

LST REVIEW

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RIGHTS OF MIGRANT WORKERS

A TRIBUTE TO A COUNSEL OF YESTERYEAR

***BOOK REVIEW -* 'CONFESSIONS OF A LAWYER'**

LAW & SOCIETY TRUST

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Editor's Note... ..

The September Issue of the *LST Review* publishes as its introductory piece, an analytical paper on the plight of Sri Lankan female domestic workers in the Middle East. Its author, *S. Nishadini Gunaratne* premises her analysis on certain basic questions as detailed;

Firstly, why do certain types of violations take place? Secondly, what can be done to minimize the risk of abuse and provide access to justice when a violation does take place? Thirdly, what does the future hold for migrant domestic workers in general in the light of recent regional protection mechanisms and international law developments?

As she observes, the extreme vulnerability of the migrant domestic worker is due to her gender and the fact that she is an unskilled worker. The examination of statistics and case studies reveals that this is a continuing and multifaceted problem which remains largely un-redressed by state policy and practice despite some attempts towards improvement.

Though recent amendments to the Sri Lanka Bureau of Foreign Employment Act (SLBFE Act, 1985) improved the supervisory regime, the practical implementation of these procedures as well as the adequacy of the measures adopted have been critiqued.

Gunaratne rightly points out that an organized legal assistance mechanism which provides assistance to both documented and undocumented workers is crucial for safeguarding the rights of all migrant workers. Sri Lankan practice and policy may be unfavourably contrasted with far more protective regimes adopted by other countries such as the Migrant Workers and Overseas Filipinos Act of 1995 which restricts its workers to work in countries where their rights are protected.

From a broader perspective, the Sri Lankan State should contemplate the due ratification of relevant treaties that guarantee the rights of migrant workers. It should also exercise a sterner ethos in the guaranteeing of basic rights on the part of receiving countries to which migrant workers are sent from Sri Lanka.

This Issue also publishes a moving tribute by *Nirmala Shear* in memory of her grandfather Henry Alexander Patrick Sandrasagra KC which recalls memories of prouder times when Sri Lanka's legal fraternity was studied by distinguished counsel of rare wit, jurisprudential acuity and intellectual prowess quite unlike what we witness today. The anecdotes that are detailed in this recollection would spur nostalgia and certainly laughter on the part of the remaining few in this country who retain treasured memories of those times.

Lastly we publish a book review by *Laksiri Fernando* which explores the perspectives that emerge from a recent volume interestingly titled '*Confessions of a Lawyer*' written by Basil Fernando. The prime value of this volume, as the reviewer remarks, is its emphasis on the contradictions and paradoxes within the legal system as well as deficiencies inherent in prevalent systems of legal education which has contributed to the catastrophic decline of the Rule of Law that we see today in Sri Lanka.

Kishali Pinto-Jayawardena

Violations of Rights of Sri Lankan Female Domestic Workers in the Middle East: A perspective on challenges encountered and progress made

*S. Nishadini Gunaratne**

1. Introduction

A unique feature of foreign employment seekers of Sri Lanka is the fact that female domestic workers or housemaids as they are popularly known form a predominant group among migrant workers. Every year, approximately 100,000 workers seek employment overseas as female domestic workers. In 2012, 119,052 workers sought employment as domestic workers and they constituted 42 per cent of the total migrant labour force.¹ An overwhelming majority of domestic workers work in the Middle East (Saudi Arabia, Kuwait, U.A.E. Qatar, Lebanon, Jordan, Bahrain and Oman are the main destination countries). The relatively high demand for domestic aides and the comparatively high remuneration paid for such workers in the Middle Eastern countries in contrast to the lack of employment opportunities available for unskilled workers and the poor pay received by such workers in the home country have made the Middle East an attractive destination.

Migrant domestic workers face both opportunities and risks. On the positive side, income from foreign employment has helped domestic workers to improve living conditions and the quality of life both for themselves and their families. Their earnings form a source of considerable foreign exchange for the home country: Remittances sent by female domestic and other migrant workers stand out as the highest net earner of foreign exchange. The flip side of migration of domestic workers depicts human rights violations and abuse to which a segment of domestic workers are subjected to every year. Every year, a few thousand domestic workers lodge complaints and they form the largest group among migrant - complainants. The grievances range from non-payment of wages to extreme forms of human rights violations in the form of cruel, degrading and inhuman treatment.

The vulnerability of the domestic worker to abuse is attributable to her gender and her position as an unskilled worker. The fact that the domestic worker is almost cut off from the outside world and is confined to her employer's residence coupled with the fact that most countries of the Middle East do not have an adequate protection mechanism that accords expeditious access to justice to migrant domestic workers makes the domestic worker extremely vulnerable to abuse by unsympathetic employers. It is important, in this context, to evaluate existing national mechanisms in place and explore avenues that would either prevent or minimise abuse wherever possible. The background to such an evaluation is formed by a number of questions. Firstly, why do certain types of violations take place? Secondly, what can be done to minimize the risk of abuse and provide access to justice when a violation does take place? Thirdly, what does the future hold for migrant domestic workers in general in the light of recent regional

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¹ *Annual Statistical Report of Foreign Employment 2012* (Sri Lanka Bureau of Foreign Employment, 2013), p. 7.

protection mechanisms and international law developments? In seeking answers to the above questions, the following procedure is adopted. Complaints from 2008 to 2012 and selected case studies are first shown in order to reveal different manifestations of violations of rights. Laws in the Middle East are next briefly discussed to highlight the degree of protection offered in the main labour receiving countries of the Middle East. The extent to which international laws and other mechanisms for the protection of migrant workers are binding on the labour receiving countries are also considered. The article then evaluates national legal and institutional mechanisms in place to prevent and address violations of rights. Challenges to the protection of rights of domestic workers and interventions necessary for changing the conditions that affect domestic workers adversely are discussed. Lastly, current developments locally, in the international sphere and in the Asian region are highlighted to depict emerging trends for protection of domestic workers.

2. Violations of rights of domestic workers

2.1 Case studies

Non-payment of agreed wages

An employment contract signed by the agent/ employer and employee is not a guarantee that the terms and conditions of the contract will be observed. A woman who left for Oman found that her employer was only willing to pay less than half of the stipulated monthly salary. The dispute over wages resulted in loss of employment without any payment.²

Overwork

Very often, domestic workers are made to work for long hours without any rest. An 18 year old girl who left for Jordan was made to work continuously for 5 days without adequate rest. As a result of over exhaustion, she fell unconscious while working and suffered fractures in the spine and leg. In her words 'I went abroad in perfect health and returned home as a disabled woman at the age of 18.'³

Physical violence

Although the two case studies presented below highlight extreme forms of physical and mental abuse, they nevertheless depict the nature of vulnerability of domestic aides to abuse in a host country.

² 'Shriyani Returns Home Empty Handed', *Daily Mirror*, 22 July 2008.

³ 'Tales of Broken Limbs and Shattered Hopes', *Daily Mirror*, 25 July 2008.

- (i) A 49 year old woman who left for Saudi Arabia in April 2010 alleged that during her 5 month stay, her employers drove nails, pins and wires into her body. An X-ray revealed that she had 24 nails inside her body which were subsequently removed by an operation in the home country.⁴
- (ii) A woman returned home from Saudi Arabia totally blind. She alleged that her policeman employer had poured a strong detergent into her eyes.⁵

Being kept against one's will

A housemaid from Saudi Arabia was rescued after 13 years where she was kept against her will by her sponsor and had not been paid since she arrived in 1997. Authorities had rescued the 45 year old after having been tipped off about the worker.⁶

2.2 What statistics reveal

An analysis of complaints from 2008 to 2012 reveal that domestic aides constitute not only the majority group among complainants of female migrant workers, but also the majority group among all migrant workers of both sexes. Complaints received from domestic aides as a percentage of complaints received from all migrant workers (both male and female workers) have ranged between 73 and 79 (In 2012, the percentage stood at 79). Complaints received from domestic aides as a percentage of all female migrant workers constituted still a higher percentage amounting to approximately 93 per cent during 2008- 2011. In 2012, this percentage had further risen to 95.⁷

The number of complaints by domestic aides from 2008 to 2012 are as follows: 7226 complaints in 2008; 8811 complaints in 2009; 11,074 complaints in 2010; 7467 complaints in 2011; 8122 (provisional results) complaints in 2012.⁸

Complaints received from domestic aides as a percentage of domestic aides departures are as follows: 6.7 per cent in 2008; 7.7 per cent in 2009; 9.8 per cent in 2010; 6.9 per cent in 2011; 6.8 per cent in 2012.⁹

Classification of complaints

The data presented below relate to both domestic workers and other female migrant workers. However, as discussed the vast majority of female complainants are domestic workers.

⁴ Krishan Jeewaka Jayaruk, 'The Agony of Ariyawathi', *The Sunday Times*, 29 August 2010.

⁵ 'Domestic in Saudi Alleges that Employer Blinded Her', *The Sunday Times*, 26 June 2011.

⁶ 'Lankan Maid in Saudi Rescued after 13 Years', *Daily Mirror*, 24 June 2011.

⁷ *Statistical Report of Foreign Employment 2011*, p. 87, *Statistical Report of Foreign Employment 2012*, p. 95.

⁸ *Statistical Report of Foreign Employment 2011*, p.89, *Statistical Report of Foreign Employment 2012*, p. 97.

⁹ *Ibid*, *Statistical Report 2012*, pp. 7-97.

Complaints Received from Female Migrants According to Grievance 2008-2012

<i>Type of Complaint</i>	2008	2009	2010	2011	2012 Provisional
Non-payment of agreed wages	1352	1657	2312	1545	1508
Lack of communication	1209	1527	1599	958	1050
Sickness	763	941	1675	1339	1491
Harassment (physical and sexual)	1154	1479	1997	1453	1478
Breach of employment contract	1087	1746	2067	935	1069
Not sent back after completion of contract	593	440	712	897	892
Death (Natural)	75	98	76	71	94
Death (Accidental)	22	16	30	24	18
Death (Homicide)	3	4	1	3	-
Death (Suicide)	12	7	8	3	6
All others categories ¹⁰	1449	1472	1426	777	923
Total No of female migrant complainants	7719	9387	11,903	8005	8529

Source: Annual Statistical Report of Foreign Employment 2011, p.87 & Annual Statistical Report of Foreign Employment 2012, p. 95.

¹⁰ The other categories include stranded- lack of reception on arrival, problem at home (Sri Lanka), stranded without employment, premature termination, illegal money transaction and others (domestic and non -domestic sector).

An analysis of complaints from 2008 to 2012 reveal that the most number of complaints came under the categories of non-payment of agreed wages, harassment, breach of employment contract, lack of communication, sickness and not sent back after completion of contract.¹¹

A noticeable feature in the analysis of complaints is that complaints under the category “sickness” have steadily increased during the last 5 years and occupied second place in 2012 for the highest number of complaints received. The percentage of complaints which stood at approximately 10 per cent (763 complaints) in 2008 rose to 17.4 per cent (1491 complaints) in 2012. A factor that needs to be determined and addressed is whether these illnesses are work-related or an aggravation of a previous illness.

The incidence of death is a disturbing trend that needs further study. A total number of 414 deaths due to “natural” causes was reported during the five year period. Similarly 110 “accidental” deaths and 36 deaths due to suicide were reported from 2008 to 2012.¹²

3. The degree of protection offered to migrant domestic workers in main labour receiving countries of the Middle East

Excessive work demands, non-payment of wages, infliction of mental and physical abuse are complaints common not only to Sri Lankan workers but all expatriate domestics based in the Middle East. The biggest drawback to safeguarding human rights of migrant domestic workers is the inadequacy in the type of protection accorded to them in Middle Eastern countries, although since of late, there has been a move towards safeguarding the rights of domestic workers. Immigration sponsorship laws also render the domestic worker vulnerable to exploitation.

It was only in July 2013 that Saudi Arabia adopted a regulation which provides basic protection to domestic workers such as nine hours of daily rest and salary payment at the end of every month. The regulation defines the rights and duties of both employer and employee and imposes penalties on both parties if the terms of the regulation are violated. Employers could be either be fined or given a recruitment ban for a first time offence and if the offence is repeated face an increased fine with a three year ban on recruitment. Similarly, a worker violating the law will be fined and will be further banned from working in the country.¹³

In Jordan, labour protection applicable to domestic workers include, *inter alia*, the requirement to credit salaries into a bank account and provide leave and medical insurance. However, there is still the

¹¹ *Statistical Report, 2011*, p. 87; *Statistical Report 2012*, p. 95.

¹² Analysis is based on *Statistical Report 2011*, p. 87; *Statistical Report 2012*, p. 95.

¹³ M. Sophia, “Saudi to fine employers holding back domestic workers’ pay”, *Gulf Business*, 1 June 2014. Retrieved from <http://gulfbusiness.com/2014/06/saudi-fine-employers-holding-back-domestic-workers-pay/#.VEo4ERbxz4s>

requirement for domestic workers to first obtain the consent of their employers before leaving the workplace.¹⁴

Bahrain passed a new labour law in 2012 (Labour Law 36) which for the first time grants few rights to domestic workers such as being entitled to a contract and vacation leave.¹⁵

Qatar, the U.A.E., Kuwait and Oman are countries that exclude domestic workers from their labour laws.¹⁶ Countries such as Kuwait, Lebanon and the U.A.E. have adopted standard employment contracts for domestic workers. It may be observed that standard employment contracts, though they offer a degree of protection, are not an adequate substitute for extending the protection of a country's labour laws to include domestic workers.

