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THE RIGHT TO EDUCATION IN SRI LANKA AND REFORMS THERETO

LAW & SOCIETY TRUST

CONTENTS

Editor's Note	i - ii
Right to Education is Meaningless without Accountability in the Public Education Sector	1 - 8
<i>- Sujata Gamage -</i>	
Proposals for a New Education Act	9 - 15
<i>- The Education Forum -</i>	
The Human Right to Education of the Vanniyala-Etto Community (The Forest Dwellers) in Sri Lanka as an Empowerment Right	16 - 32
<i>- Shirani Rajapakse -</i>	
The Noise Pollution Case: A Jurisprudential Perspective	33 - 36
<i>- Juanita Arulanantham -</i>	

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Editor's Note

The Review, in this Issue, focuses on the Right to Education from a variety of perspectives.

To initially frame the discussions, we publish a paper by Sujata Gamage which emphasizes the point that the Right to Education in Sri Lanka is meaningless in the absence of accountability being secured in the Public Education sphere.

The author's paper, which reflects upon a point of view deliberated upon in an Open Forum discussion held at the offices of the Law & Society Trust recently, questions pertinently as to why Sri Lanka's education system remains inequitable even after sixty or more years of free-of-charge education? She argues that *inefficiency* and *ineffectiveness* of the current public education system could be identified as the biggest culprit of inequalities in education and systematically examines the areas in which the delivery of good education to the underprivileged is woefully inadequate. The paper concludes that a true decentralization of education administration brought about by agitation from the grass-roots level will be the only effective catalyst to bring about true equity in education opportunities for all children in Sri Lanka.

Buttressing the opinions put forward in this paper, we also publish a set of concrete proposals for a new Education Act put forward by a group of citizens and experts in the education sector. The proposals use the 2003 National Education Commission (NEC)'s "Proposals for a National Policy Framework on General Education in Sri Lanka" as the basis to put forward several additional suggestions in this regard.

It is important to observe that the key underlying premise in this regard is the NEC's own observations that the three major factors that contribute to the overall inefficiency and ineffectiveness of the education system in Sri Lanka are as follows; firstly, extreme politicization of the education system at all levels, secondly, lack of coordination within the ministry and the agencies coming under its purview as well as between the ministry and provincial authorities and thirdly, inefficiency, ineffectiveness and indifference of officials and school principals as well as lack of motivation among teachers.

Advancing an interesting argument in the context of the education rights of indigenous people meanwhile, the Review publishes further, an analysis of the 'Right to Education of the Vanniyala-etto Community as an

Empowerment Right' by Shirani Rajapakse. This paper looks at the question as to whether the right to education of the children of Sri Lanka's *Vanniyala-etto* community are being sufficiently realized as required by international human rights standards.

It is observed that, despite basic education being provided for the *Vanniyala-etto* community, there is no focus on the education of the children in respect of the *Vanniyala-etto* culture, religious beliefs or history. Thus, the right to education as an empowerment right is being denied to them. Consequently, though the government of Sri Lanka may have, in general terms, fulfilled State policy in regard to the right to education, the State has signally failed to secure the right to education in its true sense towards the *Vanniyala-etto* community in order to secure the right to education as an empowerment right of the *Vanniyala-etto* children.

She contrasts this failure with efforts being taken in other countries such as Sweden where all children are taught the history, culture, language and religion of national minorities.

The author's observation in this respect is as follows:

The right to education as an empowerment right interconnects, interdepends, and interrelates with all other human rights including the right to development that comes under the international human rights standard setting norms. Therefore, when the State is looking for solutions, all the fundamentals have to be taken into consideration. Thus, it is recommended that the State's policy on education should be amended in order for the Vanniyala-etto children to receive at least their basic education in their mother tongue.

A series of recommendations are suggested in this respect, including amendments to the existing laws and regulations relating to education.

Finally, this Issue publishes a short reflection by Juanita Arulanantham on the judgment of the Supreme Court in *Ashik v. Bandula, OIC Weligama*, (SC (FR) Appl. No.38/2005, SCM 09.11.2007), popularly known as the "Noise Pollution Case".

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RIGHT TO EDUCATION IS MEANINGLESS WITHOUT ACCOUNTABILITY IN THE PUBLIC EDUCATION SECTOR

*Sujata Gamage**

Introduction

The right to education is a key feature of education legislation anywhere. In Sri Lanka, the right to education has been a feature of its education system since colonial days. A right to education then meant that an education in the local languages was available free to all but a quality education in the English medium was available only to the children of the elite and a handful of the talented poor.

Unfortunately, after sixty years after independence, the education system seems to be no better off. Today, there are over 9,000 schools in the country providing on average one school within a 1.5km radius from home for each child, but nobody wants to send their child to the neighborhood school unless it is one of few coveted popular schools. Meanwhile 16 percent of the schools have less than 50 children and are closing or are about to close. The Grade 5 Scholarship Examination offers the hope of admission to a 'super school' to many, but only a handful of talented children will succeed. The reason being that most of these popular schools admit children from Grade-1 based on non-merit criteria, and therefore the places available to scholarship holders at Grade-6 are limited.

Sri Lanka is proud to claim an 85 percent completion rate of compulsory education at Grade 9 but there are no provisions in the law to ensure that children who complete formal education up to Grade 9 have the requisite knowledge and skills. Based on limited results available from assessments at Grade-5 in 2003 and the results of the GCE (O/L) Examinations in the past few years, it could be estimated that 50 percent of children may complete education up to Grade 9 without the required math and language skills and that the majority of these children are from poor families.

Why does Sri Lanka's education system remain inequitable even after sixty or more years of free-of-charge education? This is a question that will be dealt with in the following analysis.

1. Despite 60+ years of free-of-charge education, the system remains inequitable

The *Kannangara Reforms* of 1943 attempted to make education truly free by establishing at least one English medium Central School in each electorate, for secondary education of gifted children who have completed their primary education in a school close to home.

Today in Sri Lanka the standard of education has come back full circle to a situation where a sub-standard education in Sinhala or Tamil medium is available free to all, but, access to better learning opportunities with exposure to English is limited to a few who are privileged to have access to the 100+ 'Top Schools' concentrated in major metropolitan areas.

* Director Knowledge Networks, LIRNEasia (a think-tank based in Sri Lanka with operations Asia-wide carrying out policy relevant research, training and advocacy with a focus on infrastructure issues).

1.1 Top schools are concentrated in just 33 out of 93 Education Zones in Sri Lanka

If the Grade-5 cut-off marking scheme published by the Ministry of Education for 2007 is any indicator, there are 106 schools that are coveted by those successful at the scholarship examination. These top schools are located in only 33 out of 93 education zones in the country. Further, the seven zones comprising Colombo, Kandy, Galle, Matara, Kurunegala, Bandarawela, and Matara account for 59 of the 'top schools', while the remaining 47 top schools are situated across 26 education zones. In 1948, all 50 out of 50 electorates in the country had at least one Central School as a quality school in each. However, by 2008, only 33 of the 93 education zones in the country have at least one 'Top School'.

Table 1 – Distribution of 'Top Schools' Across Educational Zones in 2007

Schools	Educational zones
59 'Top Schools' are in Colombo, Kandy, Galle, Matara, Kurunegala, Bandarawela, and Matara	7
47 'Top Schools'	26
8,900 (approx.) non-coveted schools	60

Source: Ministry of Education

The Grade-5 scholarship examination offers a mirage of hope especially to those students and families vying for a place in one of the top schools, but since most of these top schools admit children up to their full capacity from Grade-1 onwards based on non-merit criteria as well, places available to scholarship holders at Grade-6 are very much limited. Furthermore, the issue of admission to Grade-1 at Top Schools has led to some disturbing social phenomena, as illustrated below from a Supreme Court judgment.

Parents forge bundles of documents to "prove" that they live within the stipulated distance from the schools of their choice and children are trained to memorize and utter blatant lies to cover up that crime at the interviews, where they are debriefed by teachers and principals to check whether their parents are lying!

(Newspaper editorial quoted in S.C.(FR) 10/07, 11/07, 12/07, 13/07)

1.2 Basic needs of most schools are not met, with poorer schools hit hardest

There are provisions in the current law allowing school authorities to raise additional funds through various welfare programmes. While the provision itself is commendable, the challenge lies in that most schools including those serving poor neighbourhoods are forced to use the additional funds so raised for the most basic essentials. For example, the typical allocation of funds by the ministry or relevant authority for electricity or telephones does not even cover the minimum needs of a school, as shown in Table 2 below.

Table 2 – Basic (Utility and Communications) Expenditures Covered by Parents

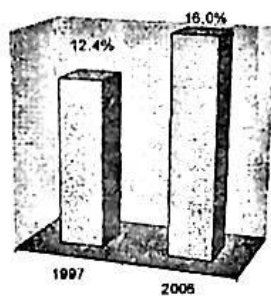
	Costs covered by parents	Total costs
Electricity	20% (~Rs.18,400/-)	Rs.91,884/-
Telephone	65% (~Rs.27,000/-)	Rs.41,589/-

Source: Kotahena Kanishtha Vidyalaya, in 2007

1.3 An adequate primary education is not available at a reasonable distance from many homes

Making a five-year old child travel several hours each day between home and school may be considered child abuse under normal conditions, but some parents in Sri Lanka do just that, because they do not consider the neighborhood schools adequate for a “good education”. Also, when parents who have higher aspirations for their child opt out of a school they perceive to be inadequate, it leads to further deterioration of that school. This phenomenon is reflected in the diminishing enrollments at rural schools. In 2007, as much as 1,549 schools (16 percent) had less than 51 students each enrolled in them, compared with 1,253 (12.4 percent) schools with such low enrolment ten years prior in 1997.

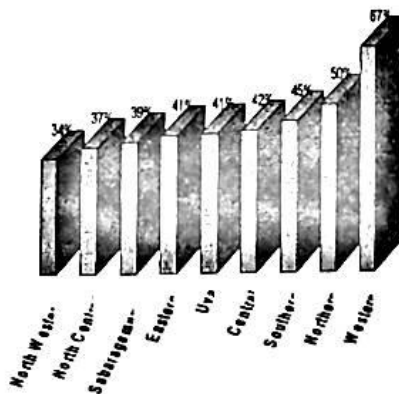
Figure 1 – Schools with Less Than 51 Students



1.4 Availability of Science and Commerce streams are limited, with rural schools affected more

Only some of the schools in the country offer facilities for studying Science or Commerce for GCE Advanced Level (Grades 12 and 13) with percentages differing from a high 67 percent in the Western Province to a low 34 percent in the Northwestern Province, with the latest data available being for 1997.

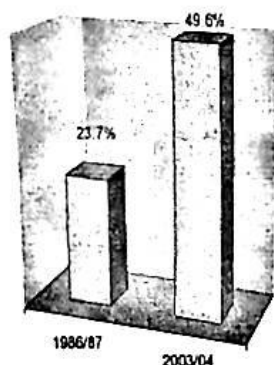
Figure 2 – Students Studying in the Science or Commerce Streams in Grades 12 and 13



1.5 Need for private tuition to succeed at competitive examinations makes free education meaningless

Calculations based on the Consumer and Household Finance Survey (CHFS) conducted by the Central Bank of Sri Lanka reveals that private household spending on education in 2005 was about 30 percent of the total expenditure on education in the country. Of this private expenditure, 45 percent is spent on private tuition. The number of students attending private tuition classes has increased over time from 23.7 percent in 1986/87 to 49.6 percent by 2003/04 (Annual Report of the Central Bank of Sri Lanka, 2003/04).

