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CONTENTS

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Editor's Note **i - ii**

A Review of Disability Law and Legal Mobilisation in Sri Lanka **1 - 30**
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Editor's Note... ..

Contributing to an ongoing exercise to streamline and expand the law, rights and practice relating to people with disabilities in Sri Lanka, the *LST Review* publishes a useful analysis by *Fiona Campbell* in this Issue, examining the country's disability profile as well as engaging in an overview of global standards relevant to disability, the prevalent national and constitutional frameworks as well as national law and policy.

Most interestingly, her concluding segment suggests several refreshingly different approaches to legal mobilization of disability rights, drawing upon comparative law and practice in support.

The fact that Sri Lanka lacks basic capacity to quantify and classify the exact numbers of the disabled in the country is a good reflection of the low prioritization of disability rights in the national discourse, despite an ambitious National Action Plan and a Disability Rights Bill. As the author remarks;

As a poor, developing nation, Sri Lanka has reduced bargaining power. In terms of knowledge and identity, the counting of disabled Sri Lankans is a vexed question and many political claims and insecurities are at stake.

What available data suggests however is an unsettling reality of a national collectivity of people substantially at risk with the suicide rate ranking among seventh on a global index.

The paper proceeds to a brief overview of international standard setting in this regard by the United Nations, observing in the meanwhile that the process therein remains problematic, privileging those in the developed world as contrasted to developing nations. The succeeding analysis of the legal and constitutional frameworks, case law and statutory provisions impacting disability rights is succinctly critical, including emphasis on well known lacunae such as the non-protection of disability rights and the absence of a right to health as well as the continuing inability of Sri Lankan courts to judicially review enacted (unconstitutional) law.

In addition, the critique ventures into new territory, using best practice in the Australian context. Thus the use of existing legal rights to enforce disability protections such as through the writ jurisdiction of the Court of Appeal and (from 1990) the High Courts of the Provinces is recommended.

This necessitates examination of the theoretical and practical difficulties in utilizing legal rights in Sri Lanka, not the least of which is the absence of a Right to Information Act, as noted by the author. Even though in some respects, the rules of *locus standi* have been relaxed and indeed, the intertwining of the writ jurisdiction of the appellate court and the fundamental rights jurisdiction of the Supreme Court has been evidenced across the range, from *habeas corpus* applications to the mandating of observance of natural justice rights in land acquisitions and examination procedures, the country's weakened legal system *in toto* provides an unsatisfactory forum for the agitation of such rights. A substantial victory was won by disability rights activists in the Supreme Court in 2011 in regard to enforcement of prevailing legal provision prescribing that all public authorities must mandatorily provide reasonable access for the disabled in new constructions, later expanded in 2013 to also include reconstructions and renovations of public buildings. But as Campbell notes, overall the rights enshrined in the Disability Rights Act (1996) 'remain unrealized, especially in the area of access to education and the workforce.'

In the final conclusion, as is observed;

Declarations aside, the challenge is to find ways to use the law to call civil servants, commercial enterprises and government Ministers to accountability and transparency

Leaving the improvement and expansion of laws aside, as necessary as they undoubtedly are, this is certainly the most formidable challenge that faces disability rights advocates in Sri Lanka today. As discovered to our detriment in many areas of law reform, taking criminal justice as an illustrative example, the provision of generally good legal and policy frameworks have not accomplished much, given the manifest lack of political will to properly and fairly enforce law and policy. These are telling though bitter lessons that should inform similar efforts in other contexts as well.

Kishali Pinto-Jayawardena

A Review of Disability Law and Legal Mobilisation in Sri Lanka*

Fiona Kumari Campbell**

1. Introduction

This paper brings together a number of disability laws and disability related provisions in review. Due to the paucity of scholarly literature concerning disability law in Sri Lanka, this paper is tailored to both the local Sri Lankan reader and as well as international readers. As such the paper is necessarily technical in parts so as to provide assistance to future legal researchers, attorneys, disability studies scholars and activists. Theoretical critiques have been kept to a minimum.¹ The development of law always occurs in the context of a country's history, legal traditions, and of course contestations in local and international politics.

The paper opens in Section 2 with a rendition of Sri Lanka's disability profile. Section 3, provides the global backdrop to 'geodisability knowledge' in order to provide clarity about frameworks acting as drivers of change and accountability. Shifting from the global to the local, Section 4 details law of country – those constitutional structures of Sri Lanka and inherited legal traditions. These structures require critical appraisal as they ultimately govern the development of disability law, create rights and remedies for disabled people at the grassroots level and conversely provide different challenges to inducing change from other countries such as the USA, India or Australia where context and legal reasoning can be dissimilar. Section 5, Disability Law in Sri Lanka, takes up the bulk of the paper and is

* Variants of this paper were originally presented at the University of Colombo, Faculty of Law, Disability Rights Forum, January 17, 2012, Socio-Legal Studies Association (UK) Annual Conference, Hosted by the Kent Law School, Canterbury, United Kingdom, 3rd – 5th April 2007, and *Global Alliance for the Protection and Promotion of the Rights of People with Disabilities Conference*, Leonard Cheshire/ British High Commission, Waters Edge Resort, Colombo, Sri Lanka, 22 May 2007; In between, the Chapter has been substantially redrafted and added to for various purposes.

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¹ For more theoretically inclined work see: Campbell, Fiona. K. (2010a) 'Disability, Legal Mobilisation and the Challenges of Capacity Building in Sri Lanka?', in C. Marshall, E. Kendall and R. Gover (eds.) *Disability: Insights from Across Fields and Around the World*, Volume III, Praeger Press, pp. 111-128, 2009; Campbell, Fiona K. (2010b) *A new horizon: using the concept of Ableism to Rethink Disability & Abledness*, paper for *Perspectives on Inclusive Development: Embracing Diversity and Creating Disability-Sensitive Communities*, pp.28 - 29, July 2010, Hilton Hotel, Kuching, Sarawak (Malaysia); Campbell, Fiona K. (2011). 'Geodisability Knowledge Production and International Norms: A Sri Lankan Case Study', 32(8), *Third World Quarterly*, pp.1425-1444; Gunawardena, Niluka. (2010). *Wounded Soldiers: Biographical disruption among disabled veterans in post-war Sri Lanka*, Paper for *Lancaster Disability Studies Conference*, Lancaster, U.K, 7 – 9 September 2010; Navaratne, Thanuja. (2007). Role of local disability movements in mainstreaming disability in development. *Empowered Newsletter*, LCI South Asia, 3(2), pp. 2-4; Perera, S. (1999). *Living with Torturers and Others essays of Intervention. Sri Lankan Society Culture and Politics in Perspective*, Colombo: International Centre for Ethnic Studies; Somasundaram, Daya. (2010). Collective Trauma in the Vanni - A qualitative inquiry into the mental health of the internally displaced due to the civil war in Sri Lanka, *International Journal of Mental Health Systems*, Section 4 (22), pp. 1 – 31.

an exhaustive overview of social policy structures, dedicated disability statutes, mental disability law, social insurance/security laws, injured employee legislation and future directions. In Section 6, the Paper turns toward social change and activism in its review of approaches to legal mobilisation, freedom of information, *locus standi* and the use of the writ of *quo warranto* and the writ of *habeas corpus* particularly for mental disability issues.

2. Disability in Sri Lanka

The island of Sri Lanka with a mass area of 1,340 kilometres (832 miles) lies 6° 55 N', 79° 52' E on the far southern edge of the Indian sub-continent. Its strategic position throughout the ancient and colonial times meant that it became a convergence point for trade among kingdoms and the intermingling of various civilizations and cultures. Developments in disability law and policy are produced within this broader global context and are constrained by "geodisability knowledge," the project of creating universal norms of disability.² Twenty-three percent of the population lives under the poverty line³ (NCED: 2005: 7). As a poor, developing nation, Sri Lanka has reduced bargaining power. In terms of knowledge and identity, the counting of disabled Sri Lankans is a vexed question and many political claims and insecurities are at stake.

Social planning in the area of disability is made difficult by a shortage of information about the scope and needs of Sri Lanka's disabled constituency.⁴ Because of these difficulties – the 'facts' contained here are at best illustrative and provisional. Like many other nations there are debates about the delimitation of disability definitions (what 'is' or 'is not' disability) and the usage of international instruments.⁵ At a 2007 conference on Disability and Development (*Diriya '07*), disability was spoken of in terms of being 5% of the population and by others as being up to 20%. In Sri Lanka disability is produced through war, natural disasters, the ageing of the population and large numbers of people undertaking high risk work.⁶

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- Campbell, Fiona K. (2011). 'Geodisability Knowledge Production and International Norms: A Sri Lankan Case Study', 32(8), *Third World Quarterly*, pp. 1425-1444.
- ³ The official Poverty Line for November 2011 is Rs.3269 (minimum expenditure per month): Department of Census and Statistics. http://www.statistics.gov.lk/poverty/monthly_poverty/index.htm
- ⁴ Japan International Cooperation Agency, (2002). *Country Profile on Disability Democratic Socialist Republic of Sri Lanka*, Planning and Evaluation Department, March 2002; Asian Development Bank. (2005). *Disability Brief: Identifying and Addressing the Needs of Disabled People*, Asian Development Bank, Bangkok.
- ⁵ Altman, Barbara. (2001). 'Disability Definitions, Models, Classification Schemes, and Applications' in Albrecht, G., Seelman, K. and Bury, M. (eds.) *Handbook of Disability Studies*. Thousand Oaks: Sage. pp. 97 – 122; Campbell, Fiona. (2001). 'Inciting Legal Fictions: Disability's Date with Ontology and the Ableist Body of the Law'. *Griffith Law Review* 10: 42 – 62; Lord, Janet. (2004). Mirror, Mirror on the Wall: Voice Accountability and NGO's in Human Rights Standard Setting, *Seton Hall Journal of Diplomacy and International Relations*, 5(2): pp.93 – 110.
- ⁶ Campbell, Fiona. K.(2010a) 'Disability, Legal Mobilisation and the Challenges of Capacity Building in Sri Lanka?', in C. Marshall, E. Kendall and R. Gover (eds.) *Disability: Insights from Across Fields and Around the World*, Volume III, Praeger Press, pp. 111-128, 2009.

Despite these enumerative and conceptual limitations, a specific Sri Lankan pattern of impairment can be described: there is an estimated population of 900,000 people with disabilities.⁷ Although the incidence of physical disability produced by war has not been enumerated, estimates by the Asian Development Bank suggest in the vicinity of 100,000 persons.⁸ There are also high levels of mental illness including war induced post-traumatic stress disorder. Fernandopulle et al (2002) argues a more far reaching approach to mental health is required, taking into account the consequences of living with years of civil and military conflict. It is estimated that 27.6% of the population in conflict areas in the North Eastern Province experience severe post-traumatic stress impairments.⁹ Whilst some empirical data suggests that 2% of the population experience 'severe' forms of mental illness, an additional 10% of persons experience a range of impairments from phobic states to depression.¹⁰

The suicide rate ranks amongst seventh in global statistics, with a ratio of 31: 100,000. Of these rates Thalagala (2000) estimates that 46% of these suicides are due primarily to depression.¹¹ Another UK based medical study undertaken in co-operation with Anuradhapura General Hospital documents that 'deliberate' self-harm through the ingesting of poisons has increased enormously in the last five years.¹² Two thirds of individuals admitted for self-poisoning were less than 30 years of age. Whilst this area remains under-researched, some sociologists have argued that impairment or indeed death is produced by the absence of support systems for young people who have difficulty coping with social and cultural expectations and of course, war and poverty.¹³

⁷ Japan International Cooperation Agency, (2002). *Country Profile on Disability Democratic Socialist Republic of Sri Lanka*, Planning and Evaluation Department, March 2002; Wijewardene, K & M. Spohr. (2000). An attempt to measure burden of disease using disability adjusted years for Sri Lanka, *Ceylon Medical Journal*, 45(3): pp.110 -115.