Immigration sponsorship laws of the Gulf increase the vulnerability of migrant domestic workers to exploitation and abuse. Under the Kafala system, workers' right to be employed and remain in the host country is tied to the sponsorship of their employer. And this system can trap workers who are under exploitative employers. Although Saudi Arabia's Labour Ministry made a proposal in April 2012 to transfer sponsorship responsibility to newly created placement agencies, it was later decided to retain the current system.¹⁷ Similarly, though Bahrain revised the Kafala system in August 2009, domestic workers were excluded from the amended legislation.¹⁸

How well can a domestic worker stand up for her rights? The domestic worker stands in an unequal bargaining power *vis-a-vis* her employer in the enforcement of her rights. Some domestic workers are subject to sexual abuse and it may be assumed that a proportion of women who suffer harassment of a sexual nature will not report such incidents due to the fear of stigmatization and other repercussions. Some are subject to mental abuse and are driven to commit suicide. In this context, one needs to take into consideration the practical difficulties of obtaining evidence since abuse takes place in the employer's residence and it is easier to destroy evidence before the arrival of the authorities. And even when domestic workers have escaped and sought assistance from the police, there have been instances where an indifferent approach was adopted by the police - domestic workers were returned to the same employers who abused them.¹⁹ Lately, few countries of the Middle East have taken positive steps in granting certain

¹⁴ D. Samaraweera, 'Middle Eastern reforms not enough to help housemaids', *The Sunday Times*, 2 May 2010. Retrieved from www.sundaytimes.lk/100502/BusinessTimes/bt25.htm

¹⁵ 'Bahrain passes new labour law to protect domestic workers', 11 October 2012. Retrieved from <http://staging.easyweb.hk/SS/idwn/news.php?id=151>

¹⁶ 'Proposed domestic workers contract falls short', 17 November 2013. Retrieved from <http://www.hrw.org/de/node/120571>

¹⁷ 'Saudi Arabia : Protect migrant workers' rights', 2 July 2013. Retrieved from <http://www.hrw.org/news/2013/07/01/saudi-arabia-protect-migrant-workers-rights>

¹⁸ 'New HRW report slams gulf states for migrant abuses', 26 January 2010. Retrieved from <http://www.migrant-rights.org/2010/01/new-hrw-report-slams-gulf-states-for-migrant-abuses/>

¹⁹ 'Obstacles to investigation and prosecution of reported abuses' in *Exported and exposed :Abuses against Sri Lankan domestic workers in Saudi Arabia, Kuwait, Lebanon, and the United Arab Emirates*. (Human Rights Watch, November 2007), endnote 433. Retrieved from <http://www.hrw.org/node/10592/section/6>

rights to domestic workers. How well a domestic worker's rights are protected in the future would depend on the effective implementation of the new regulations.

4. The degree of protection offered under international law

a) *International labour conventions*

Labour receiving countries of the Middle East are parties to several fundamental ILO Conventions. Bahrain, Jordan, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, and U.A.E. have ratified ILO Convention on Forced Labour (No 29). The aforementioned countries have also ratified ILO Convention No 105 on Abolishing of Forced Labour. Further, with the exception of Oman, the said countries are parties to ILO Convention No 111 on Discrimination (Employment and Occupation).²⁰ However, two important conventions, namely Migration for Employment (No 97) and the Migration Convention (No 143) have not been ratified by a single aforementioned country. The ILO Convention No 97²¹ provides for the foundation for equal treatment between nationals and regular migrants in areas such as recruitment procedures, living and working conditions and access to justice. The ILO Convention No 143²² seeks to regulate migration flows, eliminate clandestine migration and combat trafficking in host countries.

b) *International human rights instruments*

International Convention on the Protection of the Rights of All Migrant Workers and their Families (Convention on Migrant Workers) has not been ratified or acceded to by any labour receiving country of the Middle East.²³ The Convention on Migrant Workers²⁴ aims at ensuring that persons who qualify as migrant workers under its provisions are entitled to enjoy their human rights. Part 111 of the Convention deals with non-discrimination with respect to rights and incorporates such rights as protection by the state against violence, physical injury, threats and intimidation by public/private individuals²⁵; protection from torture, cruel, inhuman or degrading treatment or punishment²⁶; and protection from being held in slavery or servitude.²⁷ Although labour receiving countries have not ratified or acceded to Migrant Workers Convention several countries of the Middle East are parties to international human rights instruments which places obligations on such states to protect the rights of individuals against acts such as ill-

²⁰Ratification of ILO conventions: ratifications by country. Available at www.ilo.org/dyn/normlex/en/f?p=1000:11001:0::

²¹C097 Migration for Employment Convention (Revised), 1949 (No.97). Available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C097>

²²C143 Migrant Workers (Supplementary Provisions) Convention, 1975 (No.143). Available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312288:NO

²³United Nations Treaty Collection. Available at www2.ohchr.org/english/bodies/cmw/cmw.htm

²⁴International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Available at <http://www2.ohchr.org/english/bodies/cmw.htm>

²⁵Article 16 (2).

²⁶Article 10.

²⁷Article 11.

treatment and discrimination. The International Covenant on Civil and Political Rights²⁸ (ICCPR) prohibits persons from being subjected to torture, or to cruel or inhuman or degrading treatment or punishment.²⁹ It stipulates that no one should be held in slavery or the slave trade and that no one should be held in servitude.³⁰ Further, all individuals subject to the jurisdiction of a particular state are entitled to the rights enshrined in the covenant without distinction of any kind based on such factors as race, sex, religion, national or social origin or other status.³¹ Bahrain, Jordan, Kuwait, and Lebanon are parties to the Covenant.³² The International Covenant on Economic, Social and Cultural Rights³³ (ICESCR) recognizes the right of everyone “to just and favourable conditions of work” which should include, *inter alia*, safe and healthy working conditions, rest, leisure and limits on working hours with periodic holidays with pay.³⁴ Bahrain, Jordan, Lebanon, and Kuwait are parties to the ICESCR.³⁵ Further, Bahrain, Jordan, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, and the United Arab Emirates are parties to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).³⁶ The International Convention against all Forms of Racial Discrimination³⁷ (CERD) has been acceded to by Bahrain, Jordan, Kuwait, Lebanon, Qatar, Oman, Saudi Arabia, and United Arab Emirates.³⁸ Racial discrimination in the Convention has been defined as ‘any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin’ which has the effect of restricting the equal enjoyment of human rights and fundamental freedoms in the areas of economic, political, social, cultural or public life.³⁹ The Committee on the Elimination of Racial Discrimination’s General Recommendation No. 30 makes significant recommendations in relation to non-citizens’ rights at work. It recommends state parties to take measures to eliminate discrimination against non-citizens in relation work conditions. It addresses serious problems especially faced by migrant domestic workers and recommends state parties to adopt effective measures to prevent and redress such concerns as ‘debt bondage, passport retention, illegal confinement, rape and physical assault.’ It also recognizes that, ‘once an employment relationship has been initiated and until it is terminated’, all individuals are entitled to labour and employment rights.⁴⁰

²⁸International Covenant on Civil and Political Rights. Available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

²⁹ Article 7.

³⁰ Article 8.

³¹ Article 2.

³²Ratification Status for CCPR: International Covenant on Civil and Political Rights. Available at www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx

³³International Covenant on Economic, Social and Cultural Rights. Available at <http://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>

³⁴ Article 7.

³⁵CESCR: International Covenant on Economic, Social and Cultural Rights. Available at <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIndex.aspx>

³⁶ CEDAW: State parties. Available at www.un.org/womenwatch/daw/cedaw/states.htm

³⁷International Convention against all Forms of Racial Discrimination. Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>

³⁸International Convention on the Elimination of all Forms of Racial Discrimination. Available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en

³⁹ Article 1(1).

⁴⁰Sections 33-35, General Recommendation No.30: Discrimination Against Non- Citizens . Available at www1.umn.edu/humanrts/gencomm/genrec30.html

All states parties to the human rights treaties are required to submit obligatory periodic reports on the measures they have adopted to give effect to the provisions of the relevant treaties to a monitoring body of independent experts who form a committee. These committees in their examination of reports have drawn attention to the plight of migrant domestic workers. For example, the UN Committee on Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in its examination of the state party report of Bahrain in November, 2008 expressed its concern about the poor work conditions of female domestic workers who were unaware of their rights, who in practice could not easily file complaints and who were not covered by labour law. The Committee recommended that domestic workers be covered under labour law and that efforts be strengthened to ensure adequate legal protection and access to legal aid for migrant domestic workers. The Committee further requested the state party to include information on the legal and other measures adopted and their impact, and data on the prevalence of violence against women migrant domestic workers in their next report⁴¹ the Committee considered Bahrain's subsequent report in 2014.⁴² The Committee was of the view that Law No. 36/2012 governing labour in the private sector was of limited scope in its applicability to domestic workers (only certain rights are granted to domestic workers) who were subject to exploitation and abuse and recommended that legislation be amended so as to make the provisions of the legislation applicable to women migrant domestic workers.⁴³ Similarly, the Committee on the CEDAW, consequent to examining the state party report of Saudi Arabia, was of the view that there was a lack of sufficient statistical data on the situation of non-Arabian women residing in the state and was gravely concerned about the situation of migrant domestic workers who were not covered by the existing labour code. The Committee, therefore, recommended that the state party provided full details on the situation of domestic workers in the state party's next report. It called on upon Saudi Arabia to grant female domestic workers the rights provided for in the Convention. The Committee further urged Saudi Arabia to adopt a labour law covering domestic workers as a matter of priority.⁴⁴

The monitoring mechanism of the UN human rights treaties is such that it possible for a wide range of parties other than the respective UN treaty Committee to get involved in the assessment of the degree of implementation of a particular treaty: officials of state parties, non-governmental organisations at national and international level play an important role in assessing the adequacy of state implementation. In advance of a session, in which a UN Committee will formally consider a report, the Committee draws up a list of issues and questions which is submitted to the state party to obtain any additional information to assess implementation of a particular treaty. The success of the reporting system depends on objectively prepared shadow reports submitted by NGOs/INGOs on the degree of compliance with a particular treaty and timely submission of state party reports. However, given as it is, the reporting mechanism still has its advantages as national issues are brought to an international forum. The Committee on CEDAW has

⁴¹UN Committee on the Elimination of Discrimination against Women: Bahrain, 14 November 2008, CEDAW/C/BHR/CO/2 at paragraphs 34, 35 & 45; Available at <http://www.unhcr.org/refworld/publisher,CEDAW,CONCOBSERVATIONS,BHR,494ba8cd0,0.html>

⁴² Committee on Elimination of Discrimination against Women: Concluding observations on the third periodic report of Bahrain, 10 March 2014, CEDAW/C/BHR/CO/3.

⁴³ *Ibid*, Sections 39, 40(a).

⁴⁴ Concluding observations of the UN Committee on the Elimination of Discrimination against Women: Saudi Arabia, 8 April 2008, CEDAW/C/SAU/CO/2 at paragraphs 23 & 24; Available at http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW.C.SAU.CO.2_en.pdf

expressed its concern about the plight of migrant domestic workers in countries such as Bahrain and Saudi Arabia: And the aforementioned states will be answerable to the Committee on the measures taken to improve the situation of migrant domestic workers from what it was in their next periodic reports.

c) Other UN mechanisms that protect migrant workers

Appointment of Special Rapporteurs

The UN has appointed thematic special rapporteurs who have the authority to assess and report on human rights violations. They have the mandate to request and exchange information on violations of human rights from relevant sources and undertake country visits with the consent of the government of the particular country.

The mandate of the UN Special Rapporteur on the Human Rights of Migrants covers all countries, irrespective of whether a state has ratified the International Convention on the Protection of the Rights of All Migrant Workers and their Families (Migrant Workers Convention). In 2013, the Special Rapporteur on the Human Rights of Migrants visited Qatar. The Special Rapporteur stressed that it was important for Qatar to have a revised uniform model employment contract for all workers including domestic workers which protected the human and labour rights of workers to be part of all bilateral agreements with labour sending countries.⁴⁵ The Special Rapporteur recommended that the currently practiced Kafala system be replaced with a regulated open labour market which allowed the worker to change employers.⁴⁶ Interestingly, it was also noted that labour sending countries should better regulate recruitment agencies in the home country to prevent exploitation of workers once they reached Qatar.⁴⁷ The Special Rapporteur on Violence against Women, its Causes and Consequences visited Saudi Arabia in 2008. The Special Rapporteur noted that although migrant women domestic workers comprised less than a quarter of the migrant labour force, embassies from labour sending countries reported that abuses against domestic workers accounted for a great majority of complaints received. In her report the Special Rapporteur recommended that authorities prosecute those employers whose treatment of domestic workers violated national and international law, especially with regard to physical and sexual abuse.⁴⁸

d) Milestone treaty that specifically protects rights of domestic workers: ILO Convention 189 and supplementary recommendation concerning Decent Work for Domestic Workers

In June 2011, the International Labour Conference in Geneva adopted ILO Convention 189 and supplementary Recommendation concerning Decent Work for Domestic Workers. The adoption of the

⁴⁵ Report of Special Rapporteur on the human rights of migrants: Mission to Qatar, A/HRC/26/35/Add/1 (23 April, 2014) at para 41.

⁴⁶ *Ibid*, para 90.

⁴⁷ *Ibid*, para 42.