Figure 3 – Increase in Students Attending Tuition Classes over a 15-year Period



Though private education is denounced in public by many, in private, parents send their children to various tuition classes to learn subject matters which have been well-explained in textbooks provided by the government. Double expenditure by both the government and parents for an education that is based on publicly available textbooks is particularly puzzling, as public examinations also are based on subject matters well-explained in these textbooks.

Even the poor spend money on private tuition. Also, spending on private tuition increased as household income increased with level of income from 29 percent in the lowest quintile to 72 percent in the highest quintile in Sri Lanka.

2. Additional influx of funds to the public sector may not make a difference

Sri Lanka devotes a lower share of public expenditure on education especially when compared with higher performing East Asian countries, such as Singapore and South Korea, and our neighboring South Asian nations. For example, while Sri Lanka allocates 2.9 percent of the GDP to education, Malaysia spends 6.2 percent, South Korea 3.8 percent and Singapore 3.7 percent. The average for South Asia is 3.2 percent of the GDP. Due to tight budget controls, capital investments in education have declined sharply, restricting expansion of services, physical investments as well as quality improvements. One may propose that public expenditure on education has to be increased if one is to emulate miraculous growth stories of East Asian nations. However, there is sufficient evidence to show that inefficiency of the government is the root cause of inequity in education in Sri Lanka and that further infusion of money into the present system is futile.

2.1 *The average student to teacher ratio is one of the lowest in Asia (19 to 1) but rural schools do not have sufficient teachers*

The evidence is largely anecdotal. For example, teachers are said to prefer schools near cities where their own children can attend top schools. Those assigned to remote areas will buy political influence to avoid serving in remote schools. Teacher absenteeism is high in rural areas with a countrywide average of 18 percent absenteeism during an academic year.

2.2 *Curricula, text books and examination materials are delivered late or delivered under sub-standard conditions*

The year 2008 perhaps was the worst in terms of delivery of textbooks by the Ministry of Education. In the previous years there were charges of gross errors in the content of some textbooks and some delays in delivery, but in 2008, the textbooks did not reach the school well in to the middle of the school year. In their submission of proposals for a new Education Act, The Viluthu Center for Human Resource Development notes:

We hark back to the period when there was numerous text books churned out by gifted teachers who sometimes even became celebrities. State monopoly has stifled this. It is imperative that there should be choice and multiple options in textbooks. The market forces would determine the required quality. Furthermore, this would lead to a flourishing publishing industry and bookshops. The economics of publishing is such that, in a relatively small market like Sri Lanka, it is the textbook publishing that provides the base for other types of publishing.

2.3 *There is duplication of expenditure*

A service would cost us more if the provider is a monopoly and it is using its resources including its manpower inefficiently. It is also clear that we need not pay twice for a service. The education system in Sri Lanka manifests both these inefficiencies. For example, the state spends twice for education administration, first for a central bureaucracy and second for a provincial bureaucracy. In addition, parents spend twice for the delivery of the same education content, first through taxes spent on delivery at school level and secondly through fees paid to private tuition masters for the delivery of the same content.

2.4 *National Education Commission of 2003 clearly puts the finger on the state for failures in education*

The National Education Commission of Sri Lanka says in its 2003 report, that the education system is characterized by the following adverse features which are significant sources of inefficiency in public education.

- (i) Extreme politicization of the education system at all levels.
- (ii) Lack of coordination within the ministry and the agencies coming under its purview as well as between the ministry and provincial authorities.
- (iii) Inefficiency, ineffectiveness and indifference of officials and school principals, and lack of motivation among teachers.

3. Legislating equity is only a first step

Education legislation like any other public interest legislation tries to achieve the three 'E's of public administration--efficiency, effectiveness and equity. A cursory look at several key education legislation and executive orders from Sri Lanka, India and the USA shows that much could be learnt from recent efforts in the USA. The 1939 Education Ordinance of Sri Lanka simply sought to rationalize the education administration. The legislation of 1961 was under the belief that vesting the ownership and administration of schools in the State would bring about equity. The executive order by Sri Lanka's former President Kumaratunge in 1997 (Education Regulation No.100 3/5) sought to bring equity through more diligent public officials.

The 2005 Right to Education Bill in India seeks to bring about the right to free and compulsory education but all these laws lack sufficient means of accountability by public officials. In contrast to these examples, the No Child Left Behind legislation in the USA specifically concerns accountability. Although the extent of accountability is much debated in the USA, nobody would deny the necessity for accountability to the public by those in charge of disbursing public funds.

A summary of the above key legislation is given below.

Sri Lanka	Education Ordinance of 1939; amended seven times up to 1973	An Ordinance to make better provisions for education and to revise and consolidate the law relating thereto
India	Right to Education Bill of 2005	An Act to put in to effect the Right to Free and Compulsory Education for All Children in the Age Group of Six to Fourteen Years
USA	The 'No Child Left Behind' Act of 2002 (PL 107-110)	An Act to close the achievement gap with accountability, flexibility, and choice, so that no child is left behind.

The National Education Commission of Sri Lanka in its 2003 report identifies inefficiency etc by the government as contributing to the problems in the education system, but unfortunately the Commission does not venture to analyze and address the root cause of these inefficiencies.

According to the Public Choice theory in economics, the principal-agent problem causes inefficiencies in the delivery of public services. In education, parents and the society in general are the principals and elected officials and public servants are their agents. When there are layers of intervening agents between the parents and the education desired by them for their children, it is inevitable that the delivery of services is affected. Political leaders and officials, the agents of the people, are likely to make allocations based on the amount of personal utility rather than considering the utility of all society.

Moreover, due to the authoritarian nature of the education system, the delivery of government services by lesser officials such as principals and teachers are also not subject to regular public scrutiny, thereby creating opportunities for rent seeking and corrupt activities.

When a government fails to deliver its education services efficiently and effectively, the influential and the well-to-do find ways and means of making the system work for them or bypassing the system. The poor and the powerless on the other hand have no recourse but to stay in a dysfunctional public education system. Their exclusion from quality education is society's loss while their private loss amounts to a gross inequity inflicted on them by society. The most significant reason for inequity in education is that public education is delivered inefficiently and ineffectively.

4. Ensuring accountability

4.1 Decentralization of education delivery

A highly decentralized form of education governance with effective oversight by the affected community is found in the USA where each local government unit elects its own board of education by popular ballot at the same time that local government elections are conducted. Typically, a local government unit would have one or more senior secondary schools which are fed by a system of junior secondary schools which in turn are fed by a system of neighborhood primary schools. The school system is funded by local taxes with the school board acting as the ultimate authority on all policy and administrative matters.

The decentralized system in the USA is not without its problems. In 2001, a case was filed in the Supreme Court of Ohio alleging that the system of funding for education is unconstitutional because the opportunities of education for children vary across the State depending on the tax base of each locality. However, in the case of Sri Lanka where education funding is already distributed from a central tax base, this problem should not arise.

Empowerment of the schools and reduction of bureaucratic layers that extend from the central ministry to department of education to provincial authorities is the only way to combat the current ills of political interference, bureaucratic lethargy and lack of coordination among the bureaucrats. These ills were identified by the National Education Commission (recommendation 110 in the NEC (2003) report) as the three major contributory factors for overall inefficiency and ineffectiveness of the education system in Sri Lanka.

The concept of a school-based management structure has been accepted for a long time in Sri Lanka. This concept was first introduced as School Development Societies (1986), then as School Development Boards (1993) and School Development Committees (2005), and as the Program to Improve the Schools in its latest incarnation. The concept is like a good food presented in different packages to the guests at different times but not offered for actual enjoyment. Therefore it is important not only to include a strengthened form of school-based management in a new Act, but to have education activists make sure that parents and communities are aware of their rights and responsibilities. In essence, a truly decentralized form of education delivery in Sri Lanka will not happen without grass-roots level activity and agitation for change.

4.2 Mechanisms for informing the public about educational outcomes

Currently the Ministry of Education publishes an Annual Report but the data is limited to education inputs such as enrollment, teacher-student ratios etc. There is no national assessment of the performance of students until they sit for the General Certificate of Education (Ordinary Level) examination after completing Grade-11. Any new legislation should require education authorities to report to their respective political authorities and the

general public about the educational achievements of children by districts, divisions and schools at least for Grades 5 and 9. Civil society groups in each education administration unit too should keep track of educational outcomes in their respective areas.

Equity in education is not something that can be achieved by legislation alone. Throwing money at the problem will not work either. Unless committed civil society groups take it upon themselves to make the parents and the general public more knowledgeable and demanding, the status quo will continue.

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PROPOSALS FOR A NEW EDUCATION ACT

*The Education Forum**

Introduction

The Education Forum is a group of individuals and organizations representing teachers, principals, former students, educationists, businesses and other stakeholders in education. Participants of the Forum are bound by a common desire to develop, support and sustain a truly free and fair system of national education in Sri Lanka that contributes to cultural, social and economic growth in the country.

The Education Forum hosted a series of public meetings and study sessions to identify areas of agreement among stakeholders regarding recommendations for a New Education Act. The seventh and the final public meeting in the series was held on February 18, 2008 at the Sri Lanka Foundation Institute.

The conclusion reached at these meetings was that, recommendations as outlined in the 2003 National Education Commission (NEC) publication titled "Proposals for a National Policy Framework on General Education in Sri Lanka" should be used as the basis for a new Education Act, but supplemented by a document that provides guiding principles and a priority set of objectives.

The 2003 NEC document clearly identifies the following as the three major factors that contribute to the overall inefficiency and ineffectiveness of the education system in Sri Lanka:

- (i) Extreme politicization of the education system at all levels,
- (ii) Lack of coordination within the ministry and the agencies coming under its purview as well as between the ministry and provincial authorities,
- (iii) Inefficiency, ineffectiveness and indifference of officials and school principals, and lack of motivation among teachers.

Unfortunately, those who drafted the NEC report side-step these issues and present their recommendations as if there exists efficient, effective and motivated officials who would coordinate activities to deliver an efficient and effective education system, and, as if all politicians will act as responsible stewards of the public good and public trust. In effect, NEC's recommendations while laudable, fall short of its own analysis of the present system of education.

Therefore the Education Forum presents as follows a set of proposals that are largely based on the NEC 2003 proposals but with a preamble that captures a vision that should guide the formulation and interpretation of any legislation and a list of issues that are pivotal in addressing the contributory factors identified by the NEC.

* A group of individuals and organizations representing stakeholders in the education sector and working towards a truly free and fair system of national education in Sri Lanka.

The content of the proposals for a new Education Act is made up of seven sections as follows.

1. Preamble
2. Right to Education
3. Medium of Instruction
4. English Education
5. Types of Schools
6. Structure and Management
7. Welfare Services.