⁸ Asian Development Bank. (2005). *Disability Brief: Identifying and Addressing the Needs of Disabled People*, Asian Development Bank, Bangkok.

⁹ Asian Development Bank. (2004). *Technical assistance to the Democratic Socialist Republic of Sri Lanka for the Psychosocial health in conflict-affected areas Project*, November 2004, tar: sri 38129; De Silva, Damani. (2002). Psychiatric Service Delivery in an Asian Country: The Experience of Sri Lanka, *International Review of Psychiatry*, 14(1): pp. 66 -70; Somasundram, Daya. (1996). Post-traumatic Responses to Aerial Bombing, *Social Science & Medicine*, 42(11): pp.1465 - 1471.

¹⁰ Mendis, N. (1998). *Development of Mental Health Care in Sri Lanka: Challenge and Opportunity, Proceedings of the 16th Anniversary of the establishment of the National Council for Mental Health*, Colombo, SL; Thalagala, N. I. (2000). *Attempted Suicides in Sri Lanka: Antecedents and Consequences*, Unpublished, MD Thesis, Institute of Medicine, University of Colombo.

¹¹ Fernandopulle, Sudarshini et al. (2002). Mental health in Sri Lanka: Challenges for primary Health Care, *Australian Journal of Primary Health*, 8(2), p. 35. (notes that Sri Lanka has only 28 psychiatrists and 1 child psychiatrist)

¹² Eddleston, Michael. M H Rezvi Sheriff & Keith Hawton. (1998). Deliberate Self Harm in Sri Lanka: An Overlooked Tragedy in the Developing World, *British Medical Journal*, 317: pp. 133 - 135; Fauce, Thomas. (2005). Collaborative Research Trials: A Strategy for Fostering Mental Health Protections in Developing Nations, *International Journal of Law & Psychiatry*, 28: pp.171 - 181.

¹³ De Silva, P. (1989). *Suicide in Sri Lanka*, Institute of Fundamental Studies, Kandy; De Soysa, Piyanjali. (2011). The use of Psychology in the Administration of Justice in Sri Lanka, *Sri Lanka Journal of Forensic Medicine, Science and Law*, 2(1): pp.10 -14; Kasturiaratchi, N.D. et al (1997). *A Study of Suicide in Sri Lanka*. Colombo: Sumithrayo.

The 24 year war has not only resulted in significant levels of disablement but there is uncertainty about what such high levels of disability have had on transforming attitudes towards bodily or mental differences on the part of not-disabled members of the community.¹⁴ The tsunami of December 2004 contributed to more instances of disablement, its effect on the capacity for legislative and policy frameworks to enhance the lives of disabled people is unknown. Sri Lanka has the full spectrum of disability focused non-government organisations (NGO's), a number of umbrella bodies¹⁵ and Disabled Peoples Organisations (DPO's).¹⁶ A range of predominantly overseas funded and/or overseas-originated religious charities outnumbers these organisations. Additionally, there are a number of multilateral banks that actively support development projects.¹⁷

Summary:

- There is a shortage of data about the scope and needs of the disabled population;
- There is a contestation as to how many disabled people there are: 5% - 20%?
- High numbers of the population experience 'mental distress';

3. Global Contexts

The pre-eminent ideoscape and apparatus controlling the delimitation and definition of disability originates with the United Nations. Without consensual international disability norms it would not be possible to disclose and make visible the dynamics of disability at a country level and for the World Health Organization (WHO) to map disability globally. The 'seeing' of disability, it is argued, enables a surveillance both globally (of each country) and individually (every individual is surveilled for conformity). Definitions of disability in many ways determine eligibility for pensions, funding, legal protections and impact enumerative estimates which shape demands of social planning. Whilst it is beyond the confines of this paper to have a thoroughgoing discussion of the government of disability globally, it is pertinent to outline a number of salient definitional instruments that are mandated for use by UN member nations, of which Sri Lanka is one, for the purposes of enumeration and program development.

The Human Development Index (HDI), a comparative measure of poverty, life expectancy and education has been used by the United Nations Development Programme (UNDP) as a tool for apportioning funds since 1993. Sri Lanka is ranked 97 and has a medium human development ranking.¹⁸ UN formations of

¹⁴ De Silva, Damani. (2002). Psychiatric Service Delivery in an Asian Country: The Experience of Sri Lanka, *International Review of Psychiatry*, 14(1): pp.66-70.

¹⁵ Sri Lanka Confederation of Organizations of Handicapped People, Sri Lanka Federation of Special Needs Persons.

¹⁶ Central Organization of the Deaf, Sri Lanka Council for the Blind, United Disabled Action Front.

¹⁷ Asia Development Bank, World Bank, IMF and USAid.

¹⁸ International Human Development Indicators, 2011, UNDP
<http://hdrstats.undp.org/en/countries/profiles/LKA.html>

disability are deeply embedded with a broader nosology of disease, which delimits disability in relation to a so-called 'objective' comparator referred to as health status (i.e. a person without a health condition). This is an instance of colonial enframing as the partitioning of 'disability' and 'not-disability' can obscure cultural differences around bodies and mentalities. With respect to making broader categorical distinctions, the universal definition(s) of the 'disabled body', were introduced and systematised in 1980 by the UN World Health Organisation (WHO) in what has become a canonical document: the International Classification of Impairments, Disabilities and Handicaps (ICIDH). Even though this document is now obsolete, it has become a template for ways of thinking about and speaking of disablement matters and still makes the odd appearance in the literature as an explanatory framework. The ICIDH is infused within a biomedical discourse and is scoped to have definitional congruence with the International Classification of Disease (ICD-10).

In January 2001, the 54th World Health Assembly adopted the International Classification of Functioning, Disability and Health (ICF) (Executive Board WHO, 2001). The ICF has four dimensions related to disability, namely, impairment, activity, participation and context. Moreover, the ICF provides the basis and tool for implementing various United Nations instruments by member states and enacting coherent national legislation. Without the ICF, the networked nodes of UN governance would have difficulty communicating across state borders. Without the ICF, donors and financiers would have difficulties making comparative disability actuarial assessments across countries and programs. Advocates of global geodisability templates argue that universal systems can be used to bring 'into line' renegade nation states that do not appropriately plan for the needs of disabled people. It is a vexed question as to what approaches are 'renegade', what is the authoritative criteria and authoritative body and how recognition of cultural difference and contexts can be negotiated. Not long after the ICF was released, critics called for its revision.

In the Sri Lankan context, the usage of the comparator of a person without a health condition can obscure rather than clarify service delivery needs, especially if deliberations do not factor in socio-economic considerations, access to resources and consequential social exclusion. In the mental health arena, mental health is described by WHO along the lines of coping with the 'normal stresses of life'. But as Fernandopulle *et al* (2002) points out the notion of normalcy explodes given the almost normalised extra stress of living with inter-ethnic conflict and war. Different cultural locations within the country would have a different threshold of what counts as disabled or not: for instance, children without birth certificates and with mild intellectual impairment may have no real sense of their age, hence communities have no real sense of developmental delay and therefore individuals are not seen as impaired.

Among the major outcomes of the Decade of Disabled Persons was the adoption by the UN General Assembly, of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities in 1993. Whilst the Standard Rules are not legally binding, they act as a strong moral and political commitment for governments to take around equality measures for persons with disabilities. Member states are required to adopt legislative reforms in conformity with these rules. In August 2006, the General Assembly approved the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (CRPD). The Convention was opened for signatures on March

15th 2007. Sri Lanka was an early signatory but has yet to ratify the Convention. The mental health area is also regulated by UN governance that resolved at the UN General Assembly on 17th December 1991 to introduce The Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (UNMI principles). These instruments have come about through years of vigorous activism.

However, the issue of UN norm standard setting is deeply problematical as limited research exists to examine the processes of developing these standards and the role of cultural norms. The work of Lord (2004) documents the tensions and deals made between NGO's regarding access to planning forums and exposes the less known fact that internationally, there are only seven organisations that have ECOSOC status and of these organisations five are based in the developed world with limited regional representation.¹⁹

Banking donor institutions have developed their own frameworks to guide the type of projects they fund. The ADB as an example uses a framework that is known by the acronym KIPA – knowledge, inclusion, participation and access, to build disability strategies aimed at poverty reduction.²⁰ Whilst the ADB acknowledges disability to be a “multidimensional concept”, where there is no single definition of disability it nonetheless defers to the UN apparatus to negotiate its way out of the definitional quagmire. We can conclude that even before exploring disability policy in the Sri Lankan context, the international system of knowledge articulation is highly regulated and prescriptive. Social and legal responses to disability occurs within the broader purview of the UN's Millennium Development Goals (MDG's) which Sri Lanka signed up to in 2000²¹ and the Sri Lankan government's Mahinda Chintana – the Ten Year Horizon Development Framework 2006 – 2016 which is the current benchmark for social policy and engagement.

Summary:

- There is a trend emanating from the United Nations to adopt a universalist approach to disability in terms of definitions, international norms, disability surveys and coding;
- The ICF produces a common language for speaking about health and disability and how we demarcate these two population groupings;
- Within non-Western contexts there emerges the critical question of the comparator to determine a health and not-health status.

¹⁹ Lord, Janet. (2004). Mirror, Mirror on the Wall: Voice Accountability and NGO's in Human Rights Standard Setting, *Seton Hall Journal of Diplomacy and International Relations*, 5(2): pp. 93 – 110.

²⁰ Asian Development Bank. (2005). *Disability Brief: Identifying and Addressing the Needs of Disabled People*, Asian Development Bank, Bangkok.

²¹ National Council of Economic Development [NCED]. (2005). *Millennium Development Goals Country Report 2005 Sri Lanka*, Colombo: UNDP/NCED.

- *International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (CRPD)* establishes new international norms around disability rights and the alignment of domestic laws of members States.

4. Sri Lankan Law

Sri Lankan law is a complex mixture of Roman-Dutch law and the British common law system and represents a system of legal pluralism with five legal systems operating independently and at times overlapping. In the Republic of Sri Lanka, state power is formed and shaped by the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka which is an amalgam of the Westminster model and the French Presidential System.²² Whilst the Parliament is the unicameral legislative organ this does not imply Parliamentary sovereignty in the British sense, as this power is derived from the people whose sovereignty is inalienable as laid down in Article 4(a) of the Constitution.