⁴⁸ Report of the Special Rapporteur on violence against women, its causes and consequences: Addendum: Mission to Saudi Arabia, A/HRC/11/6/Add.3, 14th April 2009 at 95(d). Available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.6.Add.3_en.pdf

Convention is a landmark step that aims to provide labour protection to domestic workers worldwide commensurate with other workers. The Convention came into force on 5th September, 2013.⁴⁹ The Convention requires governments to provide domestic workers protection against all forms of violence and abuse (Article 5), take measures to inform workers of their terms of conditions of employment (Article 7), take into consideration the specific characteristics of domestic work and take measures to ensure that domestic workers are entitled to conditions that are not less favourable than those applicable in general to workers with regard to social security protection (Article 14; Article 14(2) further states that progressive measures may be adopted for domestic workers in consultation with relevant parties), establish an effective and accessible complaints mechanism under conditions that are not less favourable than those available to other workers (Article 16), and ensure that effective mechanisms are in place to monitor recruitment agencies (Article 15b).⁵⁰ To date, none of the labour receiving countries of the Middle East have ratified the Convention.

5. Legal and institutional framework for the protection of Sri Lankan migrant workers

a) The Sri Lanka Bureau of Foreign Employment

The Sri Lanka Bureau of Foreign Employment Act (SLBFE Act) 1985 (as amended) is the primary legislation that applies to Sri Lankan workers migrating for overseas employment. The primary function of the SLBFE Act is to establish the SLBFE and confers upon it a legal mandate to be the governing authority for the protection of Sri Lanka's migrant labour force.⁵¹ In terms of its mandate, the SLBFE undertakes, *inter alia*, the following activities⁵²: regulating and supervising registered agencies and registration of all migrant workers⁵³; conducting training programmes for prospective domestic workers; appointing representatives of the Bureau to Sri Lankan missions abroad to safeguard the rights of migrant workers, negotiating agreements with relevant foreign authorities and employment agencies in order to formalise recruitment agreements and formulating and implementing a model contract of employment.

The SLBFE Act was amended in 2009 (Sri Lanka Bureau of Foreign Employment (Amendment) Act No 56 of 2009). The SLBFE Act was amended to curb malpractices: the amendments, *inter alia*, increase the severity of the penalties for offences committed under the Act such as unauthorized recruitment and forgery, vest more powers in officers of the Bureau for dealing with offences and seek ways of promoting safe migration. An interesting and novel feature is that 75 per cent of fines imposed and recovered for

⁴⁹ 'Landmark treaty for domestic workers comes into force', 5 September 2013. Retrieved from http://www.ilo.org/global/standards/information-resources-and-publications/news/WCMS_220793/lang-en/index.htm

⁵⁰ C189 - Domestic Workers Convention, 2011 (No.189), Available at http://www.ilo.org/dyn/normlex/en/f?p=normlexpub:12100:0::no:12100:p12100_instrument_id:2551460:no

⁵¹ Since its establishment, the SLBFE came under purview of the Ministry of Labour until 2007 when the responsibility was transferred to the newly created Ministry of Foreign Employment Promotion and Welfare. 'Sri Lanka bureau of Foreign Employment', (n.d). Retrieved from www.slbfe.lk/

⁵² Sections 15, 21 & 22 of Sri Lanka Bureau of Foreign Employment Act No 21 of 1985.

⁵³ Since 1995, it is compulsory for all migrant workers register themselves with the SLBFE.

offences under the Act are required to be remitted to the Workers Welfare Fund of the SLBFE⁵⁴, thereby increasing the revenue available to the Fund for providing assistance to Sri Lankan migrant workers.

b) The Consular division of the Ministry of External Affairs

The Consular Affairs Division of the Ministry of External Affairs is entrusted with the responsibility of implementing the Consular Functions Act No 4 of 1981 which provides for the protection of Sri Lankan citizens abroad through its respective embassies. Its duties include the provision of such assistance as referral of complaints to relevant embassies, repatriation of stranded Sri Lankans and involvement in securing compensation awards from employers.⁵⁵

c) National policy on labour migration

In 2008, the state developed a National Policy on Labour Migration (NPA). The NPA adopts a holistic approach towards promoting safe migration and aims at strengthening the institutional and legislative framework to address pre-departure, in-service and post-return issues of migrant workers (return and reintegration plan) of migrant workers. Salutary provisions in the National Policy include amending the SLBFE Act to rectify any gaps in the law, developing a model employment contract (an expansion of the present contracts) with “non-negotiable minimum standards”, negotiating with all labour receiving countries for reaching bilateral agreements/MOUs, applying uniform procedures in all major labour – receiving countries, and assessing the adequacy of services provided in foreign missions.⁵⁶

6. How adept is the national system in safeguarding rights?

The recently introduced amendments to the SLBFE Act, the National Policy on Labour Migration and other initiatives place the relevant authorities in a better position to safeguard the rights of migrant workers. Effective implementation of initiatives is determined by the roles played by all participants in the labour migration process. The category of all participants include not only officials of the SLBFE, the Consular Division of the Ministry of External Affairs and overseas embassies but also job agents and the migrant workers themselves. The challenges that need to be addressed are twofold: firstly to ensure that competent domestic workers leave for employment abroad and prescribed procedures are followed by all parties concerned prior to departure; and secondly to ensure that embassy officials take proactive action to prevent abuse and take timely action when an abuse does take place in the host country.

⁵⁴ Section 69 (B).

⁵⁵ Consular division (n.d). Retrieved from <http://www.mea.gov.lk/index.php/en/home/divisions/consular-affairs-division>

⁵⁶ National labour migration policy for Sri Lanka. (Ministry for Foreign Employment Promotion and Welfare, Colombo, 2008), pp. 15 & 16. Retrieved from ILO Website: http://www.ilo.org/colombo/whatwedo/publications/WCMS_114003/lang--en/index.htm

6.1 Pre-departure issues

a) *Adequacy of mandatory training programme*

Since 1996 it is compulsory for prospective domestic workers leaving for the Middle East to undergo a training programme of 21 days duration at one of the training centres of the SLBFE. The course syllabus consists of several important components which include counselling and guidance, vocational training and foreign language training. Well-developed training programmes equip first-time prospective migrant domestic workers to adequately prepare themselves to the challenges of working overseas. Therefore, a high standard training programme is essential for ensuring the safe migration of domestic aides. It has to be first determined whether a three week programme is sufficient for the workers to absorb all essential knowledge prior to taking up their appointment. Although Arabic is taught to prospective workers, it must be said that even fast learners would be able to only acquire a very limited knowledge of the language unless it was previously studied to some extent. In order to enhance the impact of the language training programme, both a written test and a *viva voce* need to be administered after completion of the component in Arabic. Setting up of Arabic teaching centres will also be beneficial to prospective domestic workers who will then be in a position to master Arabic to the required level of proficiency.

In January 2013, the government took the positive decision to impose more stringent regulations with regard to domestic workers proceeding to the Middle East. Accordingly, prospective domestic workers should not only complete 21 days of residential training, but also obtain the National Vocational Qualification (NVQ) level 3 Certificate for the post of 'domestic housekeeping assistant'.⁵⁷

The proper handling and usage of electrical equipment is important to prevent work related accidents and damage to equipment. Given the poor socio-economic background that generally workers come from, it is unlikely that they are used to handling sophisticated electrical household appliances. A comprehensive practical training in first aid which provides for the assessment of trainees will help reduce work related accidents. It is also important to analyse all serious work related injuries and deaths and identify if there was a factor that could have prevented such injury or death from having occurred to incorporate the lessons learnt into the training programme on a continuous basis.

b) *Non-stipulation of a minimum educational requirement*

The SLBFE does not stipulate a minimum educational requirement for the registration of domestic workers. At the beginning of the training programme a functional literacy test is administered to ascertain the suitability of the candidate. In general, women who are more educated are better able to stand up for their rights. In this regard, it is pertinent for the SLBFE to ascertain whether there is a relationship between the educational level attained by the complainant and the nature of complaint.

⁵⁷ S.A. Jayasekara, "Govt. to Discourage Women Seeking Housemaid Jobs in Saudi Arabia", *Daily Mirror*, 25 January 2013.

c) *Non-adherence to prescribed procedures by prospective domestic workers, agents and sub-agents*

Rules and regulations that are specified by the SLBFE are in place to safeguard the rights of migrant workers. When regulations are by-passed by domestic workers, job-agents and sub-agents by recourse to fraudulent means, it is ultimately the domestic worker who places herself in a vulnerable position.

Workers who leave the country through illegal channels may do so for reasons of convenience, ignorance or even desperation. A prospective domestic worker may rely on the job agent to attend to all the formalities required for migration and be unwittingly exploited. A segment of domestic workers flout prescribed procedures and resort to fraudulent practices. It is difficult to obtain exact statistics on the issue. However, it was reported in a national newspaper that Kuwait alone had repatriated 1057 domestic workers in 2007 on the ground that they were unfit for work. This number included: 185 who had failed medical examinations; 47 who were found to be mentally unfit; 230 who had hereditary illnesses; 138 who had forged passports/documents; and 44 who were underage.⁵⁸ Figures of repatriated domestic workers from all labour receiving countries of the Middle East should reveal a much higher figure in a given year. The Department of the Registrar General, the Department of Registration of Persons, the Department of Immigration and Emigration, the SLBFE, and the Ministry of External Affairs play an important role in the prevention of falsification of documents. More advanced mechanisms to verify the authenticity of birth certificates, identity cards, passports and other official documents need to be introduced to curb malpractices. It may further be assumed that a fair proportion of workers also forge medical certificates given the relatively high number of deaths caused under “natural causes” every year which is an issue that needs investigation.

A serious concern that emerges is the clandestine recruitment of underage girls. Resorting to either forging documents or going through illegal channels is fraught with danger and young, inexperienced girls put themselves at risk of gross abuse when they seek employment as domestic aides. The case of Rizana Nafeek drew international media attention when a death sentence was passed on her. She was only 17 years when she left for Saudi Arabia in 2005 using a forged birth certificate. A baby died in her care and eventually she was found guilty for causing death by strangulation. At the time of the alleged offence she was yet a minor. Following the execution of Rizana Nafeek in January 2013, the government decided to increase the minimum age for employment to 25 years of age for prospective domestic aides proceeding to Saudi Arabia. It was also decided to increase the minimum age for prospective domestic workers proceeding to seven other Middle Eastern countries to 23 years.⁵⁹ This move will undoubtedly reduce the number of underage girls seeking employment overseas, but it does not altogether eliminate the risk of girls in their late teens from forging birth certificates. Sensitization programmes on the risk of sending underage girls on forged documents in targeted poverty stricken areas of the country will educate parents and potential domestic workers on the dangers of illegal migration. In this connection, the SLBFE should consider the feasibility of collaborating with the National Child Protection Authority (NCPA) to

⁵⁸ F. Samath, 'Three Decades after Migration, 'Housemaids' Still a Crisis Point', *The Sunday Times*, 4 May 2008.

⁵⁹ S.A. Jayasekara, 'Government to Discourage Women Seeking Housemaid Jobs in Saudi Arabia', *Daily Mirror*, 25 January 2013.

set up an institutionalized mechanism for pooling their resources and co-coordinating their activities relevant to the prevention of trafficking in underage girls.

The Amendments to the SLBFE Act (2009) accord greater supervisory powers to officials of the SLBFE for the purpose of monitoring agencies and other persons involved in the overseas employment business. In terms of Section 69 A, police officers and employees of the SLBFE are authorized to arrest persons committing offences under the Act without warrants. It also authorizes officials of the SLBFE to examine any document in the possession of persons going abroad at ports of embarkation.⁶⁰ Further, greater supervisory powers are accorded to the SLBFE: the SLBFE is entitled to inspect and take any document relating to foreign employment kept in the premises of a foreign employment agency.⁶¹ In 2012, 80 raids on illegal agencies were carried out.⁶² Using statistics of previous years as a benchmark, it would be useful for the SLBFE to observe the progress made from 2010 onwards with regard to supervision and monitoring of agencies. In a move to encourage good practices among recruitment agencies, the SLBFE made arrangements to grade recruitment agencies. Agencies are graded on a points-system based on criteria such as recruitment, complaints received and dispute settlement.⁶³ Publication of a list of registered agencies according to their rank in the daily newspapers with copies of such lists made available at Divisional Secretariats (The country's districts are divided into administrative sub-units known as divisional secretariats) and at main post offices will enable prospective migrant workers come to know the best agencies in localities closer to their place of residence which will in turn promote safe migration. In 2013, the SLBFE, with technical assistance from the ILO, also developed a Code of Ethical Conduct for Licensed Foreign Employment Agencies/Licensees. The Code was developed with the objective of fostering professionalism and accountability among employment agencies. The Code of Conduct covers such areas as business standards and best practices, job advertisement, and handling of complaints and dispute settlement. The Association of Licensed Foreign Employment Agencies (ALFEA) bears the responsibility for implementing the Code of Conduct. If an agency has violated the Code of Conduct, the SLBFE is authorised to reduce the Star Grade of the agency. Further, power is vested either to recommend the suspension of renewal of license of the relevant agency or even cancellation of the license.⁶⁴

Sub-agents play an important role in obtaining contracts for the agent. Some of them are also involved in the direct recruitment of Sri Lankans seeking overseas employment.⁶⁵ Sub-agents work informally and, therefore, it is difficult to trace them in the event of any malpractice. It was only in 2012 that the two sub-agents who were alleged to have sent Rizana Nafeek to Saudi Arabia were sentenced to two years rigorous imprisonment.⁶⁶ A decisive step was taken by the SLBFE in 2012 to monitor the activities of

⁶⁰ Section 16.

