SPEEDY & JUST SETTLEMENT of LABOUR DISPUTES

Seminar on Reform of Labour Laws in Sri Lanka

31 July - 2 August 1998,
Kandy, Sri Lanka

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Organised by the
VIGIL LANKA MOVEMENT, Sri Lanka
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I

An Explanation About This Series of Discussions on Legal Reforms

THIS CONSULTATION on labour law reforms was preceded by a series of other discussions on human rights-related law reforms. They were the Consultation held in Bangalore, India, in 1996 on Basic Criminal Law Reforms; the Consultation on Social Justice and the Judiciary, which concentrated on judicial reform; the Seminar on the Independence of the Judiciary; and the Consultation on Sub-judice. Many similar meetings have been held in some countries in Asia. Prominent examples include Consultations on Judicial Reforms in Cambodia and in Mainland China. There is a series of publications explaining the methodology of these consultations as well as the conclusions reached in each seminar. They are:

Human Rights Related Legal Reforms (Sri Lanka);

Judiciary and Social Justice (Sri Lanka);

The Problems Facing the Cambodian Legal System (Cambodia).

These discussions have been based on the following assumptions:

1. That there is a need to encourage a bottom-up approach to legal reforms;
2. That informed discussions on the needed reforms are an essential part of the reform process itself and are especially essential for the education of the public. Often dissatisfaction with the existing situations does not go beyond the expression of frustration. It is necessary to raise such expressions to the level of more informed discussion leading to constructive changes;
3. That the lawyers and judges are very important actors for promoting legal reforms which enhance democracy and human rights. This is because they, more than anyone else, are aware of the complex problems involved in achieving such reforms, and because they play a prominent role in implementing such reforms once legislation is passed;
4. And that the opportunities for such discussions are very limited.

At these meetings every effort is made to give all participants the opportunity to express their views. Formal lectures are limited as much as possible. Debate in an informal and friendly atmosphere is very much encouraged. The expectation is that in such an environment more complex problems relating to the desired reforms will emerge and be thoroughly discussed. A good record of the discussions, conclusions, recommendations and resolutions is maintained. These are later distributed to as many concerned persons as possible so as to provoke public discussion. The consultations are followed up by pursuing the conclusions arrived at. If more discussions are needed on one or more aspects of a situation, further consultations will be arranged for this purpose.

The participants of these seminars participate in a purely personal capacity and the views they express do not in any way represent the organizations to which they may belong or by which they are employed.

II

Labour Seminar

A Statement by Vigil Lanka Movement (VLM)
and Asian Human Rights Commission (AHRC)

Speedy and Just Settlement of Labour Disputes

Introduction

INDUSTRIAL LAWS, like any other laws, can become opera-tive only when they are implemented. Implementation of the laws is a very practical affair, requiring human and material resources. As in other inquiries, inquiries under the Industrial Disputes Act (IDA) require Inquiring Officers (Labour Tribunal Presidents and Labour Officers)and stenographers as well as necessary machines and other materials. The IDA was intended to provide a speedy, inexpensive and adequate ma-

chinery for the settlement of labour disputes. This implied that the necessary resources for the achievement of the triple objectives--speedy, inexpensive and adequate--would be provided. What became very clear during the deliberations at this seminar is that the resources provided are grossly inadequate. In fact, there is consensus that the lack of staff and necessary material resources is shocking and constitutes an instance of gross neglect. What is given with one hand as substantive statutory provisions is taken away with the other hand by the deprivation of material resources essential for the law's implementation. Further, it is quite natural for parties to a dispute to manipulate inadequacies in the implementation of the machinery to their advantage. The employers, being the stronger party in industrial disputes, have unscrupulously manipulated the problems generated by lack of resources for the implementation of the law to an extent that the workers for most part have lost faith in the system.

The IDA is a form of alternative dispute settlement introduced in 1950. Today, alternative dispute settlement is a very popular term globally. In the future, this form of dispute settlement is bound to spread into all areas of litigation. This form of dispute settlement lays less stress on "rules" and more stress on substance. It calls for greater maturity, experience, knowledge and integrity from all the parties to a dispute settlement and particularly from the facilitators of such settlements, namely the Labour Tribunal Presidents and Labour Officers. Thus, the IDA itself is a piece of enlightened legislation. The provision for a just and equitable remedy according to the accepted principles of social justice shows a rather brighter side of the legislators of the time. Later, such legislation as the Termination of Employment of Workmen Act (TEWA) and the Gratuity Act were added to the alternative dispute settlement scheme in the industrial laws.

In a broad social policy, this alternative dispute settlement scheme pursues the objective of trying to reduce open conflict between employers and workers. To put it in another way, these laws were an attempt to reduce strikes, "go slows" and other forms of workers' protest by provid-

ing a speedy, inexpensive and adequate machinery to redress their grievances. It is not meant to fight the workers and the unions in the "legal battlefield," as happened in some countries later, for example, Singapore. Peaceful settlement of disputes can help employers by reducing or eliminating disruption in production and workers by gainingwhat is due to them. As a social policy this could have helped the growth of both a local entrepreneur class and of healthy labour practices.