The Forum will continue to engage in dialogue and awareness activities to rally support to these proposals and meet with the Committee to Draft a New Education Act that would further elaborate on the proposals so developed and refined. Under each of the headings above, the Forum first presents the proposed legislation, followed by the rationale for the proposals.

1. Preamble

Recognizing that a good education system is essential for cultural, social, and economic progress of society,

Recognizing that education is a partnership between students, parents, communities, educators and government, each of whom has a responsibility to one another in achieving quality and excellence in education,

Recognizing the rights of all children for equal opportunity for a basic education that will give them a foundation for living, working and life-long learning,

Recognizing the rights of all individuals for access, with no undue obstruction, to a diversity of opportunities for a basic education or beyond,

Recognizing the responsibility of the State to help those who are disadvantaged economically or otherwise to help themselves,

Recognizing the ethnic and religious plurality of Sri Lanka and the importance of developing empathy and tolerance of individuals towards others who are different,

Recognizing the importance of fairness in the allocation of public funds and the necessity to minimize corruption, waste and unnecessary layers of administration,

Recognizing the right of the public to be periodically informed of the state of public education in Sri Lanka,

Recognizing the right of an individual to be educated in the medium of either of the two National Languages, and

Recognizing the importance of English as the link language,

the Education Forum proposes the following Legislation.

2. Right to Education

Proposed Legislation

- All children shall have equal opportunity to successfully complete a basic education.
- Right to equal opportunity for children should not interfere with the liberty of any individuals and bodies to establish and direct educational institutions, subject always to the observance of national standards for such institutions.
- The Minister in charge of education shall report annually to Parliament the current definition of a basic education, the rationale for such, the rate of completion of basic education by province, gender and ethnicity, the rate of successful completion of basic education by economically or otherwise disadvantaged groups, a set of targets for those groups, and a timetable for achieving the targets.
- The State shall provide and/or encourage the provision by others, a diverse range of further education opportunities beyond basic education to all those who are capable and willing, ensure that there are sufficient mechanisms to ascertain quality of those opportunities and provide financial assistance to economically disadvantaged but capable students.

Rationale

Historically, education was provided free by the colonial government to vernacular schools. The immediate consequence of the principle of free education was to give a bonanza to the rich by giving them free education without payment. The masses continued to receive the free, poor-quality education that had all along been free for them, except for a very small number who could get admission to previously fee-levying schools. It is in this context that Government Central Schools became the medium through which the benefits of free education percolated to the masses.¹

However, recent data for school children in Sri Lanka show that it is time to focus on the *ability* of the poorest of the poor to make use of this free-of-charge education and the *quality* of education provided by State facilities.

The Compulsory Education regulations of 1997² address the issue of the inability of the economically disadvantaged to utilize free-of-charge education opportunities made available by the State but those regulations do not go far enough and address the quality of compulsory education received. According to the 2003 NEC report, 17 percent of children do not complete Grade 9, which is the current level of compulsory education.

As for the quality of compulsory education received, although direct data are not available, by inference the Forum estimates that 50 percent or fewer of those completing compulsory

¹ This paragraph is taken verbatim from [http://www.moe.gov.lk/modules.php?name=Content&pa=
=showpage&pid=2](http://www.moe.gov.lk/modules.php?name=Content&pa=
=showpage&pid=2), accessed February 1, 2008.

² Gazette Extra Ordinary Notification, No.1003/5 dated 25 November 1997.

education (or 9 years of school education) may not have the required knowledge and skills³. It is reasonable to assume that the majority of these children are from economically disadvantaged groups in society.

Therefore, the overarching issue is not whether the education is provided free for all or not, but, whether the economically and otherwise disadvantaged have equal opportunity to complete a basic education and the capable students from among those or any group have opportunities to receive an adequate further education.

3. Medium of Instruction

Proposed Legislation

- Every child has a right to receive his or her education in one of the National languages⁴.
- His or her right shall not interfere with the liberty of any individuals to follow education programs in a language of his or her choice.
- The Minister in charge of education shall report to parliament biannually the percentage of children successfully completing national language requirements by school, school division and other appropriate category.

Rationale

The 2003 NEC Framework for General Education provides a complex set of guidelines⁵ regarding the medium of instruction. These guidelines require a significant bureaucracy to administer and monitor them, thus violating the fundamental principle of maximum utilization of public funds towards activities that directly benefit the students. Therefore the Forum proposes that laws regarding the medium of instruction should go no further than the rights enshrined in the Constitution,⁶ but the place of national languages in Sri Lanka should be protected by requiring that all general education certificates issued by the National Examinations authority should have the requirement of at least a pass in one of the two national languages.

³ Available data for 2003 on the competency of Grade-5 children show that up to 60 percent of children completing Grade-5 could not read or write at the required level. In 2007, 52 percent of the students completing Grade-11 failed to obtain 6 passes that included the mother-tongue and math.

⁴ Constitution of Sri Lanka, 1978, Sections 18, 19 and 21.

⁵ National Education Commission Framework for General Education (2003):

Item 20 – The medium of instruction in the primary grades should continue to be Sinhala and Tamil. Oral English should be strengthened to facilitate the development of communications.

Item 21 – Bilingualism should be promoted by using English as the medium of instruction in selected subjects such as Mathematics, Science, Information Technology in the secondary grades, year-by-year from Grade-6. Sinhala and Tamil should continue to be the medium of instruction in some subjects.

Item 22 – Students of secondary grades should be given the option to study any subject in the English medium in the GCE (O/L) and GCE (A/L) grades subject to the availability of teachers and sit the GCE (O/L) and GCE (A/L) examinations in the medium of their choice.

Item 23 – Access to English should be extended island wide over the next five years starting in 2004, and with the National Schools and Provincial Centers of Excellence to which scholarship holders should be sent, so that at least one or two schools in each administrative division will teach the selected subjects in English as early as possible.

⁶ Constitution of Sri Lanka, 1978, Sections 18, 19 and 21.

4. English Education

Proposed Legislation

- All children shall have equal opportunity to acquire an adequate knowledge of English at the end of the basic education period.
- Each school should be able to decide the extent to which and how education is to be provided with English as the medium of instruction.
- The State shall provide and encourage the provision by others, a diverse range of further English education opportunities beyond the compulsory stage to all those with ability, ensure that there are sufficient mechanisms to ascertain quality of those opportunities and provide financial assistance to economically disadvantaged but capable students.
- The Minister for Education shall report to parliament biannually the rate of English education achievement of school children in public schools, a set of targets for disadvantaged groups and a timetable for achieving the targets.

Rationale

The NEC 2003 report presents a complex set of options for including English as the medium of instruction in schools, but one set of criteria cannot fit the diverse set of schools in the country. The Forum proposes that the State assumes responsibility for ensuring that all children have an opportunity to acquire competency in English commensurate with at least the compulsory level of education, and leave options open for individuals and institutions to decide on the extent and the means of English education to be given to the students.

5. Types of Schools

Proposed Legislation

- There can be three types of schools:
 - Fully State-assisted
 - Receiving some assistance from the State, and
 - Not receiving any assistance from the State.
- Each of these types of schools should follow the minimum required guidelines for educational establishments.
- Any school receiving any form of State assistance shall be required to offer scholarships to outstanding students from low-income families, with the percentage of scholarships determined on the basis of State assistance received.
- The Minister for education shall report to Parliament biannually on enrollment of students by type of school in each education administrative unit.

Rationale

Although Section 25 of the Assisted Schools and Training Colleges (Supplementary Provisions) Act No.8 of 1961 prohibits the establishment of private schools, monies paid by parents for private tuition, after school classes, or money paid directly to private schools established as business ventures, are testimony that private education is a fact of life in Sri Lanka today.

Therefore the Forum endorses the NEC's recommendations per items 24-27 in NEC 2003 report.

6. Structure and Management

Proposed Legislation

- Schools shall have the power to administer their own affairs through duly constituted school-based units of management that represent the school community, unless such a unit of management or appropriate education authority can establish a reasonable case as to why the school cannot.
- The principal of the school shall serve as the chief executive officer under the guidance of the school management unit and he/she shall always adhere to standard government procedures.
- Evaluating the accountability and the effectiveness of the principal and the school management unit is the responsibility of the education authorities. They shall do so review of progress reports, auditing of accounts and by using other standard procedures.
- Provide an equitable allocation of resources to schools by accurately computing unit costs at least for recurrent expenditure and through resource allocation on the basis of unit costs and the number of students in each school.
- The Minister of Education shall report biannually to Parliament the percentage of education allocations spent on activities that do not involve direct contact with students, with details of such activities.
- Teachers should be deployed on the basis of a uniform student-teacher ratio with modifications for small schools as defined in Recommendation 16 of the NEC 2003 report.
- The appointment, promotion and transfer of teachers and principals should be carried out by duly appointed boards.
- The Minister of Education shall report annually to Parliament the distribution of teachers by school and subject area.

Rationale

The Education Forum feels that empowerment of the schools and reduction of bureaucratic requirements is the only way to combat the current ills of political interference, bureaucratic lethargy and lack of coordination among the bureaucrats, as identified in Recommendation 110 of the NEC 2003 report as the three major contributory factors for overall inefficiency and ineffectiveness of the education system in Sri Lanka.

The concept of a school-based management structure needs to be included in the proposed new Act but in a stronger form whereby autonomy of the school should be the default unless the appropriate authority can justify otherwise.

Discussions with functioning School Development Committees (SDC) have pointed to the need for some minor modifications to the currently applicable circular 2005/24 of the Ministry of Education, in regard to the role and function of parents, teachers and well-wishers in the SDCs including their voting rights. Teachers and principals are the key to reforms in education because they interact with children on a day-to-day basis. Therefore, it is the responsibility of education administrators to look after the well being and career advancement and satisfaction of teachers and principals. At present, the quality of teaching and the level of leadership in the public school sector are in deep crisis due to political interference and lack of transparency in the appointment, promotion and transfer of teachers and principals. There are multiple categories of both teachers and principals and the salary scales of the many categories are in dispute.

7. Welfare Services

Proposed Legislation

- Education authorities should not engage in providing welfare services to students or their families. The distribution of resources such as books, school uniforms and other amenities need to be implemented through the appropriate welfare agency by way of vouchers for purchase of required materials.

Rationale

The Education Forum proposes that the new Education Act should go beyond the NEC 2003 recommendations, which essentially endorses the State monopoly of text book procurement and distribution.⁷ The current state of affairs is a recipe for corruption and inefficiency. Legislation should be drafted keeping in mind that any additional service to be offered by the Ministry of Education requires an additional layer of bureaucracy thereby reducing the money that should go directly to the schools for the education of children. Besides, State control of the book publishing industry is hurting the independent publishing industry.

Distribution of vouchers for school books and uniforms for low income families need to be done through a State agency such as Samurdhi. This will reduce costs and improve the targeting of subsidies.

⁷ Recommendation 60(iv), NEC (2003) – Principals and staff in schools should be free to select any textbook per subject per grade which should be provided free to students from Grade-1 to Grade-11 by the State. Other approved books will be placed in school libraries for the use of students and teachers. All textbooks should be available for sale in bookshops.