⁶¹ Section 60.

⁶² *Statistical Report 2012*, p. vii.

⁶³ Somarathna, R., 'Grading system mooted for migrant labour job agencies', *Daily News*, 15 January 2009.

⁶⁴ Code of Ethical Conduct for Licensed Foreign Employment Agencies/ Licensees (November, 2013). Retrieved from http://www.ilo.org/colombo/whatsnew/WCMS_233369/lang--en/index.htm

⁶⁵ Leon Berenger, 'Three-wheeler Drivers as Part-time Sub-agents a Threat: ALFEA', *The Sunday Times*, 3 June 2012.

⁶⁶ F.T.Thajudeen, 'Rizana Nafeek Case: Sub-agents jailed for two years', *Daily Mirror*, 17 January 2012.

sub-agents by making arrangements for the issue of special identity cards to sub-agents in the future. Sub-agents will be required to operate through a registered agency affiliated to ALFEA.⁶⁷

6.2 Post departure issues

a) *Implementation of employment contract*

The Sri Lankan embassy in the host country is the focal point of contact for distressed workers. It has to be borne in mind that embassy officials have to work in the socio-legal environment of the relevant Middle Eastern countries and, therefore, the degree of success of securing rights for domestic workers is dependent on the degree of co-operation that embassy officers receive from relevant law enforcement officials/foreign agents in the host country.

It is mandatory for employers wishing to hire Sri Lankan domestic workers to sign a model employment contract which specifies the conditions under which the contract is offered. Recently, the SLBFE made it mandatory for domestic workers to sign their contracts of employment in the presence of an SLBFE officer. The aim of this move is to prevent contract substitution taking place once the domestic worker is in the host country. The main disadvantage of the employment contract, however, is that it is not legally binding on the employer although the employment contract is used as a basis of negotiation between embassy officials and the relevant employment agency for securing rights for the domestic worker.⁶⁸ Bilateral agreements offer a stronger legal basis for securing rights for migrant workers. In January 2014, an MOU was signed between Sri Lanka and Saudi Arabia. The MOU seeks to monitor work conditions of 12 categories of domestic workers (includes categories such as housemaids, drivers etc. who are in the employ of individuals). Important provisions of the MOU include the requirement of the employer to terminate the contract of employment after a period of two years if the worker wishes to leave such employment and the right of the worker to retain all original travel documents. It is hoped that a standard employment contract for domestic workers will be adopted in the near future with the implementation of the MOU.⁶⁹ Sri Lanka has also signed agreements with the Governments of Qatar, U.A.E., Jordan and Bahrain regarding supply of man power.⁷⁰

b) *Quality of services offered by embassies*

Embassy officials have to deal with a large number of complaints. They have not only to deal with problems of migrant workers in the host country, but also address cases referred to them by Sri Lankan

⁶⁷ Leon Berenger, 'Three-wheeler Drivers', Leon Berenger, 'Three-wheeler Drivers as Part-time Sub-agents a Threat: ALFEA', *The Sunday Times*, 3 June 2012.

⁶⁸ See: M. Dias & R. Jayasundere, 'Sri Lanka: The anxieties and opportunities of out-migration', in Pong-Sul Ahn (ed.), *Migrant Workers and Human Rights: Out-migration from South Asia* (ILO, Sub-regional Office for South Asia, New Delhi, 2004), p. 165; See also Strengthening Grievance and Complaint Handling Mechanism to Address Migrant Worker Grievances in Sri Lanka (International Labour Organisation, 2013), p. 44.

⁶⁹ 'MOU to protect Lankan Workers in Saudi Arabia', *Daily News*, 14 January, 2014.

⁷⁰ 'Foreign policy', (n.d.). Retrieved from www.mea.gov.lk/

authorities. The quality of services provided by a Sri Lankan embassy depends on the sufficiency of resources and the resourcefulness of the embassy officials in ensuring that workers' rights are respected. The first issue that needs examination is whether there is an adequate number of labour welfare officers (LWOs) to oversee matters pertaining to migrant workers. The number of LWOs attached to an embassy ranges from one to four. A breakdown of the number of LWOs per embassy as indicated in an ILO study⁷¹ is as follows:

The embassy in K.S.A (Riyadh) has three LWOs; the embassy in K.S.A (Jeddah) has two LWOs; the embassy in Kuwait has four LWOs; the embassy in Oman has one LWO; the embassy in Qatar has two LWOs; the embassy in Jordan has one LWO; the embassy in Lebanon has two LWOs.

LWOs have to cater to the needs not only of domestic migrant workers but all migrant workers. The largest number of complaints are received from Saudi Arabia, Kuwait and Jordan. In 2012, a total number of 5390 complaints were received from Saudi Arabia, 1762 complaints were received from Kuwait and 1377 complaints were received from Jordan.⁷² In this context, there could be practical difficulties to expeditiously attend to the needs of all domestic aides.

Anecdotes told by domestic workers which are reported in case studies and newspapers from time to time have revealed deficiencies in overseas embassies. Although the allegations were made by disgruntled workers and do not indicate an overall picture of the quality of services offered at foreign embassies, the fact that such complaints are made, emphasises the need to have more stringent supervision of welfare officers in the embassies as well as the need to assess the quality of services offered at safe houses. Domestic workers may not always stand up for their rights when a lethargic or an indifferent attitude is adopted by welfare officers of the embassy and complaints against officials may, therefore, not be always brought to the attention of the head of the relevant embassy.

The staff attached to an Embassy consists of career and non-career diplomats. In such circumstances, it has not always been possible to have one coherent policy in addressing migrant worker grievances and embassy officials have handled issues at their own discretion leading to *ad hoc* policies in addressing grievances.⁷³ In this context, the 'Operational Manual for Labour Sections of Sri Lankan Diplomatic Missions in Labour Receiving Countries', which was launched in January 2013, will greatly improve grievance handling mechanisms and streamline procedures for the protection of migrant workers.⁷⁴

Safe houses are maintained by the Sri Lankan embassies for runaway workers in Abu Dhabi, Kuwait, Lebanon, U.A.E., Jordan, Oman, Qatar, Jeddah and Riyadh. The safe houses in Kuwait and Saudi Arabia have the largest number of runaway domestics.⁷⁵ Those domestic workers who are not in close proximity

⁷¹ Strengthening Grievance and Complaint Handling Mechanism to Address Migrant Worker Grievances in Sri Lanka (International Labour Organisation, 2013), p. 40.

⁷² *Statistical Report 2012*, p. 93.

⁷³ Strengthening Grievance and Complaint Handling Mechanisms, pp. 40,43; See fn 68.

⁷⁴ D. Silva, 'Sri Lanka expects USD 7 billion from migrant workers', *Daily Mirror*, 5 January 2013.

⁷⁵ Strengthening Grievance and Complaint Handling Mechanisms, p 34; See fn. 68.

to a safe house are greatly inconvenienced since reaching a safe house could be hazardous for those fleeing their employers' home at night. Safe houses, therefore, need to remain open on a 24 hour basis every single day of the year. Establishing toll-free hot lines with caller ID in all embassies will directly contribute towards welfare officers playing a more proactive role in dealing with migrant workers' grievances as they are in a position to take follow-up action for serious violations of rights even a via telephone call.

It may be assumed that a sizable number of domestic workers in safe houses have been psychologically abused. From 2008 to 2012, three to twelve female workers committed suicide every year.⁷⁶ In this context, it is worthwhile to examine the procedure adopted in Thailand to improve the overall mental health of migrant workers. In Thailand, a programme is implemented in collaboration with the Ministry of Health where doctors not only offer counselling services to distressed workers but also train volunteers to be counsellors.⁷⁷

An organized legal assistance mechanism which provides assistance to both documented and undocumented workers is crucial for safeguarding the rights of all migrant workers. Some domestic workers who have left the country through illegal means may fear to report to the embassy of even grave violations of rights for fear of any reprisals due their initial complicity in travelling illegally. In this regard, it is pertinent to examine the Philippines system which has adopted several legal interventions for the protection of migrant workers. The *Republic Act No 8042: Migrant Workers and Overseas Filipinos Act of 1995*⁷⁸ provides for the establishment of a mechanism for providing free legal assistance for victims of illegal recruitment (Section 13) and creates a position for an individual to oversee legal assistance for migrant workers (Section 24). In addition, providing timely legal representation for those accused of serious crimes will ensure that the rights of the accused are protected during the trial. It is imperative that embassy officials establish a wide networking system with host country authorities so that any serious crime committed by a national is reported to the Embassy without delay.

The quality of services provided by an Embassy depends to a great extent on the sufficiency of recourses. The SLBFE should consider the feasibility of collaborating with the National Lotteries Board to organize a lottery to generate funds for improving the overall services offered to domestic workers/migrant workers.

c) Non-adherence to prescribed procedures by the domestic worker

It is the duty of the domestic worker or her next- in- kin to inform either the relevant embassy or the SLBFE if an abuse takes place. Some domestic aides choose not to report violations of rights to law enforcement authorities before departure from the host country and this is a mistake as it leaves room for

⁷⁶ *Statistical Report 2011*, p. 87, *Statistical Report 2012*, p. 95.

⁷⁷ Labour migration from Colombo process countries: Good practices, challenges and ways forward good practices, challenges and ways forward. (International Organisation for Migration, Geneva, 2011), p. 64. Retrieved from publications.iom.int/bookstore/free/ColomboProcessStudy_final.pdf

⁷⁸ Republic Act No. 8042. Available at <http://www.poea.gov.ph/rules/ra8042.html>

authorities in the host country to challenge the allegations of the domestic aides on the grounds of credibility. Ariyawathie, the 49 year old woman who had 24 nails inserted into her body, chose not to reveal the cause for her festering wounds even to her children. It was only when she sought treatment at a nearby hospital that doctors discovered the nails. Sceptics have raised questions as to how she could have gone through metal scanners at the airports in Saudi Arabia and Sri Lanka without being detected.

It becomes vital for a worker to inform of any change of address either to the SLBFE or the relevant foreign mission as it is only then that mission officials can take prompt and appropriate action. Some domestic workers run away from their employers and work illegally for another employer thereby losing their legal status. There are still others who flout their terms of the contract deliberately. In order to crack down on fraudulent activities, the SLBFE has taken steps to introduce a new rule which makes it mandatory for Sri Lankans seeking employment in the Middle East to undergo electronic fingerprinting and biometric scanning prior to departure.⁷⁹

7. Regional developments that positively impact on safeguarding the rights of migrant domestic workers

The Colombo Process was established in 2003 with the objective of providing a forum for Asian labour sending countries to share experiences, discuss issues and make recommendations for the effective management of overseas employment programmes.⁸⁰ Presently, there are 11 member states (Sri Lanka, Bangladesh, China, India, Indonesia, Nepal, Pakistan, the Philippines, Thailand, Vietnam and Afghanistan) and 8 observer states. (Bahrain, Italy, Kuwait, Malaysia, Qatar, Republic of Korea, Saudi Arabia and the United Arab Emirates).⁸¹ What is noteworthy is that the 'Colombo Process' has also been successful in collaborating with destination countries. The Abu Dhabi Dialogue on Contractual Labour for Cooperation between Countries of Origin and Destination in Asia was successful in bringing together labour sending and labour receiving countries to discuss common issues. In January 2008, Ministers from the Asian labour countries of origin and Gulf destination countries (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, United Arab Emirates, and Yemen) together with Malaysia and Singapore had a consultative meeting in Abu Dhabi. Partnerships were forged for information sharing and co-operation between states, *inter alia*, for the prevention of illegal recruitment and protection of contractual workers which aimed at preventing workers from being exploited at countries of origin and destination.⁸² The fourth Ministerial Consultation was held in Dhaka, Bangladesh in 2011 where the thematic focus was on migration with dignity.⁸³ Hence, the Colombo Process offers great potential to expand collaboration and co-operation among states for the protection of domestic workers' rights. In October 2013, Sri Lanka assumed chairmanship of the Colombo Process. In this context, the UN Special Rapporteur on the human rights of migrants who visited Sri Lanka in May 2014, was of the view that Sri Lanka should collaborate with

⁷⁹ Leon Berenger, 'Hi-tech Measures to Stop Swindles in the Middle East', *The Sunday Times*, 15 July 2012.

⁸⁰ 'About the Colombo Process – Objectives', Available at www.colomboprocess.org/

⁸¹ 'About the Colombo Process – Members and Observers', Available at www.colomboprocess.org/

⁸² 'Abu Dhabi Dialogue on Contractual Labour for Cooperation between Countries of Origin and Destination in Asia', Available at http://www.ilo.org/global/topics/forced-labour/news/WCMS_090660/lang--en/index.htm

⁸³ 'Dhaka Conference 2011', Available at http://www.colomboprocess.org/index.php?option=com_content&view=article&id=45&Itemid=26

countries of the Abu Dialogue to bring about a uniform work contract for workers which reflected international human rights/labour standards.⁸⁴

8. Looking ahead

The entry into force of the Convention on Domestic workers is a significant step towards protection of domestic workers' labour rights. The real challenge remains in persuading countries of the Middle East to ratify the Convention. Ratification of the Convention on Domestic workers will require states to modify their national laws accordingly to be in line with the Convention.

One of the setbacks in protecting the rights of migrant female domestic workers is the inimical social perceptions that employers tend to have of them. In this connection, government and non-governmental organizations in labour receiving countries of the Middle East have an important role to play in creating an attitudinal change in the public through sensitization programmes. In the final analysis, the inclination to treat the foreign domestic worker kindly and with due respect depends on the attitudinal orientation of the citizens in the host country.