The judiciary, whilst constituted independently of Parliament, does not have the power of judicial review typical of common law systems. Legislation once passed by Parliament is unable to be challenged as being unconstitutional in a court. Indeed, under Article 120, the Supreme Court has sole and exclusive jurisdiction to determine whether any Bill is inconsistent with the Constitution. Petitioners are only able to challenge the constitutionality of a proposed law at the Bill stage and only then within one week of the Bill being placed on the Order Paper of Parliament.²³ There is, in reality, an additional week as the Bill must also be published in the Gazette a week before being placed in the Order Paper.²⁴ Aside from any possible delays in making the gazetted Bill available, people without access to legal information (often from marginal populations) are deprived of the opportunity to study the Bill, consult others and file papers in court. It is critical then that any community education and legal mobilization strategies occur at this preliminary stage, including speculations as to the effects of the proposed law in the longer term. Once the Bill becomes law it is not possible to challenge its validity.²⁵

Furthermore, Article 16(1) of the 1978 Sri Lankan Constitution states courts are not able to review laws that were in existence prior to 1978, even if those laws contravene international treaty obligations and/or Fundamental Rights as outlined in the Constitution. The mandate for any statutory changes is invested with Parliament alone. It is the observation of this author that many Bills end up being suspended in a holding pattern in the Legal Draftsman's office and disappear off the ledger. This may present a problem for ensuring that disability service provision is aligned with contemporary approaches. Many pre - 1978 incorporated organisations have objects that reflect outdated charity and remedial understandings of disability especially in the area of mental health law.

²² Cooray, L.J.M. (2006). *An Introduction to the Legal System of Sri Lanka*, Stamford Lake Publications, Colombo.

²³ See Article 121(1), 1978 Constitution.

²⁴ Should the Bill be classified as an Urgent Bill, this Bill does not need to be published in the Gazette prior to its presentation in Parliament. Since 1978, 128 Acts of Parliament have been passed as urgent Bills, such as the *Universities Act* No.16 of 1978.

²⁵ Article 121(1).

Of interest to this paper is the procedure for incorporating disability concerns into law. Sri Lanka like many other nations is a signatory to the key Human Rights Conventions but adopts a dualistic approach to international law. Whilst the President and government of Sri Lanka are able to enter into international treaties which would bind the country as an international state, these treaties according to a recent judgment of the Supreme Court would “have to be implemented by statute enacted under the Constitution to have internal effect”,²⁶ hence Sri Lanka has non-self executing treaty arrangements.²⁷ To be clearer, the government needs to introduce or amend specific legislation for that treaty to have effect and become part of Sri Lanka’s domestic law.

Chapter III: Fundamental Rights

In Articles 3 and 4 of the 1978 Constitution the people’s sovereignty is extended and exercised in the form of Fundamental Rights (FR) (in Chapter III) and the Directive Principles of State Policy²⁸ (Chapter VI) which are to be used as a guide for interpreting the Constitution.²⁹ The Constitution contains no express right to health, however the Directive Principles of State Policy in Article 27(2) (c) in the context of environmental health, allude to the necessity to improve living conditions of citizens and hence may imply a right to health. Chapter III Fundamental Rights cover Articles 10 – 17. FR jurisdiction exists apart from and independent of other jurisdictions in Sri Lanka. The FR jurisdiction is exercised exclusively by the Supreme Court and has its own body of judicial precedent. The form of Fundamental Rights adheres to the usual rights discourse of international norms such as:

- freedom of thought, conscience and religion (Article 10),
- freedom from torture (Article 11),
- the right to equality (Article 12 (1)),
- freedom from arbitrary arrest, detention etc (Article 13) and
- freedom of speech, assembly, association etc (Article 14).

Article 12 (4) provides for the possibility of “special provisions” for women, children and disabled persons. To the best of my knowledge and after consulting other peers, there has been only one fundamental rights cases specifically concerned with the infringement of rights based on disability that went to judgement.³⁰ A small number of normal domestic laws have been engaged to address

²⁶ *Nallaratnam v. Attorney General*, 2006, S.C. Spl(LA) No. 182/99.

²⁷ *Nallaratnam v. Attorney General*, 2006, S.C. Spl(LA) No. 182/99.

²⁸ Article 29 establishes that these principles do not confer legal rights nor are they enforceable in a court.

²⁹ Wickramaratne, Jayampathy. (2006). *Fundamental Rights in Sri Lanka*, Stamford Lake Publications, Colombo.

³⁰ I discuss this case later in the paper.

complaints.³¹ The Fundamental Rights provisions of the 1978 Constitution await a range of disability rights cases to assess the extent that disabled people have their rights safeguarded by the highest law of the land.

In addition to constitutionally entrenched Fundamental Rights, there is also a judicial system of writs having constitutional force. Writ actions are regulated by Articles 140 and 141 of the Constitution and are jurisdictionally independent to FR law. Article 140 grants power to issue writs, other than writs of *habeas corpus*:

the Court of Appeal shall have full power and authority to inspect and examine the records of any Court of First Instance or tribunal or other institution, and grant and issue, according to law, orders in the nature of writs of *certiorari*,³² prohibition, *procedendo*, *mandamus*³³ and *quo warranto*³⁴ against the judge of any Court of First Instance or tribunal or other institution or any other person.

And Article 141 grants power to issue writs of *habeas corpus*.³⁵

The Court of Appeal may grant and issue orders in the nature of writs of *habeas corpus* to bring up before such Court - (a) the body of any person to be dealt with according to law; or (b) the body of any person illegally or improperly detained in public or private custody, and to discharge or remand any person so brought up or otherwise deal with such person according to law. ...

Mention is made of this system of prerogative writs as they can provide a vital avenue for the exercising of rights, the questioning of executive action and enforcement of administrative decisions related to disability. Even though writs cannot be used as a mechanism for the explicit enforcement of FR concerns, Article 126(3) states, that should the Court of Appeal in the course of a hearing believe there is *prima facie* evidence of an infringement of the provisions of Chapter III or IV, and then the court must

³¹ An example of this is the filing of a complaint by Senarath Attanayake against Qatar Airways in the District Court of Colombo (Case No. 52805/MR). It appears that Mr. Attanayake was awarded damages of Rs. 10 million.

³² A Writ related to preserving uniformity of decisions through the whole judicial system, particularly to bring decisions of an inferior court or tribunal or public authority before the superior court for review so that the court can determine whether to quash such decisions.

³³ A Writ "issued by a superior court to compel a lower court or a government officer to perform mandatory or purely ministerial duties correctly" (Garner, 2004, 980).

³⁴ Literally, "by what warrant?" A Writ that can be used to require a person to show the basis of *authority* they have for a decision, e.g. this is a writ that compels a proof of authority.

³⁵ This Writ was finally recognised by Sri Lankan law in the *Courts Ordinance* (No.1 of 1889) and is founded on the notion that every person has a right to freedom from arbitrary and/or illegal detention or arrest. Under this Writ the Court has the power to compel authorities to produce the person (the corpus) before the court and show cause for the validity of the detention. As Pinto-Jayawardena & De Almeida Guneratne note "...the courts will consider not only the basis on which the detention was ordered, but also the 'validity of preliminary steps, so that any legal flaw in those steps will invalidate the detention'" (Pinto-Jayawardena & De Almeida Guneratne, *Habeas Corpus in Sri Lanka: Theory and Practice of the Great Writ in Extraordinary Times* (Colombo: Law & Society Trust, 2011), p. 2.). Ed Note; From 1990, the writ remedies could also be exercised by the High Court of the Provinces under (Special Provisions) Act No 19 of 1990.

refer the matter to the Supreme Court for determination. In Section 6 of this paper, there is an exploration of how a writ of *habeas corpus* could be used to assist in locating and releasing disabled people from their 'unwarranted' detentions in institutions or hospitals, the ways a writ *quo warranto* could be engaged to foreground the basis for service/pension eligibility decisions and the use of writs of *certiorari* and *mandamus* to support public interest legal actions.

The Human Rights Commission Act No. 21 of 1996 (HRC Act) established a permanent Human Rights Commission of Sri Lanka (HRCSL) for the country. The Human Rights Commission is an institution that performs a broad range of functions, from investigating and mediating human rights violations³⁶ to advising the government on appropriate legislative and administrative procedures.³⁷ Commissioners were to be appointed by the President on the advice of a Constitutional Council under Article 41B of the 17th Amendment.³⁸ However, since 2006 appointments to the Constitutional Council lapsed due to the non-functioning of the Constitutional Council, resulting in the non-appointment of Commissioners to the HRCSL affecting its capacity to make recommendations.³⁹ Later, the 18th Amendment was enacted doing away with the requirement of the Constitutional Council and appointments of Commissioners to the HRCSL reverted to the sole discretion of the President. Under section 10 the HRCSL has the power to investigate violations of Fundamental Rights,⁴⁰ and can provide advice on legislation and procedures to enhance fundamental rights 10.⁴¹ Section 11 (c) enables the HRCSL to intervene in proceedings before the courts. There is provision for conciliation or mediation, in s 16 of the Act. Unfortunately the HRCSL does not have the power to enforce its orders and is totally reliant on interventions by the President. It is not clear to what extent the HRC Act overall will inform dispute resolution under the more specific Protection of the Rights of Persons with Disabilities legislation.⁴²

As previously noted other *quasi-legal*⁴³ frameworks govern the orientation of disability policy development and law, namely the Millennium Development Goals⁴⁴ and the *Mahinda Chinthana*. The *Mahinda Chinthana*, which can best be described as a social compact between the government and people, has a specific section on disabled people, who the document refers to as "differently able (*sic*) persons". There are a number of pledges orientated towards poverty alleviation, income protection⁴⁵

³⁶ See Section 10(a), 10(b).

³⁷ See Section 11(c)

³⁸ Amnesty International, 2009.

³⁹ As of August 2010, there were approximately 5,500 cases awaiting resolution (Collective for Economic, Social & Cultural Rights in Sri Lanka, 2010).

⁴⁰ See HRC Act Section 10(a - b).

⁴¹ See HRC Act Section 10 (c).

⁴² The Protection of the Rights of Persons with Disabilities Act No 28 of 1996.

⁴³ It is hard to ascertain with some of these policies what their legal basis is in law.

⁴⁴ National Council of Economic Development [NCED]. (2005). *Millennium Development Goals Country Report 2005 Sri Lanka*, Colombo: UNDP/NCED.

⁴⁵ In March 2007 the National Council for Person with Disabilities were directed to pay a monthly allowance of Rs. 3000 to low income households with a disability (*Daily News*, March 13, 2007).

physical access provision and significantly, a pledge to introduce a quota system of 3% in places of employment where there are 100+ employees⁴⁶ as well as new law with a disability rights framework.

Summary:

- Under Chapter III of Sri Lankan Constitution there is provision for the protection of Fundamental Rights;
- There is no express right to health in the Constitution, although this right is implied in Article 27(2) of the Directive Principles of State Policy;
- Judicial power to review legislation is restricted to the Supreme Court having the sole jurisdiction to determine whether a Bill is inconsistent with the Constitution. Once the Bill becomes law it is not possible to challenge its validity. Provided that a Bill is not deemed urgent, petitioners have a short time in which to scrutinise and challenge the constitutionality of a proposed law (one to two weeks);
- International treaties do not have an effect on Sri Lankan law unless they are incorporated into domestic statutes;
- Writs regulated by Articles 140 and 141 of the Constitution could be used to bring legal actions in the appellate courts to investigate and seek remedies for the infringements of disabled people's rights.