**THE HUMAN RIGHT TO EDUCATION OF THE VANNIYALA-ETTO
COMMUNITY (THE FOREST DWELLERS) IN SRI LANKA
AS AN EMPOWERMENT RIGHT[#]**

*Shirani Rajapakse**

1. Brief Overview of “The Right to Education” under Human Rights Law

Article 26 – 1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

3. Parents have a prior right to choose the kind of education that shall be given to their children.¹

Article 26 of the Universal Declaration on Human Rights (UDHR) is reiterated in the context of treaty law; it is detailed in Article 13 and 14 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).² Para.4 of General Comment (GC) No.13³ states that when realizing the right to education, the States parties have to adhere to the normative objectives (whether education provided by State is formal/informal, private or public) identified in Article 13 and the principles and purposes stated in Articles 1 and 2 of the United Nations Charter (UNC).⁴ Article 13(1) of the ICESCR recognizes the right to education of everyone, which aims the full development of the human personality.⁵

Article 13(1). The State Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship

[#] This is part of a paper on “*The Human Right to Education of the Vanniyala-etto Community (the Forest Dwellers) in Sri Lanka as an Empowerment Right*”, submitted by the author in fulfillment of a masters thesis in International & Human Rights Law, Lund University, in Spring 2006.

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¹ ‘Article 26(1) of the UDHR’, <<http://www.unhchr.ch/udhr/lang/eng.htm>>, Visited 4 February 2006.

² ‘Explanatory Note to the Hague Recommendations Regarding the Education Rights of National Minorities’, www.unesco.org/most/ln2pol6.htm, visited 29 December 2005.

³ The CESCR (Committee on Economic, Social and Cultural Rights).

⁴ Para.4, *The right to education* (Art. 13): 08/12/99. E/C.12/1999/10. (General Comments), <<H:\University of Minnesota Human Rights Library files\ University of Minnesota Human RightsLibrary.Htm>>, visited 23 December 2005.

⁵ ICESCR, <http://www.unhchr.ch/html/menu3/b/a_ceschr.htm>, visited 3 February 2006.

among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

Other international instruments further elaborating the objectives of the right to education as set out in the ICESCR states that the States parties are required to ensure the right to education conforms to⁶, the aims and objectives identified in Article 13(1) of the ICESCR, as interpreted in the light of the World Declaration on Education for All⁷, the Convention on the Rights of the Child (CRC)⁸, the Vienna Declaration and Programme of Action⁹, and the Plan of Action for the United Nations Decade for Human Rights Education.¹⁰

According to the World Declaration on Education for All interpretation, the purpose of education has an extensive value. Article 1(2) of the World Declaration states that satisfying the basic needs of education empowers *individuals* in any society, and confers upon them a responsibility to respect and build upon, to promote the education of others, to be tolerant towards social, political and religious systems which differ from their own, ensuring that commonly accepted humanistic values and human rights are upheld.¹¹ Article 29 of the ICRC states that the education of the *child* shall be directed to the development of the child's personality, respect for human rights and fundamental freedoms, respect for his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own.¹²

Besides, the World Conference on Human Rights condemns "*gross and systematic violations*" that constitute serious obstacles to the full enjoyment of all human rights and states that human rights education should include peace, democracy, development and social justice, as set forth in international and regional human rights instruments, in order to achieve common understanding and awareness with a view to strengthening universal commitment to human rights,¹³ with the Plan of Action for the United Nations Decade for Human Rights Education stating that the objective of the right to human rights education is to build up *a universal culture of human rights*.¹⁴

In the end result, education must aim at building up the individual, directed towards development, starting at a young age. If there are any impediments to realizing the goals, it is the governments concern that such obstacles must be eradicated. Building up a universal culture of human rights, respecting the cultural identity and values of individuals,

⁶ Para.5, *The right to education* (Art. 13): 08/12/99. E/C.12/1999/10. (General Comments), <H:\University of Minnesota Human Rights Library files\ University of Minnesota Human Rights Library.Htm>, visited 23 December 2005.

⁷ Article 1, Jomtien, Thailand.

⁸ Article 29(1).

⁹ Part I, para. 33 and Part II, para. 80.

¹⁰ Para. 2.

¹¹ 'World Declaration on Education for All: Meeting Basic Learning Needs Education for all: the purpose', <http://www.unesco.org/education/efa/ed_for_all/background/jomtien_declaration.shtml>, visited 3 February 2006.

¹² 'Convention on the Rights of the Child', <<http://www.unhchr.ch/html/menu2/6/crc/treaties/crc.htm>>, visited 4 February 2006.

¹³ 'Vienna declaration and programme of action', <[http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument)>, visited 4 February 2006.

¹⁴ 'The Plan of Action for the United Nations Decade for Human Rights Education', <<http://daccessdds.un.org/doc/UNDOC/GEN/N05/253/74/PDF/N0525374.pdf?OpenElement>>, visited 11 February 2006.

communities, countries, and of the different civilizations by individuals, communities, countries and different civilizations, is the universal plurality of the right to education.

Insofar as the regional instrument are concerned, the American Declaration sets forth the right to an education, including free primary education.¹⁵ There is no comparable right in the American Convention. The San Salvador Protocol offers a similar provision to Articles 13 and 14 of the ICESCR in its Article 13 with the only difference being that it is more extensive; Article 13(3)(d) and (e) refer respectively to the basic education for the people who did not receive or complete primary education and refers to special education programmes for the handicapped. The African [Banjul] Charter on Human and Peoples Rights is more far reaching than the instruments available under the European system and Inter-American systems. Article 17 of the African [Banjul] Charter on Human and Peoples Rights not only refers to the right to education of every individual, but also talks of individuals taking part in cultural life and significantly, of the duty of the State to promote and protect morals and traditional values recognized by the community.¹⁶

Apart from the Banjul Charter, there is an African Charter on the Rights and Welfare of the Child. Focal points of this Charter are stated in Article 11: right to education of every child; how the education should be directed preserving and strengthening positive African morals, traditions and values and culture; the obligation of the State to take appropriate measures in realizing the rights set in the Charter taking special measures to encourage regular school attendance and to reduce drop-out rates.

2. Right to Education of the Vanniyala-etto Community as an Empowerment Right

Article 5 of the Vienna Declaration and Programme of Action states that:

All human rights are universal, indivisible and interdependent and inter-related. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

The CESCR interprets the right to education as an empowerment right to realize human rights of economically and socially marginalized adults and children.¹⁷ Further, the right to education helps the full and effective realization of economic, social and cultural as well as civil and political rights. When implementing the right to education, States must take into consideration the indivisibility, interdependency and the universality of all human rights.¹⁸

Despite the above, a person's beliefs, geographical location and other numerous factors including particular circumstances often determine how a person's human rights are violated. Hence, the universality of human rights must be recognized in the context of the different circumstances that actually exist. Therefore, when attempting to realize the human right to

¹⁵ Article 12, ACHR.

¹⁶ 'African [Banjul] Charter on Human and Peoples Rights', <http://www1.umn.edu/humanrts/africa/commission.html>, visited 29 December 2005.

¹⁷ GC No.13 on Article 13 of the ICESCR, Implementation of the ICESCR, Para.1.

¹⁸ GC No.11 on Article 14 of the ICESCR, substantive issues arising in the implementation of the ICESCR, para.2.

education of a cultural group, e.g., the Vanniyala-etto community, not only their historical, cultural and religious background but also developments that have taken place in the economic, social and cultural and especially in the political field in Sri Lanka along with the consequent disruptions or changes made to the traditional life of the Vanniyala-etto needs to be considered.

2.1 Political structure

Different governments work through different political settings. In any kind of political setting, economic, social and cultural rights have to be realized. The success or failure of such efforts depends on the policies and the decision making of any government.¹⁹ Para. 2 of the preamble to the Declaration on the Right to Development states that,

Development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting there from.²⁰

The central subject, the active participant and the beneficiary of the right to development is the human person (Article 2(1) of the Declaration on the Right to Development).²¹ Formulating development policies is the government's right and duty, which reflects the free, active and *meaningful participation* of the individuals, the constant improvement and the well-being of the society as a whole, and the fair distribution of results. Such development affects the individuals' lives, beliefs, institutions and spiritual well being, land they use for their economic, social and cultural development (Article 2(3) of the Declaration on the Right to Development). Therefore, the *meaningful participation* of the individuals will be to participate in the formulation, implementation and evaluation of plans and programmes that affects them directly. Further, the government is obliged to ensure carrying out studies when ever is proper on the planned development activities, the social, spiritual, cultural and environmental impact on the peoples.²²

When implementing the States obligation on economic, social and cultural rights, the resources available and the methods of implementation may differ from one country to another. The CESCR, in providing guidelines on seven key objectives in its first General Comment (GC) to the States parties, states that when implementing policies, States must monitor the actual situation prevailing in the country and set policies, administrative rules, procedures and practices targeting all segments of the State, and have public scrutiny of government policies.²³ General Comment (GC) No.9 issued by the Human Rights Committee under the International Covenant on Civil and Political Rights (ICCPR) affirms that the implementation of standards stated in the Covenant has to be completed bearing in mind, the fundamental requirements of international human rights law and using all means at the State

¹⁹ 'The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights', Para.6, <[http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/6b748989d76d2bb8c125699700500e17/\\$FILE/G0044704.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/6b748989d76d2bb8c125699700500e17/$FILE/G0044704.pdf)>, visited 11 February 2006.

²⁰ 'Preamble, para.2, - Declaration on the Right to Development', www.unhcr.ch/html/menu3/b/74.htm, visited 3 March 2006.

²¹ <www1.umn.edu/humanrts/instreet/ainstls1.htm>, visited 25 February 2006.

²² 'Article 7(3)', <www1.umn.edu/humanrts/instreet/r1c1tp.htm>, visited 25 February 2006.

²³ 'Fact Sheet No.16 (Rev.1), The Committee on Economic, Social and Cultural Rights', <www.ohchr.org/english/about/publications/docs/fs16.htm>, visited 13 February 2006.

party's disposal.²⁴ It is relevant in this regard to reiterate that all human rights are universal, indivisible, interdependent and interrelated.

2.2 *The Education system in Sri Lanka*

History shows that there had been an excellent education system in Sri Lanka even way back in 200 BC. During 1658-1796, (long before the UDHR was formulated), the Dutch introduced a free and compulsory education system to Sri Lanka. During the British era (1796-1948), the education system was further developed. The then Minister of Education, Dr. C.W.W. Kannangara placed education reforms on firm ground with the introduction of free education for all the children from kindergarten to university; the adoption of the national languages as the media of instruction; and the establishment of Central Schools... which for the first time enabled poor children from rural areas to obtain a good education.²⁵

Since independence, the government has given the highest priority to education. Section 12, Part 1 of the Secretary to the Ministry of Education's circular No.ED/1/12/2/6/1 dated 2004/05, states that every child must receive education *compulsorily*. And most importantly, every parent of a child of not less than five years and not more than fourteen years of age *shall* cause such child to receive an education by regular attendance at a school unless the parent has otherwise made adequate and suitable provision for the education of such child.²⁶ Free textbooks, free school meals for the first year students²⁷ and uniforms are provided to all the children. Within a period of less than 40 years the number of schools in Sri Lanka increased by over 50 percent and the literacy rate has grown correspondingly...²⁸

There are legislation and special institutions to provide *de jure* protection and save children from employing them as domestic servants and exploitation: the Labour Department of Sri Lanka has a special unit to investigate, including a hotline to inform of the children who are employed as domestic servants. The Department of Probation and Child Care Services provides protection to child victims of abuse and sexual exploitation.