The Government is expected to set up an Employment Migration Authority which will replace the SLBFE in the near future. The proposed Act (Draft Sri Lanka Employment Migration Act) will have 8 different bodies to regulate the foreign employment sector including the Employment Migration Authority, a board of review to hear appeals against decisions of the Sri Lanka Employment Migration Authority, and a national advisory council on employment migration.⁸⁵

Unskilled workers are the most vulnerable to abuse. The possession of skills is the greatest defence against exploitation and abuse. In recent times, Sri Lanka has been promoting the migration of skilled workers. It is reasonable to assume that in the coming years, the percentage of female domestic workers seeking employment abroad will gradually decline. It is also reasonable to assume that those who do seek employment as domestic workers will have their rights better protected. A reduction of the incidence of abuse in the coming years in percentage terms is the real test of positive impact of state inventions. What needs to be done now is to strengthen, improve and expand the positive measures already undertaken.

⁸⁴ UN Special Rapporteur on the human rights of migrants concludes country visit to Sri Lanka - See more at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14645&LangID=E#sthash.b2hjJLo8.dpuf>

⁸⁵ 'Employment Authority to regulate foreign jobs', *The Sunday Times*, 23 February 2014. Available at www.sundaytimes.lk/140223/news

Henry Alexander Patrick Sandrasagra KC

(1875-1940)*

*Nirmala Shear***

Douglas Jansz QC, Attorney General, paying tribute to Henry Alexander Patrick Sandrasagra (H.A.P.), who died on September 12, 1940, recalled H.A.P. for his "masterly command of the English language, his ready wit and fearless advocacy"¹. In reply Justice Nihill, presiding at the Assize Court in Jaffna, said H.A.P. was "one of the most brilliant sons of Jaffna."² At the principal appellate court in Colombo J.W.R. Illangakoon, KC, Attorney General, eulogised H.A.P. as a man "... possessed of a charming personality and was gifted with a natural eloquence of a high order and ready wit. These qualities enabled him to gain a considerable number of triumphs before juries and he rightly deserved them. He was chivalrous towards his opponents and was generous towards the Junior Bar in whom he took a keen and abiding interest."³ He further elaborated saying, "His name will be remembered by us for the gallant and straight fights he used to put up in defence of human liberty."⁴ Eulogies by nature are laudatory, and as for the sins and frailties, they are buried with the dead. So one cannot help but be sceptical of such praise. But research into his life revealed that the accolades were for the most part well deserved.

Henry Alexander Patrick Sandrasagra was born on the 12th June 1875 in Jaffna. His grandfather, Nicholas Sandrasagra was the Maniagar of Valigamam and the family was descended from the 'Pootha Nathar' (Chiefs). He was the son of J.N. Sandrasagra, Superintendent Engineer of minor roads Jaffna, and Mary Bastiampillai Velichore. H.A.P. was married to Josephine Cherubim the daughter of Mudaliyar Simon Cherubim. They had three daughters-Lennie (Mrs. A.P. Sandrasagra), Manonmani, Minoly (Mrs. H.W. Muttukumar) and a son Wilfred.

H.A.P. received his early education at the prestigious St. Patrick's College, Jaffna from where he proceeded to Ceylon Law College (Council of Legal Education, Ceylon) qualifying as an Advocate in 1898. He was called to Inns of Court, Middle temple on the 29th of May, 1920.

He commenced his legal practice in Jaffna, but on the advice of judges, before whom he practised, moved to Colombo, in the early 1900s, where he built a lucrative and commanding practice. He was conferred

* 'This memoir is dedicated to the memory of Dr. Neelan and Mrs. Sithy Tiruchelvam.'

** Nirmala Shear (nee Sandrasagra) holds an LLB from the University of Ceylon and was admitted and enrolled as an Advocate of the Supreme Court of Ceylon. She practised at the Bar as junior to P. Navaratnarajah Q.C. until she left the country in 1977. She is the Granddaughter of H.A.P. Sandrasagra Q.C.

¹ 'The Supreme Court of Sri Lanka-The first 185 Years' By A. R. B. Amerasinghe, pp. 337 & 338.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

'silk' in 1924. He was appointed Commissioner of Assize in 1928, which position he held for a short time, only to return to the Bar.

Justice O.L. de Kretser (Sr.) described H.A.P.- 'Mr. Sandrasagra was a brilliant lawyer. He had a happy knack with the jury. He was not too ponderous and did not indulge in oratory, but his sensible arguments and little jokes appealed to the jury. He had considerable triumphs. I think he will always be remembered as a brilliant criminal lawyer.'⁵ His brilliance lay in his able advocacy, artful but still legitimate cross examination, clever tactics and electrifying charge to the jury. H.A.P. used these weapons to dent, just enough, the prosecution's armour and instil the reasonable doubt in the mind of the jury. The 'Murder of the Puttalam Widow' (1928) was such a case in point. The victim, a languishing widow, was hacked to death and disemboweled, her entrails were scattered on the room floor; she was then dragged onto the floor and left there, her mouth stuffed with a sock and her body covered in a saree. This caused Justice A.C. Alles, a renowned Judge and writer of the 'Famous Criminal Cases of Sri Lanka', to describe the 'Murder of the Puttalam Widow' as '...the most gruesome murder in the annals of crime in Sri Lanka.'⁶ It evoked public outrage and demands for immediate justice. The police answered this call with a quick arrest of the victim's son-in law Bakmiwewa—the third accused—and two others whom the police alleged were hired by Bakmiwewa to carry out the murder.

The *prima facie* case pointed to Bakmiwewa. The victim, Mrs. Theresa Rosario, was a pitiable person living in squalour. She was a widow for almost ten years, living at the mercy of her mother –in –law. She had property, but was otherwise penniless. She was a devout Catholic. The story was that Bakmiwewa, a Buddhist, moved in as a paying lodger into her house, two years before the murder, and there he fell in love with her sixteen year old daughter Annette, whom he married. Much to the chagrin of her mother, the local church and Catholic community, Annette converted to Buddhism. Bakmiwewa had reason to resent his mother –in –law; she was cantankerous and constantly complained of ill-treatment by her daughter and son-in-law. The Crown alleged he also had a strong financial motive to kill her. He and his wife were supporting the deceased; despite this, she refused to transfer some property to her daughter. This resulted in an altercation, in Proctor Muttukumaru's office, in the course of which the deceased denied that Bakmiwewa supported her and abused him in the presence of the Proctor. This incident took place about a month before the murder. Further, the police had what they deemed direct evidence to implicate Bakmiwewa and his co-accused- an admission of guilt by the three accused overheard by the Crown's principal witness, Babbu Singho.

H.A.P. appeared for Bakmiwewa. The other two accused were ably defended by H. Sri Nissanka KC. The preliminary evidence and the court of public opinion were stacked against H.A.P.'s client, but H.A.P. met the challenge. The Crown relied on the graphic and rather exaggerated recollections of the witness, Babbu Singho, who claimed that he saw Bakmiwewa and his co-conspirators together at the Bakmiwewa home on the night of the murder. Babbu Singho did odd jobs for the Bakmiwewas, in return for which he was allowed to sleep at night on their back verandah. He told the court that he had returned to the house on the

⁵ *Ibid.*

⁶ 'Famous Criminal Cases of Sri Lanka,' A.C. Alles Volume 6, pp. 47-67.

night of the murder after visiting the hospital for treatment. Sitting on the verandah he saw the other two accused enter the house and overheard the three accused discussing, in the bedroom, the details of the crime and admitting to having committed it. If his testimony was believed, the noose awaited the accused. H.A.P.'s cross examination broke the witness and revealed to the Judge and Jury that he was a lunatic and professional story teller. This view of Babbu Singho was supported by the defence witnesses- the Colombo Magistrate who recorded the witness' statement and found it to be long, rambling and the product of a vivid imagination; the evidence of the respected Reverend Saranankara Mahanayake Thera who described the witness as a man who talked big and even claimed to be the King of Ceylon. The Trial Judge, The Honourable E.W. Jayewardene, in his summation, later said it was not implausible that in view of the story telling propensity of Babbu Singho, he could have been tutored by interested parties to tell this story. Through his skilful cross examination, H.A.P. showed up the Crown's principal witness. But the question still remained, embellished or not, was there an element of truth to Babbu Singho's story?

H.A. P. then relied on his unparalleled advocacy. He staged the coup; forfeiting the defence's right of reply, he called Annette Bakmiwewa, his client's wife and the victim's daughter, as a defence witness. She was eighteen, the mother of an infant and, as H.A.P. described her, a 'wild flower.'⁷ Her story of a broken home life after the death of her father, her marriage and the antipathy she faced from her Catholic family and the Church as a consequence, aroused sympathy. That she took care of her mother in spite of all this was not questioned. Above all, it was her evidence that destroyed the foundation on which the Crown relied for a conviction, namely the conversation that Babbu Singho claimed he overheard. Her evidence was that on the day of the murder, the 15th of February, her husband was ill and their child was suffering from convulsions and needed constant care and attention. In these circumstances the alleged visit and conversation could not have taken place in the bedroom. Moreover, hospital records showed that Babbu Singho did not, as he claimed, go to the hospital on the night of the 15th February, but rather two days later.

H.A.P.'s charge to the Jury, in the words of Justice Alles, was "...the most brilliant piece of advocacy that has been heard in the Assize Courts of our country."⁸

H.A.P. called into question the unwarranted zeal of the police, who in order to win public approbation with a swift arrest, relied on a witness' supposedly overheard conversation without checking its veracity. He described the murder as the act of a madman, sending a warning to the jury not to accept evidence that they would otherwise reject. He said "There was an atmosphere which enveloped and gathered round them," which in picturesque language he described as "a miasma-like a fog in London on a November day."⁹ He took pains to describe the misery and poverty of Annette living with a cheerless and miserly mother. He portrayed his client as a gallant knight who rescued the young maiden. He castigated the Church and the Catholics of the town as those who created the 'miasma' by considering the accused as "a

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

hawk who pounced upon one of their ewe lambs.”¹⁰ He contrasted the intolerance of the Catholics of the town with the good works done by his client on behalf of his own religion. He then posed the final questions to the jury. Could his man be painted as a Jekyll and Hyde? Would he adopt the garb of a demon and plan to butcher his mother-in-law? The unanimous but silent response was ‘No.’ At the end of his address and the Crown’s summation, The Honourable E.W. Jayewardene, Commissioner of Assize, addressed the jury. The Jury deliberated for only an hour and delivered a unanimous verdict of ‘not guilty’ on all three accused.

It was this advocacy – appealing to the jury’s sense of justice, while presenting the accused in the most favourable light, all within the law, that made H.A.P. one of the greatest criminal lawyers of Ceylon. Justice Alles observed, “Shades of Marshall Hall appear in some measure in the very able manner in which King’s Counsel H.A.P. Sandrasagra procured the acquittal of his Client...”¹¹ This analogy drawn by Justice Alles shows the esteem in which he held H.A.P. Sir Edward Marshall Hall KC was the great champion of the British criminal courts who “...had successfully obtained the acquittal of his client by sheer brilliance of his advocacy.”¹² It was this same advocacy that H.A.P. relied on for his innumerable successes in the criminal courts of Ceylon.

In the ‘Panadura Murder case,’¹³ H.A.P. obtained the acquittal of his client. Unfortunately, the only record available of this case is a report in the ‘Strait Times’, and therefore is lacking in detail. H.A.P.’s client was the first accused Eckman Singho, who together with the second accused, Don Rognannis, were charged with the murder of Dr. J.V. Fernando. The charge was that on May 10, 1934, they shot the doctor at gunpoint at a Yala factory. In discharging the accused, the Judge acknowledged that based on the evidence, the Jury could not have reached any other verdict. Personally, he had his concerns that the two accused knew more than they let on, and further that their past records did not put them in a favourable light.¹⁴ Once again it had to be sparkling advocacy that rose to the defence. H.A.P.’s junior in this case was another giant of the legal profession, P. Navaratnarajah QC.¹⁵

H.A.P.’s erudite legal arguments won him acclamation. He dominated the criminal courts. The Assize Court was his stage where he held the undivided attention of his audience—Judge, jury and the public—who filled the courtroom to hear him. That did not deter him from arguing, on behalf of his client, intricate questions of law in the Supreme Court. With the eminent legal mind H.V. Perera QC as his junior, he appeared for the defendant in the famous case of *The King v Seneviratne*.¹⁶ The case encompassed many legal issues and set legal precedents. H.A. P.’s client, a Notary Public, was charged with cheating and breach of trust, in that he wrongfully retained his client’s money. His defence was that he kept the funds at the request of his client, a lender. The Crown led evidence of a similar act

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ The Strait Times, 9 April 1935, p. 7.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ [1925] 27 N.L.R 100.

perpetrated by the accused, to show that the act was not accidental but intentional. H.A.P. questioned the admissibility of such evidence. His contention was that it was only one incident and not part of a series of similar acts as required by Section 15 of the Evidence Ordinance. This objection led to a very lengthy and learned argument on the interpretation of sections 14 and 15 of the Evidence Ordinance and other issues as to the relevance of cited English and Indian precedents. In review, Justices J. Schneider, J.J. Dalton and A.J. Jayewardene allowed the evidence and Justice Schneider had this to say about H.A.P.:

"Mr. Sandarasegara (sic), upon whose objection this case came to be stated, argued the case for his client, the prisoner, exhaustively, and with much ability, and I feel that he has done a good service to the administration of justice. His objection has resulted in a careful consideration and very helpful study of the decisions bearing upon the rules of law contained in sections 14 and 15 of the Ordinance."