5. Disability Law in Sri Lanka

5.1 Frameworks

Early impetus for law and social policy reform came from pressure by external forces outside of the country. Since 2006 increasingly advocacy has come from a home-grown disability rights movement. Although Sri Lanka established the first education program for children with a disability in 1912, policy development and legal reforms related to disability concerns have been slow in coming to fruition.⁴⁷ The Sri Lankan government has developed a number of significant social policy documents which are likely to guide the development of the disability services sector and ongoing legislative reforms. In 2003, it introduced a social framework "The National Policy for Disability" to accompany that legislation. Unlike other countries there is no consolidated structure for the development of preferred service types and performance-based funding, nor is there any linkage to a philosophical framework to guide service development. The dominant model of community engagement for the delivery of services known as community based rehabilitation (CBR), which emphasizes local control and leadership of disability

⁴⁶ There already was a quota system in place in the late 1980's: *Public Administration Circular No. 27/88*, 1988.

⁴⁷ National Policy on Disability for Sri Lanka. (2003), Ministry of Social Welfare.

programs, by disabled people. In 1994, three UN organizations (ILO, UNESCO, and WHO) published a joint position paper and compromised on a new definition of CBR:⁴⁸

Community-based rehabilitation (CBR) is a strategy within community development for the rehabilitation, equalization of opportunities and social integration of all people with disabilities. CBR is implemented through the combined efforts of disabled people themselves, their families and communities, and the appropriate health, education, vocational and social services (ILO et al., 1994).

This new definition stressed that CBR is a strategy based on a broad social model of disability. At its core is the pledge to build up DPO's and to facilitate human rights legal mobilisation. In other words, it is impossible to realise this model of CBR without the voices of disabled people individually and collectively being placed at the speaking centre of development, research, planning and implementation. The World Health Organisation (WHO) in fact identified education and training of disabled people as a key element of CBR.⁴⁹ DPO's supported in their capacity building, can act as a conduit throughout Sri Lanka to train disabled people in consciousness-raising about disability. CBR usually involves an effort to de-stigmatise persons with disabilities, often through promoting particular disabled persons as positive role models. CBR can ensure that disabled people, especially women and rural communities are at the vanguard of reforms.

The sources of disability law in Sri Lanka are twofold – case law (of which little consolidated work around this canon has been undertaken) and statute law. Statute law is mainly codified and the disability aspect can be examined in two forms. The first form involves the specific enactment of legislation for the incorporation of an individual organisation. An example of this type is the Special Educational Society (Incorporation) Act No. 3 of 1999. Whilst the objects of such organisations are chartered in the statutes legal incorporation is approved on the basis of a Bill conforming with the requirements of company law or the registration of non-government organisations and not with the Bill's philosophical congruence with disability best practices in law and social policy globally. Notably the relationship of these statutes to the overall policy directives and disability standards is disconnected and not monitored.

For reasons of space and complexity, this first form of law will not be extensively discussed in this paper. The second form, moves beyond individual instrumentalities to a disabled collectivity (minority group) and focuses on government policy, regulation and standards. Examples of this form include: Mental Diseases Act No.27 of 1956, Workmen's Compensation Act No.19 of 1934, as amended No. 31 of 1957 and the Protection of the Rights of Persons with Disabilities Act No.28 of 1996 (Disability Rights Act). Changes like the Disability Rights Act are part of the country's ongoing alignment with the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities (1993). In general, the orientation of statutes referencing disablement and specifically targeted disability laws tend to be

⁴⁸ ILO, UNESCO, & WHO (1994). *Community-based rehabilitation for and with people with disabilities*. Joint Position Paper. Geneva, Switzerland.

⁴⁹ World Health Organization [WHO]. (2003). *International Consultation to review community-based rehabilitation*. Helsinki: Author.

heavily medicalised and protective. A small number of human rights and capacity building orientated laws came on the scene from 1996 onwards; these however often lack implementation and enforcement mechanisms.

5.2 The Protection of the Rights of Persons with Disabilities Act 1996

The Act for The Protection of the Rights of Persons with Disabilities Act No. 28 of 1996.⁵⁰ This came into effect on 24th October 1996. The Act principally provided for the establishment of a National Council for Persons with Disabilities charged with the promotion, advancement and protection of the rights of persons with disabilities in Sri Lanka. Until the UN Convention (CRPD) is incorporated into domestic law, the Disability Rights Act establishes the legal definition of disability in Sri Lanka.⁵¹ Section 37 reads: -

... 'person with disability' means any person who, as a result of any deficiency in his physical or mental capabilities, whether congenital or not, is unable by himself to ensure for himself, wholly or partly, the necessities of life.

Despite the pretence of being concerned with rights, the Act is severely lacking in the provision of a codified statement of rights and a philosophical framework to support interpretation and generate the development of politics and law reform. Only Section 23 of the Act makes an explicit delineation as to which rights are recognised and protected under law:

- 23 (1) No person with a disability shall be discriminated against on the ground of such disability in recruitment for any employment or office or admission to any education institution.
- (2) No person with a disability shall, on the ground of such disability, be subject to any liability, restriction or condition with regard to access to, or use of, any building or place which any other member of the public has access to or is entitled to use, whether on the payment of any fee or not.

Section 23 provides a narrow construction of rights – discrimination rights restricted to the arenas of employment and education. An additional right relates to public access to buildings or places. The Act however lacks specific mechanisms for the implementation and the enforcement of the rights ascribed in the legislation, especially the process for the bringing of individual or group complaints. Since 2007

⁵⁰ Published as a *Supplement to Part II of the Gazette of the Democratic Socialist Republic of Sri Lanka*, October 25, 1996.

⁵¹ This statement is not quite correct as the other definition used by the Ministry of Social Welfare can be found in the National Census of 2001 (Ministry of Social Welfare, 2003). Additionally the *Workman's Compensation Act* uses another definition as does the *Social Security Board Act*. How is a conflict of laws to be resolved?

there has been a Bill before the Sri Lankan Parliament that seeks to introduce enforcement mechanisms around disability discrimination.⁵² Section 24 stipulates that where there is a contravention of Section 23 entitlements, individuals or their agents can petition the High Court, in their Province for “relief or redress”. Very few cases have been brought under Section 24 and therefore the limits of the Act have not been fully tested.

Challenges using the Disability Rights Act

In 2000, the Public Interest Law Foundation⁵³ (PILF), an organisation normally concerned with environmental law, filed two writ applications in the Court of Appeal⁵⁴ arguing that the Ministry for Justice (MOJ) and the Colombo Municipal Council (CMC) failed to comply with the requirements of Section 23 of the Protection of the Rights of Persons with Disabilities No 28 of 1996 by not providing access to the courts and ensuring safe passage of persons with disabilities in Colombo. In response to the court application, the MOJ negotiated with the concerned parties and agreed to a plan to make all new court buildings accessible.⁵⁵ The CMC, in contrast, resisted conciliation and instead filed *locus standi* objections in court against the PILF. The Human Rights Commission later intervened in the application. On 28 April 2003 the CMC, agreed as part of terms of settlement with the PILF, to provide an accessible environment by 2010.⁵⁶ In 2003, a legislative amendment⁵⁷ was made to Section 4, subsection (3) was added to Section 23 of Disability Rights Act:

- (3) The manner and mode of providing facilities to allow access by disabled persons to public buildings, public places and common services, shall be prescribed.

Not only is there an incorporation of a prescribed approach to access there is also an extension of entitlements to include access to “common services”. On 14th November 2005, regulations on Access to Common Places and Services by Persons, with Disabilities Regulation No. 1 of 2005, were Gazetted to give effect to Section 23, more specifically Section 23(c), is a compilation of access standards and benchmarks. The purview of “common services” is narrowed down to mean in Section 10(a) public transportation services and facilities ...” and 10 (b) public communications services and facilitates....”.

⁵² This Bill will need to be congruent with the new “CRPD” once Sri Lanka becomes a signatory to the Convention.

⁵³ Thanks to Sonali de Silva from the Public Interest Law Foundation for providing information on the two cases listed below.

⁵⁴ *Public Interest Law Foundation v. The Municipal Council of Colombo*, CA 602/2000 and *Public Interest Law Foundation v The Ministry of Justice* CA 603/2000.

⁵⁵ The PILF conducted a follow up visit to some court houses to see whether disability access had been provided and observed that the facilities were provided in some newly constructed courts. (eg: Gangodawila Courts). PILF is trying to find funds to undertake a compliance assessment.(email communication to author, 27/12/2011, Mihiri Gunewardene).

⁵⁶ The PILF has not made a full assessment on the compliance by CMC due to the lack of sufficient funds. As of 2009 it appears that the CMC has not taken steps in some parts of the city of Colombo to provide disability access on roads that they were doing up. (e.g. Independence Avenue and Ward Place are two examples.) In other roads (e.g. Galle Road) disability access is provided. (email communication to author, 27/12/2011, Mihiri Gunewardene).

⁵⁷ *Protection of the Rights of Persons with Disabilities (Amendment) Act*, No. 33 of 2003.

In 2006 under Section 23 and 25 of the Disability Rights Act , additional regulations, the Disabled Persons (Accessibility) Accessibility Regulations, No.1 of 2006 were published in the Extraordinary Gazette. Section 2(1) stipulated a timeframe of three years to provide access facilities to public building, public places and places where common services. The Ministry of Science and Technology in March 2007 launched the Sri Lankan Standards (SLS ISO TR 9527:2006) in compliance with the regulation.⁵⁸ Failure to meet the targets of the 2006 regulations in any significant way by 2009 resulted in a further Extraordinary Gazette notification No. 1619/24, dated 18/9/2009 which repealed Section 2(1) and substituted that section by extending the timeframe for access by eight years from the operation of the 2006 regulation, hence 2014 is the new set target date.

In 2009, advocacy group IDIRIYA in conjunction with Dr. Ajith Perera, a person with spinal injury filed a Fundamental Rights petition,⁵⁹ seeking an order to implement the accessibility regulations. Perera argued that although disability rights had been guaranteed under Section 23 of the Disability Rights Act and the Disabled Persons Accessibility Regulations No. 1 of 2005 these rights, were not enforced and neglected even in new buildings.

The Supreme Court in an unanimous judgement on 27 April 2011 restated the Disability Rights Act and corresponding regulations, issuing orders that no persons should be discriminated on the ground of disability through a restriction of mobility in a manner which precludes or impedes them from gaining reasonable physical access to public building with facilities provided within such buildings, especially toilet facilities. Initially the Court ordered (SC (FR) 221/2009 dated 14th October 2009) that all new public buildings defined under the accessibility regulations 2006,⁶⁰ should “provide reasonable access in accordance with the design standards of regulations in force, to those with physical disability”. The Court further ordered that all authorities should refrain from approving plans or issuing ‘certificates of conformity’ in respect of buildings which would violate the Court order. “*Failure to comply would draw punitive repercussions* under the laws set in” (emphasis added). The Court order directs that “you would be at liberty to file a motion, if there is a violation” and states that the commissioners of local government and officers of the UDA are equal partners and equally responsible for enforcing these orders. In 17th June 2013, Dr. Ajith Perera reactivated his FR petition to the Supreme Court to extend the existing order to include “reconstructions and renovations” of public buildings resulted in the reiteration of that compliance order.⁶¹ Overall the rights enshrined in Section 23 (1) remain unrealized, especially in the area of access to education and the workforce.⁶²

⁵⁸ Peiris, Manjari. (2007). Design Guidelines in Place for Disabled-friendly Buildings, *Daily News*, 12 March 2007, p. 21

⁵⁹ SC(FR): 221/2009.

