from the people, places, and things that constitute our decisions, our pursuits, and our own identity.

This stands in contrast to the more unrealistic depiction of individuals unencumbered from their social settings and endowed with rights as a means to achieve equality (e.g., liberal notions of justice). Philosopher G.A. Cohen refers to this as equality via 'constitution making' (Cohen 2000, p.2). However, we must question the reality of this belief. Cohen calls such 'faith' in constitution-building 'misconceived.' Constitution-building cannot create equality, but rather, it 'presupposes a social unity for which equality itself is a prerequisite' (Cohen 2000, p.2). In other words, defining rules of public order and conferring rights upon individuals cannot make us a 'just' society. Cohen suggests that in his own conceptions of justice, he has transitioned to a moral point of view. It is here that he makes an unconventional prescription for the future of a just and equal society:

> I now believe that a change in social ethos, a change in the attitudes people sustain toward each other in the thick of daily life is necessary for producing equality (Cohen 2000, p.3).

Cohen provides a clear articulation as to what he understands to be necessary for a just and equal society: that *both* just rules *and* social cognizance within the framework set by just rules are necessary for justice to be realized. In other words, 'just' rules can only take us so far. Rather, our social reality requires the presence of a desire, an impetus, to contribute to the common good—and this begins, it has been argued, with a relationally-based conception of the person— persons who are socially conceived, tied to the people, places, and things that surround them, and who demonstrate a

necessary sense of collective mindfulness. The conceptual shift from unencumbered autonomy to a bounded autonomy is a shift from illusion to reality in the pursuit of justice and the common good.