In *Mutumenike et al. v Fernando et al.*¹⁷, an action between an Executrix and the creditors, the issue was whether the heirs could be parties to such an action, under the Civil Procedure Code. H.A.P. appearing for the first defendant, the creditor, ably argued the issue. His contention that in the absence of an allegation of fraud and collusion on the part of the Executrix, the heirs cannot sue the creditors, was upheld.

In the case of *Goonetilleke v Abeyagoonsekera*¹⁸ H.A.P. appeared for the defendant respondents. The court upheld H.A.P.'s contention that the Roman Dutch Law of *Senatus Consultum, velleanum* (the law dealing with a woman's status as surety on a bond) was not obsolete, even though on the facts, the court held in favour of the appellant.

His court room victories were legendary and many ".....the legal battles he fought and won especially in the Supreme Court are innumerable, judges have been amazed at his skilful and able advocacy and his rapier like tongue has proved disastrous to his opponents however formidable they have been."¹⁹ It is said that when he appeared in court ".....the court room crowded with people who wished to enjoy the mellifluous words, the quick retorts and the sparkling wit of Sandrasagra."²⁰

His repartee was matchless. In his charge to the jury in the 'Murder of the Puttalam Widow' case before Justice E.W. Jayewardene, H.A.P. suggested that based on the evidence of Advocate Aelian Pereira, one of the witnesses was a 'professional story teller.' The judge interjected.

"I have ruled against you on that point, Mr. Sandrasagra," interrupted the Judge.

Referring to Amir Ali (an Indian authority) H.A.P. said; "I have authority, My Lord, that

Judge: "Leave that book aside."

¹⁷ *Mutumenike et al v Fernando et al*, 15 NLR 429.

¹⁸ *Goonetilleke v Abeyagoonsekera*, 17 NLR 368.

¹⁹ 'Legal Anecdotes and Humour in court in Ceylon,' Edmund P. Wijeytunge, p. xx.

²⁰ 'The Supreme Court of Sri Lanka-The first 185 Years' By A. R. B. Amerasinghe, pp. 337 & 338.

To which H.A.P. throwing the book said: "I shall, My Lord. Why should I go to India for common sense?"

Judge: "I have ruled against you."

Sandrasagra: "That ruling is wrong, My Lord."

Judge: "Mr. Sandrasagra, you know enough law to know that even if I am wrong, you are bound by what I hold."

Sandrasagra: "I know more law than...."

Judge: "You are bound by...."

Sandrasagra: "I am bound my Lord. I am bound."

The Judge's face, it was said, was a study.²¹

H.A.P.'s zest for the absurd knew no limits, but he was cognizant at all times that it was his client's interest that was foremost. C.S. Dharmarajah, the renowned journalist, described him as 'An Intrepid fighter who well knew his limits' and wrote an article under this title for 'The Sunday Observer,' January 21, 1990. A classic show of this trait was in a case before Sir Phillip Macdonald C.J.—a hardworking and humane judge. H.A.P. led for the defence and a young R.R. Crosette –Thambiah, QC, Solicitor General and Commissioner of Assize, was the prosecuting Crown Counsel. C.S. Dharmarajah's re-capture of these proceedings in an interview with R.R. Crosette-Thambiah is worth repeating.

'One afternoon as the case was proceeding, the judge used the word 'palimpsest.

R.R. Crosette Thambiah who described H.A.P. as "quite easily, the most naturally brilliant advocate this country had produced," admitted to not having heard the word before, nor had any others in the court.

Sandrasagra jumped at the chance the court had given by use of that most unusual word. Here was his chance to laugh the case out of court.

"I put it to you that all you have been telling us is a palimpsest," he said to a witness.

The Mudaliyar of the court did not know what on earth palimpsest meant. So he rose to the occasion by telling the witness:

²¹'The Supreme Court of Sri Lanka-The first 185 Years' By A. R. B. Amerasinghe, pp. 337 & 338; The Strait Times, 9 April 1935, p. 7.

"Unnahe kiyanaava thamung kiyappu vachana okkoma palimpsest." The court was in titters.

Seeing that he had made a hit, Sandrasagra grasped the opportunity.

"This morning, before you came to court, did you have a look at your palimpsest?"

"Adha uday, ussaviyata enda issala , thamunge palimpsest dakka de?"

And so on, until the whole court was reduced to uncontrollable laughter.

Mr. Crossette-Thambiah describes this scene in his own inimitable way. He told me once: A less experienced Judge would have abruptly adjourned court and retired hurt to his chambers. Sir Philip sat on the Bench with unmoved face. He had command of the case, but in his own way.

When the judge adjourned for the day the jury looked at Mr. Sandrasagra with beaming eyes. That was precisely how he wanted them.

Mr. Crossette-Thambiah says: " That evening at 8, an Inspector of Police came to my room in the hotel. "Mr. Thambiah, the Chief Justice wishes to see you at once. I have brought the police car," he said.

"When I entered the Judge's house, I found the round dining table laid out for dinner—when he entertained guests, we all sat round the round table and thus the irritating question of protocol never arose in his house. The Chief Justice was in his study waiting for me."

"Thambiah" he said, "I propose to take serious notice of Sandrasagra's behaviour this afternoon."

"The man has a way with him. I don't think he meant any disrespect to your Lordship," Mr. Thambiah said.

"That may be, but the fact remains that he reduced the whole court to contempt," the Judge said.

"Will your Lordship permit me to speak to him? I think I can make him apologise the first thing tomorrow morning," Mr. Thambiah said.

"He had better," the Chief Justice said.

Mr. Thambiah continued: "When I returned to the hotel, Mr. Sandrasagra was in the middle of a hearty dinner. Seeing me, he shouted: "Thambiah. Why the palimpsest are you late for dinner."

He walked up to him and said in a serious tone, "Sir, I am afraid that word is no longer a joke," – Thambiah had appeared before him when he was Commissioner of Assize.

"Why man, do you know what that bloody word means?"

"I did not this afternoon, but I know it now. I have looked it up in the dictionary," Mr. Thambiah said.

"Of course you are a student of English and you carry an English dictionary with you," Sandrasagra said. "I am no student of the King's English. I speak good old Jaffna Tamil English which was taught by a Frenchman."

"Sir," Mr. Thambiah said, "I am just coming from the Chief Justice's house."

"Is the old boy very angry?" Sandrasagra asked in a lower tone of voice.

Mr. Thambiah says: "Mr. Sandrasagra had all the shrewdness of the consummate advocate combined with an inborn shrewdness of the Tamils of Jaffna. He realised that the fate of his client was eventually in the Judge's hands."

"Very well, "he said," I will apologise tomorrow."

At eight next morning, Mr. Thambiah was back in the Judge's house. "Mr. Sandrasagra will apologise to your Lordship," he said. The Judge smiled and said nothing.

When the court assembled at 11, Mr. Sandrasagra rose to his feet and in a loud voice tendered his most humble apologies to his Lordship.

"It will not happen again, My Lord," he said. The Judge bowed and the trial proceeded. Sandrasagra won his case, obtaining an acquittal for his client, once again showing he knew when and where to draw the line.

Anecdotes of his quick, impromptu retorts abound. In a case before Justice Mosely, Justice H.W. Thambiah QC, then a junior member of the bar, recalled how Judge Mosely interrupted H.A.P. to inform him that the law on the issue had been settled in a case before the Supreme Court. H.A.P. immediately got his Junior to fetch the New Law Report in which the case was reported. He had one look at the report and saw the case had been decided by none other than Justice Moseley himself. His comeback was vintage H.A.P.: "Well, My Lord, the Law we all know is an ass."²²

²² The Strait Times, 9 April 1935, p. 7.

H.A.P. was appearing before another English Judge. The case had gone on for a few days much to the irritation of the Judge, who then addressed H.A.P. saying, "I will squeeze you and put you into my pocket," to which H.A.P. replied, "In that case, there will be more brains in your pocket than in your head." The Judge was rudely shocked at the retort and had no answer to make.²³

Another story was one in circulation in the legal community and confirmed by his daughter Mrs. A.P. Sandrasagra. H.A.P. was appearing before a Judge –a Scotsman; H.A.P. was cross-examining a Crown witness adding volume to his already booming and intimidating voice. The Judge interrupted and said, "Mr. Sandrasagra, stop barking like a bull dog." H.A.P.'s come back to this was "My Lord! I can't help it when there's a Scottish terrier on the bench." The Judge was taken aback, but H.A. P. still won the case.

One wonders how he got away with all this. Was it that he appeared for the most part before English Judges? The Englishman deftly clothed his emotions—he wore a stiff upper lip and H.A.P. the shrewd criminal lawyer, skilled in physiognomy, saw through it.

It was said that H.A.P. acted *ex tempore* in court, but this was not the case. Indeed he did prepare; his genius lay in the fact that he did not require much time to study his case. Nobody attested to this better than his juniors. They had to be ready on a moment's notice to spring into action in the court room. Justice N. Sinnethamby QC, himself a reputed lawyer and Judge of the Supreme Court, who was inspired by the brilliance of H.A.P., recalled a murder case where he was retained as junior to H.A.P. There were two accused. He tried hard to meet H.A.P. to discuss the case and plan strategy but to no avail. H.A.P. put off consultations on one ground or another until the date of the trial, when H.A.P. asked him to meet in court on the morning of the trial. When they met a few minutes before the Judge came on the bench, H.A. P. asked him to mark his appearance for the first accused and cross examine the first prosecution witness, while H.A.P. marked his appearance for the second accused. It did not matter, as it was a joint defence. This was Sinnethamby QC's first case and he confessed he did not know what to do or where to look. However, he managed to cross examine the witness for about an hour, giving his senior enough time to get the bearings of the case, probably for the first time. Sinnethamby QC recalled that 'Mr. Sandrasagra's cross examination of the prosecution's first witness thereafter was a brilliant masterpiece, the like of which he had never seen!' Of course the prosecution's case, collapsed.²⁴

H.A.P. left a legacy- his juniors. Under his tutelage and having received their baptism by fire working for H.A.P., they rose to great heights in the legal Profession. P. Navaratnarajah QC, H.W. Thambiah QC, N. Sinnethamby QC, to mention a few, attest to this. P. Navaratnarajah QC, a Mathematics Tripos from Cambridge, like Justice N. Sinnethamby QC, admitted that it was H.A.P. who inspired him.²⁵ He also acknowledged that he was lured to the Law from the age of seventeen by watching H.A.P.²⁶

²³ *Ibid.*

²⁴ 'Does a PC evoke the glamour and aura of a KC or QC' by EMDEEJAY, Sunday Observer, Magazine, July 24 1994.

²⁵ The Strait Times, 9 April 1935, p. 7.

²⁶ An Intrepid Fighter who well knew his limits by C.S Dharmarajah. The Sunday Observer January 21, 1990.

H.A.P. served the Bar he loved. He was for a time the President of the prestigious 'Voet Lights Society.' He also served as President of the Law Students Union.²⁷ His service as Commissioner of Assize was short. His real passion was the court room, standing on his own two feet and fighting the fight. As observed, 'Strange enough H.A.P. Sandrasagra, an irresistible humorist as counsel, when promoted to the Bench as Commissioner of Assize provided no humour. At the Bar his humour was so natural and spontaneous, the Judges hardly sought to restrain him.'²⁸ So perhaps the bench was not his calling.

In his time H.A.P., short in stature, was a towering presence in the criminal courts of Ceylon. His rhetoric and skilful art of cross examination where '... he would tease and tantalise before he killed,'²⁹ took him to great heights. But H.A.P. was a man who could not let life's events pass him by. Like most of his legal contemporaries, he participated in the political scene.

The early and mid-20th Century saw the world in turmoil- two world wars, the fall of empires and growth and spread of new 'isms'—communism, socialism, fascism. Colonialism was being challenged and Ceylon was not immune to all this. British Imperialism was being threatened by its colonial subjects, especially in the Asian quarter of the Empire. India, Britain's Jewel in the Crown, was agitating, and Ceylon was not far behind. But, unlike India, Ceylon's fight for freedom was tame—no Satyagraha, no salt march, no nonviolent civil disobedience, no bloodshed and violence. The Great Depression of the 1930s, with its economic and social ills, exacerbated the woes.

The first two decades of the Twentieth Century in Ceylon are described by renowned historian K.M. de Silva Ph.D. - "What marks off elite politics in Ceylon in the first two decades of the Twentieth Century from succeeding decades was the harmony that prevailed between the Sinhalese and Tamil leadership."³⁰ He goes on to explain this phenomenon, "The fact is that at that time the Tamils were not regarded, and did not regard themselves, as a minority community. The term "minorities" had a more restricted meaning than it has today; it included Europeans, Burghers and Muslims, but not Tamils."³¹ This assessment is borne out by facts. In the 'Muslim Riot' of 1915—a violent and bloody clash between the Muslims and Sinhalese that started in Kandy and spread to the western provinces and lasted almost two months, with many casualties, the Tamils led by Sir Ponnambalam Ramanathan supported the Sinhalese. When the Sinhalese leaders D.S. Senanayake, F.R. Senanayake, F.R Dias Bandaranaike, D.R. Wijewardene, H. Amarasuriya among others were arrested and imprisoned and Martial law was declared it was Sir Ponnambalam Ramanathan who braved the dangerous seas to go to Whitehall and plead their cause. The result was that Martial Law was lifted and the Sinhalese leaders were released from prison. On his return to Ceylon, Sir Ponnambalam Ramanathan was welcomed as a hero by the Sinhalese. In 1917 the Sinhalese leadership supported en masse his election to the Educated Ceylonese seat in the legislature.