⁶⁰ *Disabled Persons (Accessibility) Accessibility Regulations*, No.1 of 2006, 1,467/15.

⁶¹ The saga around attempts at getting the law enforced continues. On 17 June 2013, the Supreme Court issued an order to government agencies to ensure compliance with an earlier court order issued in April 2011 on the disabled or those with restricted ability have easy access to public places. The Supreme Court has further directed the Attorney General to ensure this is given its full effect by directing the authorities to take immediate steps to sensitize the private sector to take appropriate steps in compliance.

⁶² A Ministry of Social Welfare survey undertaken in 2003 indicates 16 % of disabled people are in employment. The incidence of poverty amongst households in receipts of disability payments is 52% above the national

5.3 Mental Disability Law

The main legislation governing mental health and disability arising out of mental illness is a colonial law, namely the Mental Diseases Ordinance of No. 1 of 1873 (MDO) based on British lunacy laws. This Ordinance has not been repealed. The statute emphasises institutionalization through treatment and detention of those affected by mental illness. Section 5 (1), allows for compulsory detention “until the Minister’s pleasure shall be known” with the possibility that the person with mental illness be removed to a mental (*sic*) hospital by the District Court when there is no relative or friend to care for them. For some patients, this is perhaps an issue when records have been misplaced or lost and relatives are not able to be contacted. The MDO is in conflict with the present day interpretation of mental disability which is rights based. Under Section 6, a relative may petition for the admittance of a person of ‘unsound mind’ and providing that a certificate is issued by two medical practitioners then the person named in the petition will be admitted to the hospital. The long title of the Mental Diseases Ordinance states that the provisions deal with “the care and custody of persons of unsound mind and their estates”. People with mental disability in the MDO are characterised as not having deliberative capacity, incapable of improvement and generally as suspicious characters.

The Mental Disease Act No. 27 of 1956, based on the 1873 Ordinance regulates the custody, hospitalisation and incarceration of people with mental illness. Under this Act, the assessment of an “unsound mind” is undertaken by a civil court enquiry and is open to judicial appeal. The existing system of mental disability law and programs is vigorously protected and policed by the Sri Lankan College of Psychiatry who appear to hold to the position that mental health services delivery is the primary even sole domain of psychiatrists rather than shared amongst other professionals (e.g. psychologists, health or social workers).⁶³ The report of a Regional Meeting of Experts in 2004, World Health Organisation concluded that the reason for continued use of the Ordinance includes: low priority of mental health within the Health Ministry, Parliament and the public, few interest groups, non-governmental organisations or consumers devoted to supporting the rights of mentally ill individuals or providing

average. Under s.39(1) of the *Wages Board Ordinance* (No.27 of 1941), the statute setting minimum wages in the country; the “non-abled bodied worker” [sic], whose impairment affects his capacity to earn the minimum rate, is if the Wages Commissioner thinks fit, to have a wage *less* than the minimum rate. More research is needed on the operation of this provision especially as to the assessment of productivity and the relationship to impairment by the employer and wages board. What are the implications of a productivity based wage system by stealth? Does this provision allow for employers and government to opt out of developing and implementing reasonable adjustment policies in the workplace to mitigate not just the impairment but also inaccessible environments that may hinder productivity?

⁶³ Clinical psychologists have really only been used as experts in court settings for the last decade. (de Zoysa, 2011). See also Campbell, 2011.

psychiatric care, and a belief amongst some members of the psychiatric community that *legislation has little relevance* to their profession (emphasis added).⁶⁴

The Experts Group after bemoaning apathy in the field of reform conclude that “enacting new legislation will require efforts to enhance the engagements amongst all relevant stakeholders, [and] a willingness of psychiatric to sacrifice some autonomy”.⁶⁵

Although mental illness is incorporated within the legal definition of “disabled person,” under Section 37 of the Protection of the Rights of Persons with Disabilities No 28 of 1996 mental health law and policy have developed under a separate authority. In November 2005, the official Mental Health Policy of Sri Lanka 2005 – 2015⁶⁶ was Gazetted and incorporated six principles related to service provision which contains research ethics protecting persons with mental illness. The policy has an impressive rights based approach in its vision and principles. In its mission statement, it provides mental health services at primary, secondary and tertiary level, and ensures that mental health services will be linked to other sectors and further pledges to protect human rights and dignity of people with mental illness. The emphasis of the Mental Health Policy of Sri Lanka prioritizes the development of community based mental health services. Within the shift in policy, it is proposed that a new Mental Health Act giving attention to matters of codified rights, consent to treatment, treatment standards and the procedure for compulsory detention.⁶⁷

There have been several attempts to introduce a new Mental Health Act, one in 2001 and the more recently in 2007. These attempts were aborted due to differences about the proposed Bill and lack of consensus among certain main stakeholders in the field of mental health. The Draft Mental Health Act⁶⁸ of 2007 is a significant improvement to the Ordinance. The Long Title of the Act stipulates that the legislation is to “protect the rights of persons with mental illness, provide for the care, treatment, continuing care, rehabilitation of persons with mental illness....” Its Preamble makes clear linkages with a human rights paradigm as well as the notion of social determinants of health. At the domestic level, particular recognition of Articles 11 and 12 of the Constitution of Sri Lanka are mentioned. Some of the salutary features of this draft Bill are the elimination of offensive terminology and replacement of terms in line with rights discourse, a focus on capacity to give consent and provisions and mechanisms to deal with promotion, prevention, rehabilitation is given, unlike the existing Ordinance which only deals with treatment/institutionalization. Other important rights of mental patients and users such as human dignity,

⁶⁴ World Health Organisation [WHO], (2004). *A Systematic Approach to Developing and Implementing Mental Health Legislation*, Report of a Regional meeting of Experts, New Delhi India, 6 -8 December 2004. WHO Project ICP MNH 001.

⁶⁵ World Health Organisation [WHO], (2004). *A Systematic Approach to Developing and Implementing Mental Health Legislation*, Report of a Regional meeting of Experts, New Delhi India, 6 -8 December 2004. WHO Project ICP MNH 001.

⁶⁶ *Gazette Extraordinary of the Democratic Socialist Republic of Sri Lanka, Part I: Section (I), No. 1418/33 – 11.11.2005.*

⁶⁷ Paragraph 7.

⁶⁸ Document produced by the Ministry of Health, dated January 22, 2007.

privacy, protection of property, informed consent, freedom from exploitation and abuse are also addressed.

5.4 Social Insurance/ Security Law⁶⁹

Social security systems are an important source of income support for workers who acquire a disability in the course of their employment. Additionally, a social security system provides a safety net for those with aged related disability and disabled people unable to work. Aside from the provision of a national health service, Sri Lanka as a developing economy has had difficulties in adopting statutory schemes for citizens ineligible for the various industry based schemes despite introducing the Poor Law Ordinance of 1939.⁷⁰ In 2003, a strategic framework⁷¹ for health development was adopted by the government. There are a number of social security schemes organised around the government, formal and informal sectors which are contributory.⁷² These systems appear to be fragmented and do not link up with any comprehensive national strategy, especially related to disability and capacity building.

Under the Widowers, Widows and Orphans Pension Scheme⁷³ lifetime benefits are provided for an orphan with disability. In 2009, there were 23,000 children drawing disability pensions through these arrangements.⁷⁴ Due to concerns about rorting the system, changes to a pension recipient's life chances (marriage, employment or other income earning activities, death of the child), and the neglect and abuse of children with disability by guardians; the Department of Pensions signposted new amendments to the existing statutes to ensure benefits are for those "persons who are truly and totally incapacitated"⁷⁵ and issued interim policy decisions. Of note is the emphasis on assessing capability for employment and permanency of disability, residential arrangements and the rejection of applications from unmarried non-

⁶⁹ It is beyond the orientation of this Chapter to have a thoroughgoing discussion of social security law and programs in Sri Lanka. For an excellent overview see Chandraratna, 2003; ILO, 2008.

⁷⁰ The *Poor Law Ordinance* No.30 of 1939 amended No. 3 of 1946. Space does not allow for discussion of the *Samurdhi* (prosperity) program, *Samurdhi* is established under the *Samurdhi Authority of Sri Lanka Act* (No. 30 of 1995). *Samurdhi* the main cash transfer scheme to address chronic poverty and disability payments in particular, special payments to soldiers with disability and their dependents. For a history of this program, see (<http://samurdhidept.gov.lk/Aboutus.html>).

⁷¹ *Framework for Health Development in Sri Lanka* (2004 – 2015), April 2003, Ministry of Health Care and Nutrition.

⁷² The various schemes cover a third of the population, much more than other South Asian countries, equal to 54% of the working age population (ILO, 2008, p.19).

⁷³ Section 13, *Widowers, and Orphan's Pensions Act* (No.24 of 1983) and s. 11 [new section 29A], *Widows' and Orphans' Pension Fund (Amendment) Act*, No.44 of 1981. Access to these provisions is thoroughly medicalised. The child is required to present to a medical board of 3 doctors who will determine whether the child has a physical or 'mental' disability that "renders him incapable of earning his livelihood". Whilst there is provision for a lifelong pension, there is a built in disincentive toward rehabilitation and employment training should any gains result in the loss of the pension.

⁷⁴ Pension Circular 1/2009, *Payment of Disabled Orphans' Pension – Re-amendment*, Department of Pensions, 7/01/2009, paragraph 1.1.

⁷⁵ Pension Circular 1/2009, *Payment of Disabled Orphans' Pension – Re-amendment*, Department of Pensions, 7/01/2009, paragraph 2.1.

disabled women over 26 years of age.⁷⁶ In 2011, the Regulation on Payment of Disabled Orphans Pension,⁷⁷ provision was made for a disabled child to draw the pension after the death of the employee's spouse. The 2011 regulation provides greater scrutiny in regard to alternative sources of chattels and income to determine eligibility for a pension, financial management including appointments of guardians to assist in this regard, and a 5 yearly medical review by a medical board for those recipients not disabled from birth.

Government workers are covered by the mandatory defined benefits scheme, the Public Servants Pension Scheme, originally established in 1901, under the Ordinance No. 2 of 1947. Since 2002, this scheme has been closed to new members. A Contributory Pension Fund (CPF) was established under the Management Service Circular No. 18 of 2003. Under this fund, all permanent employees in the public sector and provincial services are contributory members. Employees' contribution is 8% while the employers' contribution is 12%.⁷⁸

The main schemes covering employees in the private sector are the Employees' Provident Fund Act No. 15 of 1958 and the Employees' Trust Fund Act No.46 of 1980. Benefits are in lump sum form rather than periodic payments. This benefits system raises concerns about the capacities of certain beneficiaries to manage their income over their lifetime rather than using benefits to pay for immediate, short term needs and the existence of support and independent financial advice for planning. The Employees' Provident Fund Act No. 15 of 1958, amended to No.14 of 1992 is the largest social security scheme in Sri Lanka for workers in the formal sector. According to the EPF Act, an employee is required to contribute a minimum of 8% and the employer a minimum of 12% of the total salary of the employee monthly. In Section 23(c) benefits are paid when the employee ceases to be employed due to "permanent and total incapacity for work". The Employees' Trust Fund Act No.46 of 1980⁷⁹ has similar provisions for the termination of employment. Here coverage includes disablement due to injury or disease: Section 24 (1) and (2) cover "permanent and total incapacity for work", "unfit for work any longer for that reason". No mention in either scheme is made of alternative pathways or the possibility of transfer to other industries.