As stated above, even though Sri Lanka has a high-quality education system in comparison to the South Asian countries, according to the 1993 State report submitted to the CRC, it has failed to achieve due standards in respect of treaty obligations regarding education. There are disadvantaged children who need attention; children who are living in the plantation sector, street children, child soldiers in the North and Eastern part of Sri Lanka, drug addicts, children who are sexually exploited, children of migrant parents, and tsunami children.²⁹

The primary law relating to right to education in Sri Lanka is the Education Ordinance No.31 of 1939 (as amended). According to Part V, Article 37(1) of the Ordinance, the Minister of

²⁴ 'General comment No. 9 - The domestic application of the Covenant', [www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/4ceb75c5492497d9802566d500516036?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/4ceb75c5492497d9802566d500516036?Opendocument), visited 25 February 2006.

²⁵ 'Historical Overview of Education in Sri Lanka', www.moe.gov.lk, visited 31 December 2005.

²⁶ Regulation No.2, Government Notifications under the Education Ordinance, No.1003/5, dated 25 November 1997.

²⁷ 'Government Policies and Programs to Eliminate the Worst Forms of Child Labour – Sri Lanka U.S. Department of Labour, Bureau of International Labour Affairs', <H:\Bureau of International Labour Affairs (ILAB) - U_S_ Department of Labour. htm>, visited 20 February 2006.

²⁸ *Supra* Note 25.

²⁹ 'Initial reports of State parties due in 1993: Sri Lanka. 05.05.1994', <H:\international instruments\United Nations Human Rights Website - Treaty Bodies Database - Document - State Party Report - Sri Lanka_files\United Nations Human Rights Website - Treaty Bodies Database - Document - State Party Report - Sri Lanka.htm>, visited 12 February 2006.

Education has the power to make regulations for the purpose of giving effect to the principles and provisions of the Ordinance. Article 37(4) states that, "every regulation made by the Minister shall, upon publication of the notification of the approval of that regulation as provided for in Subsection (3), be as valid and effectual as if it were herein enacted." Apart from these regulations concerning administrative issues, there are circulars by the Secretary to the Education Ministry.

Sri Lanka has ratified many international treaties that enforce obligations to protect children's rights including education. The ICESCR, the ICCPR, the CRC, the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others directly relates to the education of children.

2.3 Non-discrimination in Education

Discrimination in all areas and levels of education is one major obstacle towards realizing the right to education. The United Nations Secretary General's memorandum on "The Main Types and Causes of Discrimination" explains how discrimination can be identified in the area of education; discrimination means "any act or conduct which is denied to certain individual's equality of treatment with other particular groups of the society".

Articles 12(1) and (2) of the Sri Lankan Constitution guarantees fundamental rights to all the "citizens" without any discrimination of any kind. Thus, Article 12(4) states that for the advancement of children, special provisions, laws or executive action could be taken. For the full realization of fundamental rights and freedoms of all people,³⁰ the government has an obligation to eradicate illiteracy completely and to assure to all persons the right to universal and equal access to education at all levels.³¹ However, what is meant by "complete eradication of illiteracy and the assurance to all persons of the right to universal and equal access to education at all levels"? Does this mean providing a basic education by the state? How will the government interpret it? Or how can we interpret it according to the international norms and standards?

The Sri Lankan society is a pluralistic society comprised of different cultural groups. If cultural pluralism helps the minority groups to participate fully in the dominant society, and maintain their cultural differences, then education has a major role to play in a pluralistic society. It cannot be a basic education that one should get. All cultural groups in a pluralistic society must have a good knowledge about cultural differences in order to tolerate to a certain degree and coexist with the other groups.³²

Different interpretations can be given to the human right to education: one could say that it is the right of the Vanniyala-etto to get an "education". However, there are different actors in the field of education: the government, parents, teachers, students, or third parties who provide educational facilities, and anthropologists who have studied the Vanniyala-etto community or countless other persons that may make a contribution to the "education" of the

³⁰ Article 27(2)(a) of the Sri Lankan Constitution.

³¹ Article 27(2)(h) of the Sri Lankan Constitution.

³² 'What is cultural pluralism?', <H:\Cultural Pluralism. htm>, visited 2 January 2006.

Vanniyala-etto, e.g., the international community. Conversely, the political and economical environment of the country; government policies on education or economy may be vital factors in deciding the right to education.

The present Vanniyala-etto Chieftain has affirmed the value of education in the following manner:

If I am not a knowledgeable person, I won't be able to answer you. The society is very complicated now. Therefore, the younger generation might face lots of problems if they are ignorant. There were 136 indigenous representatives from all over the world at an international conference. I was fascinated by the way we interacted with each other, using one common language of humanity, since our cultures were different. They respect and had protected their own cultural identities but have assimilated into the larger societies. This has not harmed their cultural identity. There was respect towards the Vanniyala-etto community as well.³³

2.4 *The Sri Lankan Policy on Education of the Vanniyala-etto*

The Directive Principles of State Policy and Fundamental Duties, stated in Article 27 and 28 of the Sri Lankan Constitution affirms the State obligation to eradicate illiteracy "completely", assure to "all persons" the "universal and equal access to education at all levels", it covers education of the children and adults, as stated in Article 13(1) of the ICESCR "...right of everyone to education..." The Directive Principles guide the State to formulate State policies.³⁴ Those principles are not justiciable.³⁵

The Sri Lankan policy on education, to fulfil the Education Ordinance, is to provide "education for all". To this extent different circulars are issued and/or regulations have been made.³⁶ However, it is a fact that the education system in Sri Lanka does not focus on the child. It only aims at exams. However, as Gunawardhana, the first graduate from the Vanniyala-etto community states, education must focus on the child, to build up his or her personality.³⁷

It needs to be stressed that when fulfilling the State obligation as stated in the ICESCR on right to education, neither the *progressive realization* nor *availability of resources* can be cited to justify the State party's delay. Progressive realization means that State parties are subject to a specific and continuing obligation "to move as expeditiously and effectively as possible" towards the full realization of Article 13 (GC No.3, para.9).³⁸ Its application is *full and immediate* (GC No.3, para.2).³⁹ When *taking steps* (Article 2(1) to realize the right to education, *all appropriate means* include adopting legislations, administrative, judicial, policy, economic, social, and educational and all other measures that requires realizing the right to education.⁴⁰ This is acknowledged in the Sri Lankan Constitution, in Article 12(4).

³³ Present Vanniyala-etto Chieftain, Dambana, 25 November 2005.

³⁴ Article 27(1) of the Sri Lankan Constitution.

³⁵ Article 29 of the Sri Lankan Constitution.

³⁶ 'Regulation I(b) of the Gazette notification No.1003/5 of 25 November 1997.

³⁷ Dambane Gunawardhana, Dambana, 25 November 2005.

³⁸ Fact Sheet No 16(Rev.1) the Committee on Economic, Social and Cultural Rights – at www.ohchr.org/english/about/publications/docs/fs16.htm. Visited 13 February 2006.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

Free and compulsory education therefore, has to meet the above national and international goals.

Even if the States have to realize rights progressively due to constraints of financial and other available resources, the States have an immediate obligation (GC No.3, para.1, CESCR) to guarantee that the right to education will be realized without discrimination of any kind (Article 2(2)). Such steps must be “deliberate, concrete and targeted” towards the full realization of the right to education.⁴¹ When States do not have adequate funding, economical and technical assistance can be obtained as stated in Article 55 and 56 of the UNC.⁴²

For example, Sweden’s belief is that it is vital that all children learn the history, culture, language and religion of the country’s national minorities. School curricula has therefore been amended to include instruction on national minorities and minority languages.⁴³ The Swedish National Agency for School Improvement is working on a project to produce Romany Chib teaching materials including computerized dictionaries. A survey has been completed on language subjects taught at the university and college level. Accordingly, Romany Chib and Yiddish courses are to be introduced. It was said in 2002, that the Swedish Broadcasting Corporation, the Swedish Educational Broadcasting Company and Swedish Television were granted new broadcasting licenses. New national minority programmes have been introduced.⁴⁴ In Mexico, students from 47 indigenous groups are learning through bilingual and intercultural education programmes. It is said that their educational performance falls far below that of non-indigenous students. It is same with Chile.⁴⁵

However, educating the indigenous students or other students of the Vanniyala-etto culture, religious beliefs or history is not taking place in Sri Lanka. The WB has funded programmes since 1997 to improve the curriculum, the quality, access and management of schools, and the training of teachers from Grade 1 to 9.⁴⁶ But since independence, though anthropologists and other researchers have advised the government appropriately, the government does not appear to have seen the need for a policy in this regard, perhaps for the reason that the Vanniyala-etto community is gradually assimilating into the larger society which would not leave any room for learning of their language or culture.

Yet, each indigenous community in the world has different traditional knowledge and cultural heritage. In the larger society, there is only limited space to develop their cultural heritage. There is no doubt that education helps to protect, preserve and promote the traditional knowledge, cultural heritage and the intellectual property. The Draft Declaration on the Indigenous People lists the importance and ways of indigenous education.⁴⁷

- “Indigenous philosophies and principals to underpin indigenous education;
- Promotion of quality and exemplary indigenous education models;

⁴¹ *Ibid.*

⁴² *Supra* Note 19, Articles 29 to 34.

⁴³ ‘Education’, <http://www.sweden.gov.se/content/1/c6/21/02/160449b202.pdf> visited 11 Feb. 2006.

⁴⁴ ‘National minorities and minority languages – A summary of the Swedish Government’s policy on national minorities’, www.sweden.gov.se/content/1/c6/21/02/160449b202.pdf visited 11 February 2006.

⁴⁵ ‘The Special Rapporteur’s report’, [UN Doc. E/CN.4/Sub.2/2002/12](http://www.unhcr.org/refugees/refugees.html)

⁴⁶ ‘Government Policies and Programs to Promote the Well-Being of the Labour – Sri Lanka’, U.S. Department of Labour, Bureau of International Labour Affairs, U.S. Bureau of International Labour Affairs (ILAB) - U.S. Department of Labour, www.dhs.gov/eis/india/india.html visited 11 February 2006.

⁴⁷ ‘Article 15 – Education’, *The Draft Declaration on the Rights of Indigenous Peoples (DARIP)*, <H:\international instruments\Education as an indigenous Right.htm>, visited on 11 Feb. 2006.

- Indigenous teacher education programs;
- Ethics of indigenous education research and development;
- Indigenous schools and post-school learning centres;
- Indigenous studies for all people (including teacher education courses);
- Equal access to and with education systems;
- Indigenous parental right to choose the kind of education that shall be given to their children;
- The right to enjoy their own cultures in community with other members of their group;
- Provision of conditions that are conducive to the use and maintenance of indigenous languages”.