²⁷ 'Famous Criminal Cases of Sri Lanka,' A.C. Alles Volume 6, pp. 47-67.

²⁸ *Mutumenike at al v Fernando et al*, 15 NLR 429.

²⁹ The Strait Times, 9 April 1935, p. 7.

³⁰ Legal Personalities of Sri Lanka-Vol. 1, p. 125.

³¹ *Ibid.*

The Ceylon National Congress, a united movement to fight for reform, was founded in 1919. In 1920 Sir Ponnambalam Arunachalam was elected the first President and for all purposes the chief negotiator with the British. In the same year he led the delegation to Whitehall to press for reform; H.A.P. was a member of the delegation. But this racial harmony was starting to crack. "Within two years of its foundation, however, the Congress was torn apart by personal conflict and communal wrangling, and was soon reduced to a hard core of low-country Sinhalese activists."³² Sir Ponnambalam Arunachalam left his position as leader; he died in 1924.

The Ceylon National Congress's case for constitutional reform presented to Whitehall in 1920 resulted in the first Constitution of 1924. This Constitution failed—the issue of communal representation continued to be a contentious issue between the Sinhalese and Tamils. In 1927, Whitehall sent a commission headed by the Earl of Donoughmore to inquire into the failure of the 1924 Constitution and to draft a Constitution that would rectify the situation. It was the precursor to the Soulbury Constitution and Ceylon's eventual self-rule. The Donoughmore Constitution, promulgated in 1931, provided for universal adult franchise, regional representation, and the committee system of government. The Legislative Council had been replaced by the State Council. The elected representatives to the State Council functioned both as the executive and legislative branch. Seven committees consisting of designated members of the State Council with the head of the committee titled Minister, reported to the Governor whose assent was necessary for any bill to pass. The key portfolios of Defence, External Affairs and Finance remained in the hands of the British. The committee system was to allay fears of the minorities that they would be left out in the decision making process. These reforms were viewed as providing training for eventual self-rule. The regional representative system however created discord. Tamils and Kandyans, with fewer seats, were now in the minority. The disenfranchisement of Indian Tamils in the upcountry plantations added to the problem. H. A. P. and a young G. G. Ponnambalam QC drew public attention to the considerable weight which the Kandyans effectively received through the disenfranchisement of most of the Indian Tamils. For example, H.A.P. complained to the Delimitation Commission in Jaffna in 1930 that:

"A large number of Indians had been disenfranchised under the Doughnamore scheme, but in computing seats, those in the south had taken full benefit of the presence of the Indians in their midst. Until that anomaly was rectified, any scheme for the number of seats was bound to end in over-representation of the Kandyan Provinces."³³

This evoked the ire of the Kandyan Sinhalese led by Bernard Aluvihare, who recorded in his diary:

"The Tamils have all along been ready to betray any others to get their own advantage. They joined the low country (Sinhalese) in 1919 to beat the Kandyans, and get weightage for themselves. They joined the

³² *Ibid*, p. 130.

³³ 'Communal Politics-1931-1947, by Jane Russell, p. 241.

minorities in 1924 when they lost the Colombo seat and their weightage, and they threw over everyone else when they joined the Europeans in 1936 and thought they could get what they want.”³⁴

The first election to the State Council under the Doughnamore Constitution was held in 1931. The Jaffna Youth League “initiated a boycott of the election in imitation of the left wing Indian National Congress.”³⁵ The Governor of Ceylon summed up the situation in a communiqué to Whitehall as follows:

‘the ostensible reason [for the boycott] is that the new Constitution is no advance towards to self – government. The real reason is no doubt dissatisfaction at what Tamils consider their inadequate representation.’³⁶ H.A.P. and Sir Vaitilingam Duraiswamy supported the boycott. The moderate Tamils did not support it, but they were leaderless since Sir Ponnambalam Ramanathan, who represented them and commanded a lot of respect, had died in 1930. None of the Sinhalese leaders supported the boycott. ‘H.A.P. Sandrasagra, at this point made the melodramatic claim; “I’ll make Jaffna an Ulster and I’ll be its Lord Carson.”’³⁷

A brief description of Baron Carson and what he stood for is in order at this point. Carson, like H.A.P., was a brilliant lawyer and judge. He was a strong Irish Unionist and opposed Home Rule for Ireland. He achieved his objective with the recognition of Protestant Northern Ireland as separate from the Catholic Irish Republic in 1920, leading to decades of bloodshed.

The boycott took its course with its fair share of violence. The 1931 election excluded the Jaffna Peninsula. Throughout 1933, the Peninsula was the scene of incidents of violence as boycotters and anti-boycotters clashed in demonstrations or at public meetings.’³⁸ ‘By January 1933 the Jaffna Peninsula was riven with endogenous bitterness. The boycott and the Jaffna Youth League were largely discredited with some of the leaders of the boycott making open confessions of the blunder they had committed. G.G. Ponnambalam emerged as the one non-boycotting Northern politician to save the Jaffna Tamils.’³⁹ By the beginning of 1934, the boycott had failed. Elections to fill the vacant seats in Jaffna were held in 1934 and G.G. Ponnambalam was elected to the State Council.

H.A.P. at first an ardent and rabid supporter of the boycott, was later lukewarm in his support after the 1931 election. There is no record of whether he contested a seat to the State Council; if he did he was not successful.

The objective of the Donoughmore Constitution was to train the Ceylonese in self- government. What was envisaged was the emergence of national political parties based on socio-economic ideology, such as

³⁴ *Ibid*, p. 240.

³⁵ A History of Sri Lanka by K.M. de Silva, p. 530.

³⁶ A History of Sri Lanka by K.M.de Silva, p. 530.

³⁷ *Ibid*.

³⁸ ‘Communal Politics-1931-1947, by Jane Russell, p. 39.

³⁹ *Ibid*, p. 38.

Capitalism, Socialism, Communism-- Conservative, Liberal, Labour and Communist parties. But instead, the split was on communal lines. In 1937 S.W.R.D Bandaranaike founded the Sinhala Maha Sabha. S.W.R.D.'s monograph 'Spinning Wheel and Paddy Field (Colombo, 1933) was dedicated to a nationalist revival of Buddhist and Sinhalese culture and Gandhian philosophy of simplicity of life style, farming and spinning in the home.⁴⁰ In 1938 the Burghers joined the Burgher Political Association and in 1944 the All Ceylon Tamil Congress was founded.

H.A.P.'s contemporaries in the political world were Sir Ponnambalam Arunachalam (1853-1924), Sir Ponnambalam Ramanathan (1851-1930),

F.R. Senanayake (1886-1926), Sir D.B. Jayatilleke (1868-1944). They were leaders. The Political Scientist and Scholar, A.J. Wilson, observes that when Sir Ponnambalam Ramanathan died in 1930 'There were other Tamils such as Sir Ambalavanar Kanagasabai, K. Balasubramaniam and H.A.P. Sandrasagra, but none of them wielded the same influence as the two brothers.'⁴¹ The leadership vacuum was ultimately filled by G.G. Ponnambalam QC., who went on to become a member of the State Council and later Member of Parliament, leader of the All Ceylon Tamil Congress and a Minister under the United National Party government of D.S. Senanayake, the first Prime Minister of Independent Ceylon.

H.A.P. joined the Legislative Council in 1929. It was reported⁴² that H.A. P. made a speech in Jaffna, as member of the Legislative Council, accusing the Crown Agents of importing and selling insulators made in Bavaria at an enhanced valuation of thirty three percent. The sarcastic tongue of H.A.P. did not stop there, as he remarked that such examples of 'commercial dishonesty' were to be expected from the Englishmen who were a nation of shopkeepers. In quoting Napoleon he seemed to have forgotten that it was at the hands of the 'shopkeepers' that Napoleon met his Waterloo. In a sense H.A. P. too had a Waterloo moment in that when asked for proof he could not produce it and the insulators were, in fact, made in England. He did, however, make one valid point that Ceylon had to pay more for goods when ordered through Crown Agents than directly from the manufacturer. H.A.P. who in the court of law insisted and relied on evidence and proof beyond a reasonable doubt ignored this rule outside court.

In 1931 with the world gripped in a recession, H.A.P. argued that 'while the country was suffering, British Officers were enjoying "undiluted prosperity," and put forward a motion that the salaries of officers on the civil list should be reduced by ten percent. It was a motion with which, slightly amended, the Council concurred...'⁴³

Unfortunately, there is little information available to enlighten us as to H.A.P.'s political ideology. Was he like most of his contemporaries, in keeping with the prevailing ideology amongst the educated elite, a socialist?

⁴⁰ *Ibid*, p. 38; 'The Supreme Court of Sri Lanka-The first 185 Years' By A. R. B. Amerasinghe, pp. 337 & 338.

⁴¹ Sri Lankan Tamil Nationalism, by A.J. Wilson, p. 55.

⁴² The Strait Times, 5 February 1930.

⁴³ Sir Bernard Boudillon, by Robert Pearce, p. 125; *Ceylon Hansard*, 3 Mar. 1931, 4 Mar. 1931.

A recollection of the life of H.A.P. will not be complete without reference to his encounter with Leonard Woolf (L.W.). H.A.P. was a proud Jaffna man. It was this pride that led to the famous incident with L.W. Had H.A.P. humbly submitted to imperial authority, this would never have happened. L.W., author, British civil servant, and member of the famous Bloomsbury group—a group of British intellectuals that included economist John Maynard Keynes and writer Virginia Woolf, wife of L.W. From 1904-1911, L.W. served in the Ceylon Civil Service for seven years. Of these seven years, two (1905-1907) were in Jaffna as a cadet of the Ceylon Civil Service. L.W. carried with him a dosage of arrogance as the representative of Imperial power. The story goes that Mr. Price, Government Agent and L.W., his Office Assistant, were riding their horses up Main Street Jaffna when they encountered H.A.P. at the intersection, riding his trap down Main Street. L.W. is supposed to have turned his horse and deliberately struck H.A.P. with the strap. L.W.'s version is that he respected H.A.P. and what happened was an accident. He writes in his autobiography⁴⁴ that at the intersection, his horse got restless and swerved and while trying to control the horse his whip accidentally grazed H.A.P. H.A.P.'s version was of course different. H.A.P.'s eldest daughter, Mrs. A.P. Sandrasagra, related his version corroborated by others who lived in Jaffna at that time. According to her, there was an altercation between H.A.P. and L.W. as to who had the right of way. H.A.P. knew the law. L.W., the representative of the Imperial Power could not abide the idea of a subject telling him the rules of the road and hence the raising of the whip. But according to her, it was H.A.P. who, on seeing L.W., raised his whip and struck L.W. before L.W. struck him. The cause was taken by the Jaffna Tamil Association, of which H.A.P. was a member, who then submitted a petition to the Government Agent and the Central Authority in Colombo. The petition was dismissed and H.A.P. continued his struggle against Imperial Power.

There are many stories about H.A.P. and his wide interests and talents. He was the consummate performer—he performed in and out of court to the pleasure of his audience. He used his short stature and dark skin to the maximum advantage. When he visited England with other leaders, as part of a delegation pressing for reform, he was mistaken for the Emperor of Abyssinia. He revelled in the misidentification and rose to the occasion, giving the royal wave to the awestruck crowd that lined the streets to White Hall. He lived the part or parts bestowed on him. He used his booming deep bass voice to sing 'Old Man River' made famous by Paul Robeson as well as many of the African-American spirituals with the plaintive cry 'Let my people go.' According to Mrs. A. P. Sandrasagra, he was a lover of classical music and theatre. On his many visits to London, H.A.P. found the time to follow his passions of music and the theatre. He visited Covent Garden for opera and music. He patronised the Old Vic and other theatres, of which there were quite a few, in London. He made the pilgrimage to the Shakespeare Memorial Theatre in Stratford-upon-Avon. In a sense, like most of the educated Ceylon elite of his time, he was a contradiction—fight the Imperial Ruler but absorb his culture. This extended to the knife and fork and bland British food only made edible thanks to a glass or two of Scotch.

His education at one of the premier schools—St. Patrick's College— opened his world to the Greek philosophers whom he talked about with his daughter. He was an avid reader of the classics of Thomas Hardy, D.H. Lawrence, Charles Dickens and of course the compulsory Shakespeare. He even ventured to

⁴⁴ *Growing - an Autobiography of the Years 1904-1911*, by Leonard Woolf, pp. 112-114.

Scotland to read Sir Walter Scott. His mastery of the English language is testimony to this. For a man who spoke 'good old Jaffna Tamil English which was taught by a Frenchman', his English with a French twist—carried weight in the era of British Imperialism. Further, this joined with his irreverent wit produced uncontrollable laughter in those who had the privilege to hear him.

Once at a social gathering, a Judge of the Supreme Court asked him: "Is this your son?" "No my sin." He said amidst laughter.⁴⁵

Colvin R. de Silva, himself an eminent advocate and leading politician, related this anecdote about H.A.P. "I remember how he described a hard working father in Jaffna in relation to his profligate ne'er-do-well son, residing in Colombo." H.A.P. said, "The father makes hay in Jaffna whilst the son shines in Colombo." Colvin R. de Silva goes on to comment: "Now, I ask you, can you think of anything more cleverly put."⁴⁶

Mrs. A.P. Sandrasagra, had many stories to tell about her father. Amongst them is this one- H.A.P. was addressing an election rally in favour of his candidate when he spied the opposing candidate—the son of a leading light—at a distance. H.A.P. stretched his hand out and said, "Behold! The mountain stream that ends in mud." Eyes turned and laughter ensued.