For the informal sector where there is heightened vulnerability due to an inability to invest in savings, two schemes were introduced for farmers and fishing workers up till age 59. The Farmers' Pension and Society Security Benefits Scheme Act No.12 of 1987 and the Fishermen's Pension and Social Security Benefit Scheme Act No.23 of 1990 are both voluntary contributory schemes that explicitly provide non-

⁷⁶ Pension Circular 1/2009, *Payment of Disabled Orphans' Pension – Re-amendment*, Department of Pensions, 7/01/2009, paragraph 3.2.3.

⁷⁷ *Extraordinary Gazette*, 1719/3 – 2011, August 15, 2011 made under the *Widows and Orphans' Pension Fund Ordinance*, (No. 1 of 1898), amended by Act (No. 44 of 1981).

⁷⁸ *Public Servants' Provident Fund*, established in 1942 operated by the state, is for the benefit of certain non-pensionable employees of the government.

⁷⁹ Extended to the University Grants Commission and Higher Education institutions by *Employees Trust Fund (Special Provisions) Act*, (No.19 of 1993).

means tested benefits in the event of disablement. There is the option with both schemes to take a lump sum or receive a monthly allowance.⁸⁰

The Social Security Board Act No.17 of 1996 is a statutory regime of social insurance for self-employed workers using a defined contribution type benefit payable according to a prescribed schedule. The Act establishes a board that oversees a contributory social benefits scheme for self employed persons. There are six different schemes available depending upon income, with the *sahana* and *thilana* systems available to individuals who earn less than Rs. 36, 000 per annum (Reg 2(a)).⁸¹ Under Section 3 (1) (b) (c), benefits and/or lump sum payments are provided for “permanent partial disablement” (Section 11) and “permanent total disablement” (Section 12), although no definitions of these distinctions are given in the legislation. The Pensions and Social Security Scheme Regulations⁸², 2006 made under Section 31 of the Social Security Board Act contains in Regs. 15 – 17, medical definitions of disablement that bear little association with environmental impacts as per the Protection of the Rights of Persons with Disabilities Act No. 28 of 1996 (Disability Rights Act) definitions. For instance, Reg 15 & 16 (permanent total disablement) incline towards impairments of both limbs, hand, eyes etc; whereas for partial disablement the emphasis is on singularity, that is one eye, foot, arms (Reg 17). The meaning of “permanency” is not defined in the regulation.⁸³ Maybe in recognition that when disabled people are gainfully employed that employment is likely to be self-employment; the Social Security Board (Amendment) Act No.33 of 1999, Section 7⁸⁴ enables a contributor who enters the fund before age 35, who is deemed by a medical practitioner to be “mentally retarded” (*sic*), to take up a pension at aged 40 years. There is no obvious link between these regulations and the National Disability Policy of Sri Lanka or the Disability Rights Act in terms of vocational development or capacities building.

5.5 Injured Employee Laws

Running parallel to public disability law is legislation establishing a workplace injury compensation system and *Rana Viru Seva*, an authority to assist soldiers and police officers with disabilities.

Civilian Injured Workers

The workplace injury compensation system is designed for able bodied men and women who succumb to an injury arising out of and in the course of their employment.⁸⁵ On face, value the Workmen’s Compensation Ordinance No. 19 of 1934, as amended up to No. 10 of 2005 is gender neutral, however, often already on differential wages, women recipients of payments (on behalf of their injured spouse) are

⁸⁰ There are reports that the scheme is financially unstable and has a stigma attached to it. (Withanage et al, 2005). See (ILO, 2008) for discussion of the low take up rate of this fund by the target population.

⁸¹ The poverty line in 2011 was SLR 39,228. The minimum wage set by the Wage Board is SLR6900.

⁸² *Pensions and Social Security Scheme Regulations, 2006, 1464/5, 2006 Extraordinary Gazette, 25 September.*

⁸³ Exclusions are covered by *Pensions and Social Security Scheme Regulations, 2006, Reg. 22, 23* and exempt inter alia attempted suicide and drug and alcohol influenced impairment.

⁸⁴ Amended Section 9.

⁸⁵ For reasons of limited writing space I have not made mention of the disability provisions under the country’s pension (superannuation) plan. See *Employees’ Trust Fund Act (No.46 of 1980)*.

classed along with those regarded as having a legal disability (See Section 13 (1) (2)). The legislation is interesting because it contains two rather obtuse distinctions between “partial disablement” and “total disablement” squared with a ranked combination of injuries outlined in Schedule 1 of the legislation. In contrast with the Social Security Board Act 1996, Section 2(1) relates ‘partial disablement’ to be of a temporary nature and ‘permanent disablement’ relates to a reduction in earning capacity “in every employment which he (the employee) was capable of undertaking at that time”. Within this legislation there is clear prejudice against women and those with mental disability, for Section 11(1) disallows direct payment of compensation. Instead the compensation is required to be deposited with the Commissioner administering the scheme who acts as a guardian.

The tables of maims⁸⁶ (under the 1960 revisions contained 14 injuries, whilst the 1990 version contained 35 categories and Schedule 3 of occupational diseases had 7 types in 1960 and 44 types in 1990. Of concern is that the Commissioner for Workers Compensation has all the power of a court (Section 35) and no civil court has jurisdiction over matters under the power and control of the Commissioner. The exception is that appeals to the High Court are allowed on points of law and only then by the aggrieved party to the order (Section 48(1)(2)). Disabled people themselves have great difficulty being covered under existing worker’s compensation arrangements which act as a disincentive for employers to hire disabled people as they are fully liable should there be an injury. Cases of medical negligence are rare in Sri Lanka, with the number of cases reports up to 2002 being less than ten.⁸⁷

Armed Forces and Police

Members of the armed forces and police services are not covered under the usual workers compensation laws; rather the *Rana Viru Seva* Authority has responsibility to meet their needs in the event of disability. In addition, there is a complex system of pensions for both the armed forces and police related to aged-based retirement and not necessarily disablement.⁸⁸ In keeping with the parameters of this paper, the focus is on documenting disability related benefits.⁸⁹ For police officers there exists a number of Public Administration Circulars that provide grants of medical aids, compensation (according to a schedule of rank and loss of earning capacity⁹⁰) depending upon the circumstances [causation]⁹¹ that provoked the injury or disability – ‘terrorist activity,’⁹² ‘terrorist attack,’⁹³ an ‘accident,’⁹⁴ or in consequence ‘of

⁸⁶ Compensation for specific injuries.

⁸⁷ Fernando, R (2002). A Landmark Case of Medical Negligence in Sri Lanka, *Ceylon Medical Journal*, 47(4), pp.128 – 130.

⁸⁸ See *Pensions Circular 9/2008*, issued 3/10/2008, Department of Pensions regarding the relationship between disability pensions co-existing along with a service pension.

⁸⁹ The provision of land is sometimes made to officers with disability who are not in service.

⁹⁰ *Extraordinary Gazette*, 1686/19, 2010, *Part 1: Section (1)-General Government Notification, Minutes of Pensions*, dated 29/12/2010.

⁹¹ Causation induces the moral imperative as the Sri Lankan State has had to look after its police officials who have acquired disability within the context of the country’s often violent and bloody conflict. There is an emerging disability apartheid between State employed war disabled and the others (war victims, disability produced by other causes) and access to services, cash payments and other livelihood schemes.

⁹² *Public Administration Circular*, No. 21/88.(1988)

⁹³ *Public Administration Circular*, No. 21/88. (1988)

atrocities committed by robbers, criminals, drug traffickers or underworld elements.⁹⁵ Under the terms of the 2010 Extraordinary Gazette Minute on Pensions⁹⁶ recipients of a disability pension are not eligible for additional compensation, injury allowance or police compensation.

The Rana Viru Seva Authority Act No.54 of 1999 (Rana Viru Act) establishes an Authority that promotes the welfare of disabled members of the armed forces. The authority is charged with providing after care and rehabilitation (Section 4 (a)), the provision of housing (Section 4 (b)), and medical care (Section 4(c)). There is no definition of disability or philosophical statement about the approach to disablement or service delivery. However, Sections (d),(e) and (f) reflect a new approach to the management of disability away from the familiar passive and typical non-developmental orientation of much of the statutory regimes concerned with disability. Section 4(d) is an enabling clause, aimed at achieving greater access to education, especially higher education through the provision of scholarships and other assistance. There is an emphasis on achieving sustained employment (Section 4(e)) and the establishment of small business ventures (Section 4(f)). The realisation of the objectives of the *Rana Viru Seva Authority* will need advocacy and monitoring, not just for eligible recipients but also to assess the effect of the policy shift on other groups of disabled people, including community awareness as well as competition for restricted social protection measures.

5.6 A Disability Rights Bill and the Convention on the Rights of Persons with Disabilities?

A Disability Rights Bill, to relieve the inadequacies of the Disability Rights Act was first publicly mooted in the 2003 national policy. Although subsequent amendments have been made to the Disability Rights Act along the way, the Disability Rights Bill, Version (January 31, 2006) has only made it to the Legal Draftsman's office. Should the Disability Rights Bill become law the Disability Rights Act would be repealed (Section 63). In the meantime international developments in the area of international disability law have moved at a lightening pace resulting in the fastest ratified convention in United Nations history: the Convention on the Rights of Persons with Disabilities (CRPD) and the Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP). This Convention has not been ratified by the Sri Lankan government.

It is unclear what "adjustments" will be made to the proposed Disability Rights Bill (DRB) in the light of the Convention (CRPD). After this survey of existing disability legal regimes there are several areas that need clarification. In cases of inconsistency between definitions of disability in legislation which definition would prevail, Section 37 of the Disability Rights Act or another? Will the Disability Rights Act be deemed the lead legislation for interpreting others, or will the proposed Disability Rights Bill which will have the effect of repealing the Disability Rights Act perform that role? There may be merit

⁹⁴ *Public Administration Circular*, No. 22/98. (1998).

⁹⁵ *JG's Circular*, No. 1783/2004.

⁹⁶ *Extraordinary Gazette*, 1686/19, 2010, Part I: Section (I)-General Government Notification, *Minutes of Pensions*, dated 29/12/2010.

in supporting multiple definitions of disability depending upon the field of its use. What criterion will be used to assess the validity of these different definitions?

5.7 Additional Case Law⁹⁷

Until recently, case law has related predominantly to the status of profoundly deaf persons at law. A progressive decision in *Sapapathipillai v Tirumanchanam*⁹⁸ (1913), Ennis, J. ruled that deeds executed by a profoundly deaf person were held to be good. The case is interesting because the Justice revisits the views of both the Roman-Dutch and English law systems which were unfavourable about the capacity of deaf (and dumb) persons to make Wills or enter into contract.⁹⁹ Instead Ennis, J. draws a clear distinction between deafness as producing impairments, that is the inability to vocalise and the manner of communication impairment denoting lunacy or imbecility.¹⁰⁰ In contrast the case of *Aiya v Peniya*¹⁰¹ (1913) that “same person must be present in Court skilled to interpret between the deaf mute (*sic*) and the Court”, however if that person also cannot understand what is going on due to Deafness, they are instead dealt with under Chapter 32 of the Criminal Procedure Code No. 52 of 1980.