The Kari-Oca Declaration, titled The Indigenous Earth Charter (Brazil 1993), includes the following statements on Indigenous Education:⁴⁸

- Indigenous peoples have the right to their own knowledge, languages and culturally appropriate education including bi-cultural and bi-lingual education. Through recognizing both formal and informal ways the participation of family and community is guaranteed;
- Indigenous peoples must have the necessary resources;
- Elders must be recognized and respected as teachers of the young people;
- Indigenous wisdom must be recognized and encouraged;
- The use of existing languages is their right; these languages must be protected.

2.5 Schools

The multicultural and intercultural education of a country has to be ensured by the educational system itself. It involves research on countries that have already introduced such methods; their draw backs, research on what is suitable for the country concern, policy making, setting up institutions or making use of institutions that are already in place in the education system, schools at the national level or at the regional level, specially where the indigenous people live, creating new schools to suit their education, changing syllabuses; inclusion of indigenous culture, religious beliefs, history, training teachers from the indigenous communities itself to teach their culture and other teacher training programmes, educating the majority populations on indigenous culture, etc.

“...[i]t involves a complete revision of educational contents and methods in a country... [i]t basically means that the cultural diversity of the country is

⁴⁸ ‘The Kari-Oca Declaration – The Indigenous Earth Charter (Brazil 1993)’, H:\international instruments\Education as an indigenous Right.htm>, visited on 12 February 2006.

reflected in the curriculum and the preservation and promotion of cultural diversity become an objective compatible with democratic governance and the enjoyment of human rights by all... revision of traditional ideas held by the majority or dominant cultural groups about national culture and identity”⁴⁹

Thus, Sweden has taken major steps to preserve the Sámi culture and education. Some of the obligations of the Swedish Sámi Parliament established in 1993 are to appoint the board of the Sámi Schools as stated in the School Act, to deal with Sámi language issues.⁵⁰ In 1997, Norway had introduced curriculum in Sámi schools in six municipalities. In 2002, Greenland’s Parliament introduced far-reaching educational reform in the country, the Atuarfitalak programme, to secure local culture. Then again, the government of Canada, funds 119,000 students, so that the First Nations children could attend grades K-12, computer assisted instruction while some First Nations and Inuit can attend higher education.

Sri Lanka cannot be compared with developed countries. But when there are difficulties in realizing economic, social and cultural rights, the State’s obligation is to obtain international assistance as stated in the ICESCR Article 2(1). Guatemala, for example, has introduced a Mayan bilingual and intercultural education project with the help of the UNESCO: to teach two languages (mother tongue and the dominant tongue), teaching and testing of complementary value systems (Mayan and universal values), teaching of Mayan art and art from other cultures, identification, analysis and interpretation of the world on the basis of indigenous Mayan culture and the accumulated knowledge of mankind in general.

In Sri Lanka, the Vanniyala-etto are mainly restricted to two Provinces: Uva and the Eastern Province, comprising of Badulla, Monaragala and Ampara Districts. According to the Education Ministry circular No.ED/3/37/9/2/3(1) dated 18.01.2005, schools are categorized as follows: remotest, remote, and schools-that-are-not-difficult to reach; and popular and very popular (the circulars are only available in Sinhalese and Tamil languages, therefore, the translation is subject to clarification); based on the following indicators: availability of (1) basic facilities, (2) usable equipment, (3) basic usable sanitary facilities, (4) usable building spaces, (5) minimum spaces, (6) education – teacher availability and professionalism of the teachers, (7) location – distance, traffic count and location and, (8) school value, according to the facilities provided to the teachers. Those indicators are used only to implement the national teachers transfer policy. But this policy indicates the type of schools that any child goes to. Mostly, the Vanniyala-etto children go to schools that come under the first two categories of schools, remotest or remote. They may not get the best teachers, since the teachers always try to get transferred from these types of schools.

Government schools are graded by functional grade and status (2004) as: (1) Type 1AB – up to Advance Level with science classes, (2) Type 1C – Advance Level with arts and commerce but no science classes, (3) Type 2 – up to year 11, and (4) Type 3 – up to year 8.

Pollebadda is a Vanniyala-etto village in Maha Oya Divisional Secretariat in the Ampara District in Sri Lanka. It has a population of 1,688, or 150 Vanniyala-etto families. The Pollebadda Vidyalaya is a Type 3 school (education up to year 8) according to the statistics by the Education Ministry for the year 2004. But it has classes up to the 11th year. There are ten teachers including one each to teach Tamil and English languages as well. There are only five teachers to teach in Grades from 5-11. The required teachers are 16. For the year 2006

⁴⁹ ‘Report by the Special Rapporteur 2002, E/CN.4/2002/97, p.20.

⁵⁰ ‘Sametinget News’, <www.sametinget.se/sametinget/view.cfm?oid=2000&sat=no>, visited on 8 February 2006.

there had been 50 applications as new enrolments. The parents had not known the school admission procedure. Due to their ignorance, there had been last minute school admissions on the first day in school, for the year 2005. The normal procedure for school admissions will be to select the students before the end of the previous year. It was revealed that when parents want to cultivate *Chenas* (where you grow vegetables, etc) the students do not attend school.⁵¹

Gunawardhana, a graduate teacher from the Vanniyala-etto community, stated that they have classes up to Grade 5, but there are only two teachers, the principal and himself to teach all the subjects. According to the Education Ministry statistics for the year 2004, the Gurukumbura Kanishta Vidyalaya, (belongs to Dambana, Mahiyangana District), is a Type 4 school, which goes beyond the Education Ministry grading.⁵²

The above examples are of two Vanniyala-etto schools belonging to different districts. The schools belong to either the remotest or remote areas as stated in the Education Ministry Circular No.ED/3/37/9/2/3(1) dated 18.01.2005 (see Chapter 4.5.2, paragraph 8, page 51). How many of the children belonging to the Vanniyala-etto community get an opportunity for better education? The social background shows the parents' ability to provide an education to their children is extremely low.

Educated people like Gunawardhana states that it is because of the education he got, that could live either in the Vanniyala-etto or the larger society. But his option would be inclined towards the education that he has obtained. Thus, he points out that;

Most of the members belonging to the larger society have a different attitude towards the *Veddas*, that is how we are often called, that we are unclean and who doesn't belong in the society, who kills animals. The great majority question us whether we eat rice. They never try to learn about the Vanniyala-etto lifestyle, culture and the language.

Gunawardhana does not have any hope for tomorrow; he says that with the principal's help, he has done his level best to teach their culture to the younger generation. However, the situation may change if another principal comes who does not understand the importance of preserving the Vanniyala-etto culture.

According to Article 2(1) of the ICESCR, the government has the obligation to respect, protect and fulfil the rights stated in the ICESCR. Failure to fulfil such obligations is a violation of economic, social and cultural rights. When implementing the State's obligation on right to education: the State should refrain from interfering with the Vanniyala-etto's enjoyment of their rights and should take pro-active measures to preserve their cultural heritage on their own; e.g., educating the children on their culture, religion through their cultural centre, or through publications.⁵³ The State has an obligation to protect the Vanniyala-etto rights against third parties; NGOs and other organizations that have tried to intervene with the Vanniyala-etto life in so many unnecessary ways.⁵⁴ Some organizations attempt to show that the Vanniyala-etto are in a pathetic situation and try to get funds from international donors. Preventing such happenings is also the State's obligation.

⁵¹ Chandrasiri, Regional Coordinator, Ampara. Discussion with the Principal, Pollebadda Vidyalaya, 5 December 2005.

⁵² Gunawardhana, a graduate teacher, Dambana, 25 November 2005.

⁵³ 'A guide to the study of Veddas' language and culture', Dambane Gunawardhana.

⁵⁴ Jayasekera, Future-in-our-hands Development Project, Dambana. 25 November 2005.

The obligation to fulfill requires the State to take appropriate legislative, administrative, budgetary, judicial and other measures. The State is obliged to take many measures to ensure equality between the larger society and the Vanniyala-etto. To meet this end, putting temporary special measures into place is not discriminatory towards other members of society. Neither does it amount to giving new rights for the Vanniyala-etto⁵⁵ since temporary special measures are only being taken to alter the inequality between the larger society and the Vanniyala-etto.

2.6 Language

Commenting on the right to education contained in Article 13 of the ICESCR, the CESCR in its GC No.13 explains the two elements of Article 13(3). Accordingly, the State parties have to respect the parents or the guardians liberty to ensure the religious and moral education of their children in their own belief; this relates to Article 18(1) of the ICCPR on the freedom to teach a religion or belief, Article 13 is a replication of Article 18(4) of the ICCPR. Article 13(3) permits public school instruction in subjects, e.g., history of religion and ethics, to the extent that the instructions are unbiased and are in an objective way, and respects the freedom of opinion, conscience and expression. If non-discriminatory exemptions or alternatives that would suit the parents are not being made, such instructions will not be in conformity with Article 13(3).⁵⁶

The second element is that the liberty the parents and the guardians have to choose other than public schools, which should be read with the complimentary provision Article 13(4), such establishments have to be in conformity with the educational objectives set in Article 13(1) and certain minimum standards; admission, curricula, and the recognition of certificates.⁵⁷

In Sri Lanka, children are taught English/Sinhalese and Tamil as languages in the State schools. As stated earlier, the Vanniyala-etto are restricted mainly to two Provinces. The government of Sri Lanka has the obligation to respect when the Vanniyala-etto community takes measures to educate the youngsters within their capacity: With the second International Decade of the World's Indigenous People commencing from 1 January 2005,⁵⁸ the Vanniyala-etto Chieftain is making an effort to teach their language to the children through the cultural centre in Dambana.⁵⁹ Dambane Gunawardhana has published a guide to the study of Vanniyala-etto Language and Culture and will publish many more.⁶⁰ The other constituent is that their religious beliefs are connected to the traditional land. The Vanniyala-etto have specific places where they perform rituals. Therefore, if the children are to get any experience about their traditional religious beliefs, it cannot be in a classroom. Will it be possible for the parents to exercise educational freedom with regard to such a religious belief?

In developing countries, with limited resources in hand, how could the right to educational freedom be interpreted? Could this right be limited to the parental right of choice? Will the parents belonging to indigenous communities have the ability to exercise such rights as stated

⁵⁵ Article 2, ICESCR and Article 39, Article 2(2) – non-discrimination, Limberg Principles.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, para.29.

⁵⁸ The General Assembly adopted resolution 59/174 on 20 December 2004, which proclaims a second International Decade of the World's Indigenous People to commence on 1 January 2005 <<http://www.ohchr.org/english/issues/indigenous/decade.htm>>, visited on 20 January 2006.

⁵⁹ Present Vanniyala-etto Chieftain, Dambana, 25 November 2005.

⁶⁰ Vaddas – The Indigenous People of Sri Lanka – 1, Dambane Gunawardhana, (Simple Wisdom Publishers, 2003).

above? In the above context, could a State party to the Covenants, disregard and restrict the right to indigenous languages being used in education?