H.A.P. was a legend in his time. His achievements were many, but it was as a criminal lawyer that he shone and nobody captured that better than Justice Nihill who, talking of H.A.P. said "he was an ornament to the legal profession"⁴⁷ and that he was. His acute knowledge of the law, his able command of the English language, his sparkling wit and above all his native intelligence made him that ornament. His skilful marriage of legal wizardry to verbal acumen was unmatched. He indeed earned the accolades paid to him. In recognition of his legal stature and the invaluable contributions he made to the profession, a portrait of H.A.P. hangs in Hulftsdorf-- the law courts in Colombo. Despite all this, one must consider the question addressed by Justice O.L. De Kretser (Sr.) about H.A.P. 'In other fields too, he arrested much attention. Outside the courthouse he was always joyous, very good company, always generous and sympathetic. In fact one wonders whether he would not have done better had he taken his work more seriously.'⁴⁸ This is pure speculation, nevertheless intriguing. Did H.A.P. reach his zenith as a criminal lawyer, or were there still more steps for him to climb? Had he gone those extra steps, how much richer might his legacy have been?

As a politician, there is no doubt that H.A.P. was overshadowed by the brothers Sir Ponnambalam Arunachalam and Sir Ponnambalam Ramanathan. A.R.B. Amerasinghe, Ph.D. had this to say, "Although he was praised as a great lawyer, his flirtation with politics may not have earned him comparable

⁴⁵ The Strait Times , 9 April 1935, p. 7.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ 'The Supreme Court of Sri Lanka-The first 185 Years' By A. R. B. Amerasinghe, pp. 337 & 338.

encomium.”⁴⁹ This opinion, though it has a ring of truth, may be a little too harsh. H.A.P. was mercurial, impulsive and undiplomatic, all traits not conducive to good leadership. Nevertheless it is clear that he did not hesitate to defend the people against exploitation by the Imperial power. That leaves us with another question- did he foresee the future of a Ceylon mired in communal dissension?

In summary, H.A.P. in his time was a legal luminary, a wit without peer and, quirks aside, a politician who challenged the Imperial ruler.

⁴⁹ ‘The Supreme Court of Sri Lanka-The first 185 Years’ By A. R. B. Amerasinghe, p. 338 - a comment by A.R.B. Amerasinghe.

'Confessions of a Lawyer' - Basil Fernando

Book Review by Laksiri Fernando*

"Autobiography is about change; it narrates a series of transformations. This is an expectation we bring to any autobiographical text." - Carolyn Barros

When I picked up Basil Fernando's *Nitignayekuge Papochcharanaya Hewath Mage Kathawa* (A Confession of a Lawyer or My Story), admirably written in excellent Sinhala, I got what I reasonably expected. It is a narrative of Basil's transformation from a curious village boy from Palliyawatta, Wattala, to an internationally reputed human rights advocate now living in the technologically advanced city of Hong Kong. Why he lives in Hong Kong is part of the story.

The first episode of his last chapter titled "The Death List" ends with a sentimental comment on his father.

"It became clear to me from most of what I heard from others that my departure from the country greatly affected my father who was already becoming weaker and weaker because of age. I also came to know later that a frequently asked question by him was whether I would ever come back."

Loss of dear ones, temporary or permanent, by departure, incarceration, disappearance or death was part of Sri Lanka's unfolding tragedy in the late 1980s. The crime he had committed was to appear as a lawyer for a sister of someone who was suspected to be a 'JVP terrorist.' Of course Basil had appeared for several other human rights cases during that time, to add to his misfortune. Anyone who exactly wants to know why he was forced to leave the country as an exile should read the previous chapter twelve fittingly titled "Injustice Created through Law."

Law and Injustice

What is most important in this chapter is the contradictions and paradoxes within the legal system that he explains succinctly. The legal structure and the court system is supposed to protect the liberty of people

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Ed Note: Basil Fernando, Director of Policy at the Hong Kong based Asian Human Rights Commission pursuant to leading the organization as Executive Director for more than fifteen years and author of '*Confessions of a Lawyer*' was recently among five recipients awarded the Right Livelihood Award by the Stockholm based Right Livelihood Award Foundation. The other recipients in 2014 are Edward Snowden, Alan Rusbridger, Asma Jahangir and Bill McKibben. The first Sri Lankan to receive this award was Justice Christopher Weeramantry in 2007.

under normal circumstances. But under Emergency and under the Prevention of Terrorisms Act (PTA) this is not at all the case. The whole of the judiciary was in crisis. Judges and even the lawyers came under immense pressure and they were virtually helpless. He has outlined several of these contradictions and tragedies.

Under normal circumstances, the effort of a good lawyer is to get bail for the client as soon as possible. But under the prevailing situation, the remand prison was safer than bail or otherwise the client could have been possibly 'disappeared' after release. The police used to submit incredible reports to keep people incarcerated. However, challenging them could have amounted to being accused of abetting terrorism. No one was ready to take that risk. To prevent possible disappearances, the clients or their families were asked to resort to unusual procedures. One was to petition higher officials as much as possible with much details of the whereabouts of the person under arrest and let the arresting authorities also know about the petitions. Discussions in the biography are directly important to practicing lawyers in the country.

What might be of interest to the reader is the last episode that the author has related. Basil had appeared for a client who had killed his wife quite unknowingly in his insanity. When the case was up, the Judge had called Basil to his chamber and had asked as to how he would plead for his client, pointing out that he could give a lenient punishment if the accused pleaded guilty for 'culpable homicide.' The Sinhala term that Basil has used is '*Sawadya Manushya Gathanaya*' which I am not aware of. That is how the matter was settled. The point of the story is to argue that most of what happened during the late 1980s amounted to similar insanity on the part of the entirety of Sri Lankan society. As he notes;

"There was no major difference between the mental status of all of us living in the country and the mental status of the client that I represented."

The style of the autobiography is innovative. The substantive chapters from chapter nine are divided into several episodes, each chapter impressively giving snap shots of different stages of his metamorphosis into the present status. Being a poet, other than being a lawyer, Basil has related these stories in a lyrical manner. On the contrary, being a crude political scientist, or a claimed one, I am definitely not in a position to appreciate fully the value of his literary eminence.

Village Background

Let me however focus on the first few chapters on his 'village background.' As he has openly admitted, he has been influenced by Martin Wickramasinghe in many ways. Before commenting on more controversial ideological influences, there is a clear resonation of *Ape Gama* (My Village) particularly on the first few chapters. Can he be criticized of imagining an *ape gama* through Palliyawatta? He cannot be. Many of the post-independent first generation of Sinhala educated youth perhaps tried to imagine the same during our young days. I did the same quite unsuccessfully in my own 'village' at Moratuwella, and could not unfortunately gather the minute details of what Basil has gathered on flora and fauna or more precisely on various types of *Ibbas* (tortoises) or *Issas* (prawns). But what differs my experience from his experience

perhaps is in relation to caste and class.

In his depiction of “Internal Divisions within a Village” in chapter two, the caste system predominates and any particular mention of class divisions is conspicuously absent. Perhaps that was the exact situation in his village but this is substantially different to my experience. Of course we knew about the existence of certain families belonging to certain castes but they were not despised because of that fact in any manner. I was not even aware of my own caste until I came of age. Moratuwa undoubtedly was at the forefront of the capitalist development and the main division in my own locality was between the ‘rich’ and the ‘poor’ and not between different castes. This is one reason why Moratuwa became prominent for leftwing radicalism as the great majority obviously belonged to the poor.

What might be questionable in Basil’s analysis is that the caste system and the antecedent ideological backwardness are depicted as evils that came after the influence of Hinduism, as he says, after the 8th century. According to historians (i.e. K.M. de Silva), the caste system prevailed in ancient times in Anuradhapura with Candalas confined to do the menial work. The genesis of the caste system was vocational and service. The basis was not primarily religion or ideology but the political economy. When there were major disruptions or final breakdown within the traditional political economy, undoubtedly the caste system became uglier socially than when it was working. This is exactly what happened under colonialism even continuing after independence. All the examples that he has given shows that the so-called high castes were using the ‘stigma’ as a weapon in their social competition or to demean others when they were advancing socially.

Transformations

Basil has always been a conscientious bloke as I knew him. His social convictions had come quite early. As he says, he was influenced by the SWRD Bandaranaike motto which was popular at that time that “the primary duty of man is to serve mankind.” When he was in grade nine, he joined the seminary to become a De La Salle Brother, if I am not mistaken. Perhaps this was in 1959. He trained at Mutwal and then in Penang, Malaysia, for this purpose. Then came a rupture even before he returned to Sri Lanka in 1964.

The first influence was the Second Vatican Council (1962) which was a renewal of the Catholic doctrine more towards the needs and aspirations of the people wherever the Church worked. Basil also recounts the influence of a Dutch Catholic Priest, Fr. Henk Schram, who influenced him and others greatly even before the Vatican II sessions. These influences stemmed from his work in respect of working for the people and particularly the poor. Then came his exposure to the leftwing ideas during his study at Aquinas College for his university entrance. It is not clear however from the narrative as to when he abandoned the idea to become a Catholic Brother; perhaps this was much later. His study as a student of law at the University of Colombo appears to be relatively uneventful although he is critical of all what the Faculty offered to him as ‘legal knowledge.’ I have no reservations on the matter whatsoever. He is critical of the professors, the (law) students and particularly of the curricula. It was in the midst of his university days that the JVP insurrection of 1971 took place but he was quite safe and immune. There are several key

statements to this undisturbed effect.

Without becoming a practicing lawyer, Basil then became an English teacher at the Vidyodaya University after his law degree. This phase seems to be quite a radical one in his life. Apart from teaching English, he became a 'teacher in revolution' for the masses. For some years, he was associated with a leftwing Trotskyist organization of which I was a founder a few years ago. But by the time he joined, however, I had left the organization because of my milder or moderate policies. We crossed paths very narrowly. All indications were about his devotion to the cause, until he became disillusioned and left the organization for good. However, his experience within the organization must have helped him to become a lawyer with a social conscience later.

The experiences that he has related as a lawyer and the cases referred to as episodes in the evolving saga are useful insights for anyone who wish to understand the breakdown of rule of law and the predicaments of the judiciary in the country amidst social and ethnic conflicts. His story spanning for over sixty years, intermittently relates major events and incidents from the Bandaranaike era to the Eelam war in the North through two insurrections in the South. Another tragic story that he relates is the court case of Kuttimani and his killing in prison custody.

His later international experience, particularly in Cambodia during the peace process and reconstruction, supply more useful insights in understanding the tragedies of a country facing protracted social and ethnic conflict/s. In the case of Sri Lanka, his critical eye is unhesitatingly focused on the Police and its excesses.

A Critical Comment

There cannot be much doubt that the story that Basil Fernando relates is part of the common story of everyone in Sri Lanka. Much of it is his own interpretation but is nevertheless quite useful for anyone to understand the events, developments and underlying causes. As recently stated in another review of this book, "...this, I felt, is a remarkable effort in the search for the truth, and nothing but the truth." That reviewer has also pointed out that, "...as a reader, I felt that the readings of Basil Fernando are infused with a certain sense of religio-sensitivity which depicts the needs to express what is inexpressible."¹

I am not sure, however, whether I can completely agree with what Basil says about 'the truth and the lie' (*aththa saha boruwa*). In his Preface, he has argued that there is something called 'the eternal difference or contrast between the truth and the lie.' Second, he has argued that 'one can only understand the above clearly if one intends and is capable of understanding the truth and the lie about himself or herself.' This appears to me a very subjective endeavor although he has admitted that 'this is not a problem that can be solved easily.'

¹A book review: Universality of poetic feelings, by Prof. Sunanda Mahendra. <http://www.ninjabroxy.ca/index.php?btxmnercdeqt=aHR0cHM6Ly93d3cuY29sb21ib3R1bGVncmFwaC5jb20vaW5kZXgucGhwL2EtYm9vaylyZXZpZXctdW5pdmVyc2FsaXR5LW9mLXBvZXRpYy1mZWVsaW5ncy8%3D>

This statement may be true or at least, needs to be respected if Basil is a believer in the concept of 'the truth and the lie'. In my case, I am not, and quite skeptical about absolute truths except what the Buddha has said about the four noble truths. However, there are valuable historical, social and political propositions and conclusions that humans have arrived at both as targets and means to achieve them. Otherwise, most of the interpretations that we make about events and developments are subject to controversy and different points of view.

I am particularly skeptical about his final conclusion or the concluding paragraph which says referring to Martin Wickremasinghe's *Bawatharanaya* that "the conclusion that I have arrived at is the evolution of the social crisis that Sri Lanka facing today cannot be understood separated from the major transformations in the country around the twelfth century." Apparent historical inaccuracy apart, one can even criticize Basil for interpreting history through the narrative of Sinhala nationalism. It is this narrative which considers all what came from Hinduism or South India to be detrimental to the glorious Sinhala civilization. Perhaps this mistake or orientation is a result of Basil's effort to be religiously sensitive to Buddhism or the way he wanted to understand 'what is Sinhala Buddhism.'²

² All the quotations are my translations from the original text.

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