In a later case, *Joseph v. Fernando*¹⁰² (1940), *Aiya* was not followed and instead Wijeyewardene, J. disputed the view that deaf persons who cannot be made to understand legal proceedings should not be tried, and instead argued that “a Magistrate trying a deaf and dumb (*sic*) accused should make all reasonable efforts to ascertain if there is any reliable person who is able to communicate with the accused by signs and make him understand the nature of the proceedings, in order to avail himself of the assistance of such a person”. It is also desirable that there should be “... some medical evidence as to the state of mind of a deaf and dumb accused so that the Court may consider the propriety of taking action under Chapter 33 of the Criminal Procedure Code”¹⁰³

6. Legal Mobilisation and the Public Interest

Legal and social policy interpretation is not precise and definitive, but rather is contingently mapped onto wider social textures and dependent on divergent experiences with and beliefs about rights, as well as the “inclinations, tactical skills, and resources of the contending parties who mobilize judicial endowments”.¹⁰⁴ Any realisation of legal mobilisation in Sri Lanka needs to be understood in the context of a backlash by government over the Supreme Court’s supposed judicial activism, As a former Dean of Law, the then Minister for Justice, Dr. G. L. Pieris stated that “it is very important for the Court to

⁹⁷ This section is underdeveloped and should be considered a work-in-progress as additional obscure cases come to light.

⁹⁸ *Sapapathipillai v Tirumanchanam* 17NLR, 146, Ennis J, De Sampayo A. J.

⁹⁹ *Id.* at p. 147

¹⁰⁰ *Id.* at p. 148

¹⁰¹ *Aiya v Peniya* 21 NLR, 72, Shaw, J.

¹⁰² *Joseph v Fernando* 42 NLR, 93.

¹⁰³ 42 NLR, 93 at 94.

¹⁰⁴ McCann, Michael (1994). *Rights at Work Pay Equity Reform and the Politics of Legal Mobilization*. Chicago: University of Chicago Press.

confine itself to the proper sphere and to not overreach itself and not to arrogate to itself the functions that belong to the Executive and the Legislative”.¹⁰⁵

Legal Mobilisation

Charles Epp (1996), in his study on the effect of the Canadian Charter of Rights and Freedoms 1982 concludes that whilst legislative reforms creates legal interests, statutes do not create institutional resources to activate those rights.¹⁰⁶ He identified three types of resources that can shape access to the judiciary:

- (1) organized group support from advocacy organizations,
- (2) adequate funding and
- (3) support of the legal profession.

Other studies of legal mobilization critically examine the reproduction and successes of rights advocacy with the understanding that “legal norms and discourses derive their meaning primarily through the practical forms of activity in which they are developed and expressed”.¹⁰⁷ Assuming that disabled people and their allies can achieve access to information, and are aware of the mechanisms available or procedures to follow to obtain legal redress, the possibility exists to test the purview and enforceability of disability-related statute laws and constitutional protections, especially the Fundamental Rights (FR) provisions.

There is overwhelming cynicism about the utilization of law as a vehicle for social change. Although knowledge of the law and legal structures for minorities such as disabled people are important, legal competency and consciousness involves more than merely knowing about rights; it is, as Philippe Nonet puts it, “... an active and searching awareness of the opportunities offered by law for enhancing one’s position in society”.¹⁰⁸ The use of writs of *certiorari* and *mandamus* under the jurisdiction of the Court of Appeal as the basis of a public interest claim, is one mechanism of engagement and is one of the few ways that individuals and NGO’s can get access to government information.

There have been some significant hurdles which had to be overcome to open up this avenue of legal mobilisation and even then there are restrictions in using this mechanism for writs of *mandamus* and *locus standi* petitions for FR cases. Disability itself may place an impediment to bringing a grievance to

¹⁰⁵ *The Island*, November 22nd, Pieris, quoted in Pinto – Jayawardena, 2006, p. 8

¹⁰⁶ Epp, Charles. (1996). Do Bills of Rights Matter? The Canadian Charter of Rights and Freedoms, *American Political Science Review*, 90(4): pp. 765 – 779.

¹⁰⁷ McCann, Michael (1994). *Rights at Work Pay Equity Reform and the Politics of Legal Mobilization*. Chicago: University of Chicago Press, pp. 261-62

¹⁰⁸ Nonet, P. (1969). *Administrative Justice: Advocacy and Change in a Government Agency*, New York: Russell Sage Foundation, p. 8.

the attention of the courts. Therefore, disabled people individually and collectively need, to work with public advocacy organisations. For the legal and social policy mobilization to occur, all stakeholder sectors need to be fully cognizant of the multi-layered dynamics of disability consciousness. Developments in disability law and social policy initiated since 1996 cannot be effective in terms of emancipatory social change until education for justice occurs with teachers, municipal officers, practitioners, disabled people and social services personnel. It would appear that limited training and development activities have been undertaken regarding recent developments in the reconceptualisation of disablement and the public law interest implications with legal mobilization and reform agencies. Collective advocacy training is therefore required for individuals and their families.¹⁰⁹ The law itself requires transformation to allow access to justice for minorities. In this respect, unlike Sri Lanka, the Indian Court has made access to justice a primary concern of the legal system.¹¹⁰

Freedom of Information

In Sri Lanka, legal mobilization cannot be considered independently of the vexed questions of rights to information and the rules of *locus standi* (a principle about “who” can bring a petition to the courts, the right to be heard). The foregoing discussion applies to all people, and in this instance, the situation of people with disabilities in terms of barriers to information and judicial access are magnified.

There are no freedom of information laws in Sri Lanka. An opposite norm of assumed secrecy exists to the extent that the Law Reform Commission of Sri Lanka Report on Freedom of Information of 1996 stated that “the current administrative policy appears to be that all information in the possession of the government is secret unless there is good reason to allow public access”.¹¹¹ Lack of access to information, including official documents on governmental policies such as social security initiatives, access regulations, medical records, legal aid and education, affects the enjoyment of political, economic and social rights. In March 2010 the Urban Development Authority (UDA) agreed to provide public access to certain documents related to public utilities, urban development and environmental assessments. We know that Sri Lankans with disability have limited knowledge about the existence of services provided by the Department of Social Welfare.¹¹² In my own capacity as a researcher, it was hard to find out where to obtain information such as public policy documents and then be granted access to materials and finding laws and draft Bills.¹¹³ Additionally, Thomas Faunce (2005), notes in a recent workshop held at Galle around reforming mental health legislation, people with disabilities did not figure highly and argued that

¹⁰⁹ Hess, R, E. Clapper, H. Gibson. (2001). Empowerment Effects of Teaching Leadership skills to adults with a serious mental illness and their families, *Psychiatric Rehabilitation Journal*, 24: pp. 257 – 265; Stringfellow, J. (2000). The relationship of participation in a collective advocacy programme to the attitudes towards authority of consumers of mental health services, *Dissertation Abstracts International*, 61 (03), 1700. (UMI No. AAT 9965694).

¹¹⁰ Gomez, Mario. (1998). *Emerging Trends in Public Law*, Colombo: Vijitha Yapa Publishers, pp. 42-47.

¹¹¹ Law Reform Commission (LRC). (1996). *Report on Freedom of Information*, 20 November 1996, Colombo.

¹¹² National Policy on Disability for Sri Lanka (2003), Ministry of Social Welfare, p. 23.

¹¹³ See also Pinto-Jayawardena & De Almeida Guneratne, *Habeas Corpus in Sri Lanka: Theory and Practice of the Great Writ in Extraordinary Times*: (Colombo: Law & Society Trust, 2011)

“as much as possible (mentally ill research subjects) should be involved in the development of human rights modules related to their protection in clinical trials”.¹¹⁴

*Visvalingam and Others v. Liyanage and Others*¹¹⁵ was the first FR case that challenged the Court to imply a right to information as part of the guarantee of freedom of expression.¹¹⁶ The Court held that the right to freedom of expression does include the right to receive information of one's choice. In *Fernando v. The Sri Lanka Broadcasting Corporation and Others*.¹¹⁷ The Court stated: “... that information is the staple food of thought, and that the right to information, *simpliciter*, is a corollary of the freedom of thought guaranteed by Article 10 (of the Constitution).”¹¹⁸ This authority could be used to initiate a petition for FR violation under Article 10 of the Constitution arguing that various authorities were remiss in providing information in an expeditious, transparent accessible manner to disabled people.

Locus standi – the Right to be Heard

Locus standi rules in Sri Lanka are narrowly construed. Until 2003 the authority for FR *locus standi* cases was *Somarawathie v Weerasinghe*.¹¹⁹ Amerasinghe, J. stated that other than an aggrieved person (and their attorney) “no other person has a right to apply to the Supreme Court for relief or redress”,¹²⁰ and later in commenting on the possibility that the Constitution itself might abridge, restrict or deny the rights of citizens, he said “I can only give effect to the intention of the makers of the Constitution, however inexpedient, or unjust or immoral it may seem”.¹²¹ This case was distinguished in the decision of *Sriyani Silva v Iddamalgoda and others*.¹²² In this case involving a petition filed by the wife of a man who died in custody, the Court reasoned, in response to the argument that only the deceased could submit a petition (an improbability at the best of times), that “a right must have a remedy ... recognised by the maxim *ubi jus ibi idem remedium* – there is no right without a remedy”. In allowing for the wife of the deceased to have *locus standi*, the Court concluded “a strict literal construction should not be resorted to where it produce[s] such an absurd result”. This case not only paves the way for third party disability litigation over fundamental rights breaches but also petitions on behalf of a disabled person who has perished as a result of neglect or abuse in institutional care.

However, under public law which covers the majority of statutes discussed in this paper, *locus standi* rules are more broadly framed. In *Environmental Foundation Limited v Ratnasari Wickramanayake*¹²³, known as the “Zoo Case”, Justice Ranaraja expanded the principle of *locus standi* by making a

¹¹⁴ Faunce, Thomas. (2005). Collaborative Research Trials: A Strategy for Fostering Mental Health Protections in Developing Nations, *International Journal of Law & Psychiatry*, 28: p.180.

¹¹⁵ *Visvalingam and Others v. Liyanage and Others* 2 Sri L.R. 123 [1984]; *Visvalingam v. Liyanage* F.D.R. (2) 529.

¹¹⁶ See Article 14

¹¹⁷ *Fernando v. The Sri Lanka Broadcasting Corporation and Others* 1 Sri L.R. 157 [1996].

¹¹⁸ Above at 179.

¹¹⁹ *Somarawathie v Weerasinghe and Others*, 2 Sri L. R. 121. [1990].

¹²⁰ *Id*, at p. 124

¹²¹ *Id*, at p. 128

¹²² *Sriyani Silva (Wife of Jagath Kumara-Diseased) v. Iddamalgoda, Officer-In-Charge, Police Station, Payagala and Others*, 1 Sri L. R. 14 [2003].