2.7 *Curricula/Syllabus*

Currently, primary education in Sri Lanka is divided into three stages. Stage I – Grades 1 and 2; the main learning mode, guided play with secondary emphasis on active learning and a minimum of desk work. Stage II – Grades 3 and 4; equal importance will be given to all three modes of learning; activity, deskwork and play. Stage III – Grade 5 greater emphasis on deskwork. In the primary stage of education, three of the new integrated primary curricula will consist main subjects of first language, environmental related activities and religion. And in the junior stage of education, curriculum in Grades 6 to 9 includes ten subjects. Some of the subjects including practical work and work on small projects will be of first language, social studies, life competencies, religion, aesthetics, health and practical and technical skills.⁶¹

In the present context, the Vanniyala-etto children may not get an opportunity to learn (in their language), of their religious beliefs since the language of instruction is either Sinhalese or Tamil. In the junior stage, this would be the same since the Vanniyala-etto language (at schools) is not recognized as the first language of the children belonging to that community.

According to a memorandum of the SG to the UN, “If a child receives its education in a language which is not its mother tongue, this might imply that the child is not treated on an equal basis with those children who receive their education in their mother tongue”.⁶²

In the primary stage of education, the child has to learn his/her first language, environmental activities and religion. At present, in the first years of studies, there are assignments (*pāvarum*) given to the primary school children, where they have the freedom to choose a topic. The teacher’s duty is only to supervise the student. These assignments do not aim at any grading; therefore, the children will not be very enthusiastic in putting the best effort to their work. Most of the time the students are disheartened since there is no system in getting credits that has a direct or indirect relevance for their studies. Gunawardhana suggests that in the primary stage, the students must be taught in their mother tongue. Therefore, the curricula must be specially designed to suit the environment of the children from the Vedda-community. This could be merged in the latter stages of the education, so that children belonging to all the communities could get to know about all the other communities at a certain stage (by sixth year or so). But giving the primary education in a child’s mother tongue is essential since the child will not be confused and will get to know about his/her social background first.

The only time that any questions formulated on the Vanniyala-etto may have become relevant is in the context of regional dialects where at the Ordinary Level and Advance Level Examinations, a number of questions (four for the O/L and ten for the A/L respectively) are formulated. Sometimes questions may be based on the Vanniyala-etto language. This is just to test the general knowledge of the students. This has no direct or indirect relevance to

⁶¹ Recent Developments in Education in Sri Lanka, <http://www.moe.gov.lk/modules.php?name=Content&pa=showpage&pid=6#top>, visited 21 January 2005.

⁶² A memorandum of the Secretary General of the UN, “The Main Type and Causes of Discrimination”, ‘The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities’, in Patrick Thornberry (ed.), *The United Nations Charter and the treaties of peace: the issue of minorities (...publishers)* p.126.

learning the Vanniyala-etto language. There had been no proper learning about their history or culture *per se*. None of the subjects in the present curricula focuses on the Vanniyala-etto religious beliefs, culture, and their language.⁶³

Article 12 of the African Charter on the Rights and Welfare of the Child is vital in realizing an equal and balanced education. In particular, Article 12(b) refers to eliminating all stereotypes in textbooks, syllabuses and the media that perpetuate discrimination.

The indigenous children have the right to education in their own languages, in an appropriate manner to their cultural methods of teaching and learning.... Indigenous peoples have the right to have the dignity and diversity of their cultures, traditions, histories, and aspirations appropriately reflected in all forms of education and public information.⁶⁴

The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, 2005 has engaged in a study on the right to education of the indigenous people: When providing an education to the indigenous people, the States have the obligation to look into the appropriateness and the quality of the education that is to provide; he recognizes that the UNESCO has stressed the need for a linguistically and culturally relevant curriculum in which history, values, languages, oral traditions and spirituality are recognized, respected and promoted. Lack of trained teachers who are bilingual, lack of teaching materials suitable for intercultural and pedagogy, are some of the problems. But there are new developments taking place as well; e.g., Alaska Native Knowledge Network is developing a school curriculum based on aboriginal knowledge. He appreciates the knowledge of older people from the indigenous communities and states that the formal educators are devaluing their knowledge.⁶⁵

The Special Rapporteur reports that the system of formal education has shown both sides; it has supplied the access of the indigenous children to the larger society. But when the formal education is provided in another language, the programmes, curricula and teaching methods coming from other societies, not from the indigenous culture itself, has made the indigenous people forcibly change or, are apt to destroy indigenous cultures. When the indigenous people are assimilated either to the western or the national dominant culture, as the case may be, it is difficult to achieve the fundamental goal of education, it is a culture which is alien to the indigenous people, this either results in the disappearance of the indigenous cultures or their marginalization within the cultural systems. This result could come about even if legislation sets specific objectives on principles of equality and non-discrimination.

This is true of Sri Lanka as well. The Vanniyala-etto were assimilated either into Sinhalese or Tamil groups. Therefore, the formal education was given in either of the languages. Due to the ignorance of the Vanniyala-etto community, they never had the chance to be educated in their native language. The common argument brought was that the language is not as developed as the Sinhalese or Tamil languages. Even these two main languages have developed by mixing with other languages. If due regard is given, there will be a way for the Vanniyala-etto language to be developed. The Vanniyala-etto and their language is a part of the Sri Lankan heritage.

⁶³ Harendra, Zonal Deputy Director of Education, Mahiyanganaya, Sri Lanka, 22 November 2005.

⁶⁴ The Special Rapporteur's Report –E/CN – 4/2005/88. p9

⁶⁵ *Ibid*.

2.8 Teachers

According to Sri Lanka's National Teacher Education Policy of 2001, the student-teacher ratio (STR) is, in the primary level 26:1 and in the secondary level 22:1. The Ministry of Education has identified an excess of teachers in the urban popular schools and shortage in rural difficult schools. For the university entrance classes, they are recruited from the University Graduates. There are National Colleges of Education to train teachers. Teacher training is carried out through the National Institute of Education and Teacher Training Colleges (for untrained teachers). There are short-term continuing education courses introduced in the Teacher Education Institutes. The Universities offer Post Graduate courses in education as well.⁶⁶

However, the student-teacher ratio is well below what is required. Training teachers to teach the Vanniyala-etto children in their language is a policy decision that the Sri Lankan government has to make. Selecting people from their own communities to be trained as teachers (who have the basic qualifications) is vital, as they are well conversed in their language and have the knowledge of their culture.

It is well said by David Van Broekhuizen that preparing teachers to teach, read and write in indigenous languages differ from community to community. Some countries may speak one language.⁶⁷ In some countries, the same community in different parts speak different dialects according to their cultural background. For example in Sri Lanka, Kandyan Sinhalese and low-country Sinhalese speak different dialects, so are the Tamils who live in the up-country and in the North East part of Sri Lanka. Therefore, when teachers are trained, the cultural backgrounds of those communities have to be contemplated.

Van Broekhuizen states that when a whole country speaks one language, special training would not be essential. But when the teachers do not speak any native languages, special attention should be given:

Native American communities where there are few native speakers left, community colleges have consulted with tribal leaders to establish pools of language teachers certified by the tribe. Each tribe is responsible for developing its own criteria.⁶⁸

In the Special Rapporteur's report for 2005 he mentions about the difficulties of teacher training to educate indigenous people or the whole community: if the teachers are ignorant of the indigenous languages then they would not be able to communicate well with the indigenous students.⁶⁹

...Lack of well trained indigenous teachers who are bilingual... before training teachers the trainers should be trained; overcoming institutional resistance, change the attitude of the ministerial officials, members of the teachers' associations and unions within the formal education system. The instructors who are trained in the general teaching institutions have no knowledge and cannot speak any indigenous language.

⁶⁶ 'Reforms in Teacher Training and Deployment', www.moe.gov.lk, visited 23 February 2006.

⁶⁷ 'Pacific Resources for Education and Learning – Literacy in Indigenous Communities', L. David Van Broekhuizen (Ed.), www.prel.org/products/re_/indigenous.htm, visited 23 February 2006.

⁶⁸ *Ibid.*, 240.

⁶⁹ *Supra*, Note 64

The Special Rapporteur points out that, South Africa and Namibia have taken major steps to promote indigenous languages in educational systems: preparing teaching materials for primary schools. South Africa wants to promote multilingualism and adult literacy.⁷⁰ He states of the importance of the non-formal education by using wisdom and knowledge of older-persons. He gives success stories of the Maori of Aotearoa New Zealand, some of the First Nations in Canada, the Sámi in the Nordic countries.⁷¹

3. Conclusion

It is clear that the right to education of the Vanniyalaetto community as an empowerment right is not being secured in the true sense. Therefore, their distinct cultural identity and value is not being recognized by Sri Lanka.

If the Vanniyala-etto children are denied their right to receive an education in his/her mother tongue he/she is being discriminated against his human right to education as protected by the ICESCR, the CRC and the Constitution of Sri Lanka.

Governments often are reluctant to find solutions to indigenous people's problems because of the autonomy that links to their rights. One of the principles that the States should adhere to when realizing the right to education is the State's sovereignty. In this connection, Sweden offers a good example in trying to find a solution, in spite of some criticisms leveled against these efforts. Sweden has recognized the Sámi as indigenous people within the concept of national minorities and their cultural identity and language is also protected. In Sámi schools, teaching is to be conducted in Swedish and Sámi and the Sámi language is to be a subject in all grades.⁷²

The right to education as an empowerment right involves the right to preserve a culture. To preserve a culture, what helps is one's own language. The Vanniyala-etto are not given the opportunity to receive an education in their mother tongue. However, the education system in Sri Lanka only aims at fulfilling the State's policy, to "provide education for all the children." The Vanniyala-etto were assimilated into the larger society to make them self-supporting communities. The Vanniyala-etto children get basic education, like all the other children, either in Sinhalese or Tamil language, depending on how they were assimilated unto the larger society.

The right to education as an empowerment right interconnects, interdepends, and interrelates with all other human rights including the right to development that comes under the international human rights standard setting norms. Therefore, when the State is looking for solutions, all the fundamentals have to be taken into consideration. Thus, it is recommended that the State's policy on education should be amended in order for the Vanniyala-etto children to receive at least their basic education in their mother tongue. To this extent, the following measures are necessary.

- To amend the laws, amend administrative directives.
- To carry on research, in Sri Lanka, regarding the ground situation, and on the countries that have already introduced methods, e.g., Sweden, India.

⁷⁰ *Ibid*, para. 62, p.15.

⁷¹ *Ibid*, para. 66, p.15.

⁷² 'The Sami Language in education in Sweden', www1.faknaw.nl/mercator/regionale_dossiers/regional_dossier_sami_in_sweden.htm#Primary%20education, visited 5 March 2006.

- To amend the school curricula, for the Vanniyala-etto children to receive their basic education in their mother tongue.
- To provide teacher training, on Vanniyala-etto language, and to choose people from their own community, to the possible extent.
- To include Vanniyala-etto history, culture and language in the school curricula.
- Alternatively, adopting temporary special measures to bring de facto equality for the Vanniyala-etto, a disadvantaged group is not discrimination by others right to education.