¹²³ *Environmental Foundation Limited v Ratnasari Wickramanayake*, C.A. App. No. 137/96.

distinction between two types of public interest petitioners. The first petitioner is one who can show a “genuine interest” in the matter. The other category of petitioner is one who acts out of a social ethic “a public spirited person”. To ensure that laws are applied to all. This authority then paves the way for NGO’s to have *locus standi* in applications before the courts in matters related to the implementation of disability laws such as was undertaken by the Public Interest Law Foundation in 2000.¹²⁴

Remedies?

Creativity plus persuasion is the essence of good lawyering. Finding new and novel ways to engage with existing precedents and statutes is paramount to making inroads into areas in the lives of disabled people that appear to be caught in a legal vacuum. With the increased access to judgements abroad it is possible to study different approaches to argumentation. For instance in Australia attempts were made to extend the use of company law, in particular the *principle of fiduciary duty*, as a mechanism to argue a breach of the duty of *loco parentis* by State institutions that had custody over children. These children were subsequently abused whilst in ‘care’.¹²⁵ This final section of the paper provides some thoughts around the usage and testing of strategies of legal engagement.

Confinement or detention

In March 29, 2009 edition of *The Sunday Leader* a spotlight piece “*Living Hell; Ashanthi’s Story*”,¹²⁶ told the story of a 26-year-old who had been forced into marriage, literally imprisoned in her home whilst overseas, harassed by the Mirihana Police and then was duped into being admitted to Angoda mental hospital under the guise of getting a ‘free’ scan for a head injury. There are many people like Ashanthi¹²⁷ who should not be in mental health institutions – some of these people have been forgotten (files have been lost or relatives have died) whilst others have simply ‘disappeared’ in the system or died under mysterious circumstances, as it is difficult to access admission and patient history records.

The writ of *habeas corpus*¹²⁸ is a valid mechanism to adopt to seek an investigation or heightened inquiry into the detention of a person with disability in a hospital, home or residential services, especially in the absence of transparent and actionable grievance procedures and a multidisciplinary assessment and

¹²⁴ *Public Interest Law Foundation v. The Municipal Council of Colombo*, CA 602/2000 and *Public Interest Law Foundation v The Ministry of Justice* CA 603/2000

¹²⁵ Batley, Paul. (1996). The State’s Fiduciary Duty to the Stolen Children, *Australian Journal of Human Rights*, 2(2): pp.177-94; Hammond, T. (1998). The ‘Stolen Generation’ - Finding a Fiduciary Duty, *E LAW : Murdoch University Electronic Journal of Law*, 5(2): www.murdoch.edu.au/elaw/issues/v5n2/hammond52nf.html; Howe, Adrian. (1997). Family Relationships, Fiduciary Law and Civil Incest Suits: Re-framing the Injury of Incestuous Assault, *The Australian Feminist Law Journal*, 8: pp.59 - 80.

¹²⁶ Eye, Hawke. (2009) ‘Living Hell Ashanthi’s Story’, *The Sunday Leader* (newspaper), March 29, Retrieved 30.12.2011. <http://www.thesundayleader.lk/20090329/spotlight-1.htm>.

¹²⁷ The article discusses several attempts by the Institute of Human Rights and the group Women in Need to enforce various court orders.

¹²⁸ In Sri Lanka this writ has been used as remedy to locate and ‘resolve’ concerns about individuals who have ‘disappeared’ or been detained by the police or security forces. See Pinto-Jayawardena, K & J. De Almeida Guneratne (2011).

review mental health teams. In Australia, in 1979, this rarely used writ was successfully galvanised to compel the Health Commission of Victoria to show why Anne McDonald, an 18 year old with severe physical and speech disability who had been living in an institution from just after birth had been detained against her will.¹²⁹ Upon the court's judgement, Ms. McDonald was released from the institution and in subsequent years successfully read for a Bachelor's degree.¹³⁰

In the Sri Lankan decision of *Rasammah v. Major General Perera*¹³¹, it was determined that courts had a wide discretion to determine the stage a 'detainee' should be produced in court. This judgment is significant as there may be issues in locating a disabled inmate including contestations around the 'availability' and capacity of the resident to be produced in court.¹³² The scope of *habeas corpus* was further strengthened in *Juwanis v. Lathif*¹³³ where it was held that even when an authority denies the detention of a person, this denial does not prevent the Court of Appeal to refer the matter to the Magistrates Court for further enquiry. These mechanisms can be somewhat slow and tedious, but are ultimately about getting an agenda for the person's cause/case and also to provide an opportunity to highlight the issues more broadly.¹³⁴

Guardianship issues

Some mental hospital inmates cannot leave as they have no next of kin or 'friend' to reside with. In a Florida Supreme Court (USA) case, concerning Terri Schiavo, a woman with brain injury in a persistent vegetative state, a writ *quo warranto* was used to compel her husband Michael Schiavo¹³⁵ to explain what authority he maintained as guardian as part of a 7 year battle over guardianship of an incapacitated life. Scrutiny of guardianship under this type of writ may provide greater scrutiny of Section 5(1) and Section 6 powers of the Mental Diseases Ordinance especially where there are concerns about the unscrupulous interference of a spouse or family member in the process of involuntary admission to a facility and any guardianship decisions made therein. In regard to guardianship abuses related to the Disabled Orphans' Pension, a writ *quo warranto* may also induce beneficial scrutiny.

Delays in determinations

¹²⁹ *The Queen and the Health Commission of Victoria, George Lipton and Dennis McGinn, ex parte Anne McDonald*, Unreported Victoria Supreme Court [1979].

¹³⁰ Dwyer, J. (1996). Access to justice for people with severe communication impairment, *The Australian Journal of Administrative Law*, 3(2): 73-119. A duplication copy of this can be found at: <http://members.optusnet.com.au/~dealcc/DEALPages/Dwyerarticle.html>.

¹³¹ [1982] 1 SriL.R. 30.

¹³² Some residents indeed maybe drugged or health deprived to the extent that they may not be fully appraised to present their competencies in a court setting.

¹³³ [1988] 2 SriL.R. 185.

¹³⁴ The Donald case – changed the shape of the ways that hospitals did business including their accountability to patients.

¹³⁵ Michael Schiavo had petitioned the courts to have Terri Schiavo life-prolonging procedures or life support treatment removed. See <http://www.miami.edu/index.php/ethics/projects/schiavo>

Based on the strategy adopted in *Rosalie Whiley v. Hon. Richard Scott*,¹³⁶ a Florida Supreme Court case, where in a writ *quo warranto*, the advocacy organisation Disability Rights Florida argued *locus standi* on the basis of their protective advocacy role. Governor Richard Scott instituted a freeze in rule-making which negatively impacted on the lives of disabled Floridians. The case was successful and overturned the freeze. There are equivalent advocacy groups in Sri Lanka. Under Article 12(4) of the 1978 Constitution we can argue not only a FR cause of action, but disabled people could be viewed as a 'protected class' where there should be heightened scrutiny. In *Whiley*, the issue concerned a delay in rule-making that had arbitrary effects in the lives of disabled people. In Sri Lanka the Disability Rights Bill has been delayed in the Legal Draftsman's office since late 2006, is also arguably causing arbitrary effects, creating uncertainty about disabled people's and industry statutory obligations and, rights and responsibilities.

Enforcement of laws

In this paper I have persistently argued that mechanisms for the monitoring and enforcement of disability laws and statutory instruments are weak, if not non-existent in certain statutes. Declarations aside, the challenge is to find ways to use the law to call civil servants, commercial enterprises and government Ministers to accountability and transparency. In furtherance of the Supreme Court decision (FR 221/2009) a writ of *quo warranto* could be engaged to pursue the issuing of planning/building Certificates of Conformity, where there is a belief that such issuing is beyond authority in delegation and ascertainment. In addition the testing of consistency in the application of access regulations and the Sri Lankan Standards can be harvested using a writ *certiorari* to assess uniformity of access decisions. The paper has also pointed to a fragmentation in the statutory development of disability laws, especially the lack of congruence with the Disability Rights Act and the conformity with the UN Convention (when it is eventually ratified). Applying best practice, any incorporation Bills (for the establishment social services and NGO's, including companies) needs to be assessed for FR and Disability Rights Act alignment.

It has been noted that Section 23(1) (2) of the Disability Rights Act provides for non-discrimination in education and employment and free access to common services and buildings. Section 24 enables petitions to the High Court, for relief or redress when there is deprivation. Combined with the *Rana Viru Act*, Section 4(d) that promotes access to higher education for disabled soldiers and police, a writ of *mandamus* could be utilised to access the veracity and implementation of the University Grants Commission (UGC)¹³⁷ regarding applications for university admission and access adjustments.

Finally the 1978 Constitution itself requires clarification regarding the fundamental rights of disabled people. Article 12(3) reads:

¹³⁶ No. SC11-592, Florida Supreme Court, 16 August 2011. Florida Governor Richard Scott exceeded his power when freezing agency rulemaking through an executive order earlier this year. The court, in a 5-2 ruling, agreed with a disabled woman on food stamps who had argued that rulemaking is a legislative province. Scott created an office within his administration from which all state agencies had to seek permission to make or change rules.

¹³⁷ In accordance with the *Universities Act* (No. 16 of 1978).

No person shall, on the grounds of race, religion, language, caste, sex or any one of such grounds, be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of his own religion.

Under Article 3(3) disability is not a protected ground (attribute) in terms of access to common places and freedom of movement.¹³⁸ In Article 3(4), disability is narrated in terms of “special provisions ... for the advancement”. This may not be the same as a protected ground. A Supreme Court determination needs to ascertain whether equality claims are weakened or differentiated for disabled people advising of the full extent of the equalising measures.

7. Conclusion

This paper has provided a broad overview of legal responses to disability rights and entitlements in Sri Lanka. Globalisation and the increased internationalisation of geodisability knowledge as well as corresponding international regulation mean that Sri Lanka as an international player and developing nation has little choice but to conform to new universal legal regimes. An outstanding concern arising from the paper is whether social policy and legislative infrastructures are suitably resource equipped and trained to undertake the enormous task ahead of promoting legal cultures that enhance disabled peoples quality of life in ways congruent with other citizens. Much of the current arrangements are patchy and lacking co-ordination across the various government ministries and reactive to internal and external pressures. Furthermore, there is no legislatively entrenched philosophical framework that underpins legal development in the area of disability and that can act as a benchmark for service delivery and the statutory incorporation of NGO's, nor does government and the courts seem inclined to enforce laws through the carrying out of stiff penalties.

Capacity building among government officials and disabled people are paramount to give effect to the aspirations contained within disability laws. This includes development of strategic responses to disability standards in the various laws and enforcement mechanisms that need to be implemented to ensure that these laws carry weight. Knowledge of disability law by disabled people, attorneys, government officials and members of the public remains an ongoing change. Further audits of existing statutes and case laws are required to extend our knowledge of the new field of disability jurisprudence.¹³⁹ Finally this paper has identified two existing areas that remain under explored. The testing of existing public laws through public interest litigation has been identified as an area of law available to legal activists. Outside the regime of ordinary law, the Fundamental Rights provisions of the 1978 Constitution await a disability rights case to assess whether disabled people have their rights safeguarded by the highest law of the land.

¹³⁸ See also Article 14

¹³⁹ I recommend the establishment of an accessible information clearing house at the UOC as a repository for disability legal research.

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