Further, the implementation of the land acquisition law that enabled the taking over of the ancestral land of the Vanniyala-etto community and arriving at a permanent solution through negotiation is also important

To implement these measures, the State must understand and accept the importance of their lands for the Vanniyala-etto people as well as the consequent social, cultural and psychological trauma/impact on the Vanniyala-etto. The Vanniyala-etto are generally identified as backward and primitive. However, the contribution of the Vanniyala-etto is vital for the economical development of the State and for the perseveration of the cultural heritage of the society. This is a truth that must be understood by us all.

THE NOISE POLLUTION CASE: A JURISPRUDENTIAL PERSPECTIVE

*Juanita Arulanantham**

Introduction

This article will examine the judgement of *Ashik v. Bandula, OIC Weligama*¹, most popularly known as the 'Noise Pollution case'. Can it be declared with any degree of certainty that the case represents a 'Natural law approach' being adopted by Sri Lanka's Supreme Court? Or is it a continuation of the strict positivist approach adopted by the Supreme Court in some cases in recent times?² Examining this question, this article will begin with a short description of the judgment, briefly discuss the concepts of natural law and positivism, evaluate the judgment in light of related jurisprudential concepts, and discuss its implications.

The judgment

For the purposes of this article, the primary significance of this judgment is that it restricts the amplification of noise, especially during the hours of 10 p.m. to 6 a.m. It makes this order under a fundamental rights application under Article 12(1). The legal regime examined is the restrictions on noise pollution in the National Environmental Act No. 47 of 1980; the Police Ordinance 1865 regarding the grant of permits for loudspeakers, amplifiers and the like; and the Penal Code and the Criminal Procedure Code regarding the offence of public nuisance. There is also extensive reference to Indian case law on noise pollution and public nuisance.

Positivism³

Positivist theories of law concentrate on a description of law based on formal, rather than moral or ethical, criteria.⁴ This was developed through the work of Jeremy Bentham and John Austin. Bentham defined law as,

'...signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed...by...persons, who...are or are supposed to be subject to his power'⁵

Bentham considered lawmaking by judges a usurpation of the sovereign function⁶. Austin's opinion however, was that judges properly exercise a 'legislative' function in filling the gaps in prescription left by the legislature and even claimed that the law of every country which was made by judges was better than that enacted by the legislature.⁷

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¹ SC (FR) Appl. No. 38/2005, SCM 09.11.2007

² *Singarasa v. Hon. Attorney-General*, S.C. Spl (LA) No. 182/99, SCM 15.09.2006.

³ See generally Freeman, *Lloyd's Introduction to Jurisprudence*, 7th Ed., London: Sweet & Maxwell Ltd., 2001, pp. 199-254.

⁴ McCoubrey and White, *Textbook on Jurisprudence*, 3rd Ed., London: Blackstone Press Ltd., 1999, pp. 11, 13 and 14.

⁵ Bentham, *Of Laws in General*, ed. H.L. A Hart, London: Athlone Press, 1970, ch. 1, para 1.

⁶ Bentham, *A Fragment on Government*, Oxford: Basil Blackwell, 1967, ch. 2, paras 31 and 32.

⁷ Austin, *The Province of Jurisprudence Determined*, London: Weidenfeld & Nicolson, 1954, p. 191

Contemporary positivist jurisprudence⁸ describes laws as human beings' commands. It claims that legal analysis should be distinguished from the causes and origins of laws, the relation of law with other social phenomena and moral aims. Thus, Positivism envisages a closed legal system where decisions can be deduced by logical means from predetermined rules without reference to social aims or moral standards.

Natural law⁹

According to Natural lawyers an immoral rule wouldn't be law however much it may satisfy formal requisites.

Sajjad J. in *Jilani v. Government of Punjab, Pakistan*¹⁰

Thus, as St. Thomas Aquinas stated, naturalist thought:

...implies...that ...(bad) laws are defective in being wrongly made and are thus limited or even entirely lacking in their claim to be obeyed as a matter of conscience. This is in fact a concern with the moral nature of the power to make laws rather than with the formal identification of State prescription¹¹.

Finnis' theory of natural rights which centres around seven basic forms of human goods clearly falls into naturalist theory. Finnis' core concern with the theory of rights sets classical naturalist emphasis on the moral nature of law into a modern discussion of rights which is rooted in basic concerns of the current legal and political world.¹²

Positivist or Naturalist?

It is clear that a primary point of contrast between positivism and natural law is the role they respectively attribute to morality in the determination of the law. Thus, in determining if the judgment is of a naturalistic or positivistic nature, the primary issue is the role of morality in Court's determination of the law.

On one hand, however, there are indications of positivist strands in the decision. Technically, it centres on the Right to Equality and the law on Public Nuisance, both indisputably part of formally established Sri Lankan law¹³, and thus satisfying positivist conceptions of legal validity.

On the other hand, there seems to be an undeniably strong moral basis to some aspects of the decision, arguably suggesting a dominant naturalist strand in the judgment.

⁸ Hart, *Essays on Jurisprudence and Philosophy*, Oxford: Clarendon Press, 1983, p. 57-8.

⁹ See generally Freeman, *Lloyd's Introduction to Jurisprudence*, 7th Ed, London: Sweet & Maxwell Ltd., 2001, pp. 89-198. See also McCoubrey and White, *Textbook on Jurisprudence*, 3rd Ed., London: Blackstone Press Ltd., 1999, p. 60.

¹⁰ LD (1972) SL 139 at 261; pp 500-501 post. See also pp 87 et seq ante.

¹¹ McCoubrey, *The Development of Naturalist Legal Theory*, London: Croom Helm, 1987, p.12.

¹² McCoubrey and White, *Textbook on Jurisprudence*, 3rd Ed., London: Blackstone Press Ltd., 1999, p.94.

See also Finnis, *Natural Law and Natural Rights*, London: Clarendon Press, 1980, p.86-9.

¹³ See Article 12 of the Constitution of the Democratic Socialist Republic of Sri Lanka, 1978 and Section 261 of the Penal Code.

Firstly, Court refers to the argument regarding the violation of the 'fundamental rights...such as the right to silence and the right to quiet enjoyment of property.' Although it does not directly approve of it, it does not refer to the fact that the fundamental rights chapter in the constitution does not include these rights¹⁴. These rights are actually emphasised in the decision, all the jurisprudence examined, including that of public nuisance, being cases regarding noise pollution (*Marshall v. Gunaratne*¹⁵, *India v. K.K.R.M, In Re Noise Pollution*¹⁶). The Court does not even attempt to justify the seemingly implied acceptance of these 'fundamental rights' by linking them to established legal precedent. For example, *Bulankulama v. Secretary, Ministry of Industrial Development*¹⁷, it is submitted, could have been cited as precedent. This stated that the right to a 'healthy and productive life in harmony with nature' 'can hardly be ignored by Sri Lanka'. However, Court declined to cite such precedent in its judgment. It is thus arguable that Court seems to impliedly accept these 'fundamental rights' as law merely because although formally established law did not recognize them, such non recognition was immoral and 'an immoral rule would not be law however much it may satisfy formal requisites'. This clearly indicates naturalist influence.

Further, Court tries to balance the 'right to silence and the right to quiet enjoyment of property' against that of religion. The examination of the issue from a 'rights' point of view, instead of mere technical examination of the applicable law is in keeping with Finnis' theory on natural rights, which 'clearly falls into naturalist theory'. Finnis' seven basic forms of human goods actually include¹⁸ aesthetic experience, and religion – the rights that Court seemingly attempts to balance in this case.

Finally, despite claiming to adopt a secular approach, Court refers to religious concepts to buttress its arguments (eg: the reference to Buddhist philosophy on how Pirith ought to be chanted). It is submitted that this influence of religion, inextricably linked with morality, reflects the pull of natural law.

Further, it is submitted that the decision reveals clear strands of 'anti-positivist' thinking. The reference to Indian jurisprudence is against strict positivism as it is not strictly law in Sri Lanka 'conceived or adopted by the sovereign in a state'. Implied acceptance by Courts of the 'fundamental rights' of the 'right to silence and the right to quiet enjoyment of property' also goes against Bentham's strict positivist notion that 'lawmaking by judges' was 'a usurpation of the sovereign function'.

Thus, naturalist thinking, it is submitted, is clearly evident, although, perhaps, not explicitly acknowledged. However, the decision is also clearly justifiable from a positivist perspective. In which camp, thus, does the decision stand?

It is submitted that it follows the Thomist tradition, according to which law is,

A rational regulation for the good of the community made by person(s) having powers of government, and promulgated.¹⁹

¹⁴ See Chapter III of the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka.

¹⁵ 1 NLR 179

¹⁶ AIR 2000 SC 2773

¹⁷ 2000 SAELR 7(2), at p. 28.

¹⁸ Finnis, *Natural Law and Natural Rights*, London: Clarendon Press, 1980, p.88-9.

¹⁹ McCoubrey and White, *Textbook on Jurisprudence*, 3rd Ed., London: Blackstone Press Ltd., 1999, p. 73

This contains both naturalist and positivist elements. The former is reflected by the requisite that law should be for 'the good of the community' – synonymous with the pivotal role of morality in natural law. The latter is reflected by the requisite that law be 'made by person(s) having powers of government, and promulgated.' This satisfies the positivist emphasis on formal criteria. Court determines the law clearly influenced by moral concerns, but also justifies its validity based on formal criteria.

The implications of the Thomist approach

It is submitted that the Thomist Approach adopted in the judgement is a desirable ideological shift from the strict positivist approach formerly adopted in Sri Lanka (*Singarasa v. Hon. Attorney-General*²⁰). Epitomizing the positivist argument, Hart states that the law is valid despite being immoral, but that the 'certification of something as legally valid is not conclusive of the question of obedience'²¹. It is submitted that this argument is unconvincing for two reasons. Firstly it is unrealistic, as it is unlikely that a government morally base enough to enact immoral laws will have scruples in imposing dire punishment on those who disobey such laws. Thus it is probable that there will be very few who will be courageous enough to disobey such laws. Secondly, if the public does disobey such laws, it will in the long term lead to disrespect for the legal system, which in turn will lead to anarchy.

It is conceded that the inclusion of naturalist strands in the thinking of Sri Lankan courts clearly has its flaws. As Ross observed, it is 'like a harlot, is at the disposal of everyone'²², the subjective nature of morality making the unpredictability of the dictates of natural law inevitable. This fault is, however, negated to a great extent by the positivist influence in Thomism which ensures predictability as it interprets law solely on formal criteria. Further, naturalism, by requiring the stamp of morality to validate laws prevents total dependence on a completely man-made legal system, which will inevitably contain human flaws.

It is thus submitted thus that the Thomist approach of combining both naturalist and positivist elements achieves a desirable balance, and is thus a commendable guide to judicial thinking.

Conclusion

The arguments submitted clearly explain the desirability of the Thomist approach, which successfully achieves a satisfying balance between Natural Law and Positivism. The precedent set in this respect by the Noise Pollution case is thus desirable, and it is hoped that such judicial thinking will be adopted in the future as well.

²⁰ S.C. Spl (LA) No.182/99.

²¹ Hart, *Concept of Law*, Oxford: Clarendon Press, 1961, pp.205-6.

²² Ross, *On Law and Justice*, Stevens & Sons Ltd., p.261.

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