However, such intentions by the legislators have not been honoured by the executive. Scanty resource allocation has generated a crisis in law enforcement. It is this crisis of enforcement that needs to be resolved. Although the title of this Seminar was "Reform of Labour Laws," the consensus that emerged in the Seminar is that what requires reformation is rather the enforcement of the labour legislation. The supply of such basic material needs as computers, tape recorders and other technical facilities can bring about "revolutionary changes" to the primitive enforcement machinery that exists now.

Alternative Dispute Settlement in Industrial Laws

It could be safely said that the thread running through the various discussions at this Seminar is the search for improved forms of industrial dispute settlement.

CONCILIATION

There was consensus on the issue of providing a special set-up for conciliation. Participants feel that the present form of conciliation through the Labour Department is beset with inherent difficulties and is not conducive to creating a proper atmosphere for amicable settlement. The Labour Officers who receive the complaints have to fill in forms containing such questions as regardomg the payment of statutory dues, provident fund, etc. Core issues that may have led to the immediate dispute may not be the ones that receive primary consideration. Besides, there are only 210 Labour Officers available for this function throughout the country. Further, these officers are trained for and have

to attend to many other different functions. The concepts of reconciliation and mediation differ from each other. Within the Labour Secretariat set-up, these two functions seem to become confused.

Conciliation is a very basic aspect of dispute settlement and requires a set-up different from that which is available now. Conciliation is a process of dispute settlement in which the parties to the disputes directly engage each other in discussion. The role of Labour Officers is not to impose a settlement, but to provide a healthy background in which the parties to the disputes can discuss matters among themselves. Any attempt to make interim orders or to regulate the process is likely to lead to interference in the conciliation process. A "culture of conciliation" needs to be nurtured. Attempts to discourage workers or employers by various forms of harassment must be avoided.

The issue as to whether the proposed new set-up for conciliation should be established within or outside the present Labour Secretariat was raised at the Seminar. There was no final conclusion on this matter.

LABOUR TRIBUNALS

At the initial stage of a Labour Tribunal proceeding, there need to be very serious attempts to reach a reasonable settlement. To bring about such a settlement, discussion on the basic issues of the dispute needs to be encouraged. It is not sufficient to ask whether there is a settlement. Instead, a genuine exchange of views between the parties may help create a less tense situation; it may bring the parties to adopt a more conciliatory approach and to see the benefits of settlement. In this, it is very necessary for the parties to see the Labour Tribunal President as an unbiased mediator who can be trusted. The President's patience and persuasive capacities are tested in this way. However, such persuasive functions should not be confused with coercive practices directed towards achieving quick results.

Even where settlement fails, such early discussion will help determine the basic issues of the dispute. The inquiry must then be confined to these basic issues. Often lawyers contrive to prolong the inquiries and

go into detailed evidence on matters that are not relevant. An early identification of and agreement on the basic issues can shorten the inquiry.

Regarding procedural matters, such issues as the admissibility of evidence led before disciplinary inquiries and the admissibility of affidavit evidence must be looked into within the social context of the Sri Lankan society. Inquiring Officers in these disciplinary inquiries are paid by the employers and are very likely not to be given such assignments in the future if they issue orders against the employers. Affidavit evidence can also easily be misused.

It is of paramount importance to give due consideration to the stark reality of the workers' vulnerable position. Fellow workers, who may be aware of facts being inquired into, may not be willing to come forward to give evidence, as they may be under serious threat from the employer. At the same time, the workers' financial position does not permit them to hire the services of more skilful lawyers. Workers' awareness of legal procedures is also limited. The competition between a worker and an employer thus cannot be fair. In these circumstances the special protection that the Tribunal must extend to a worker does not violate the principle of equality of law, but is in fact an assertion of it.

The lack of infrastructural facilities for holding inquiries is a great hindrance to the dispute settlement process. Insufficient stenographers is a major cause of delay in inquiries. This long-standing problem may be resolved by the use of such technical facilities as tape recorders and computers. If legal impediments exist preventing the use of these facilities, they should be removed as soon as possible. The provision of these facilities is not prohibitively expensive and the State should be persuaded to make the necessary budgetary allowances for this purpose. Where financial or technical assistance is needed, countries as well as funding agencies are likely to help in the achievement of this aim.

ARBITRATION

Arbitration is another form of dispute settlement. However, in recent times there have been quite a lot of setbacks in this area. Voluntary arbitration does not take place anymore. Compulsory arbitration has many limitations. Conceptually, compulsory arbitration seems to be an anomaly, for arbitration by the very term implies a voluntary selection of the process of settlement. Also, the IDA's distinction between minor and major disputes does not seem to be based on any objective criteria. What is rather clear is that compulsory arbitration is essentially and to a great degree a political process. The place that the Minister of Labour has in such arbitration makes it even more political. Besides, the long period that is taken to complete the arbitration proceedings seems itself to be political, as it becomes a means to suspend actions on the parties during the arbitration process.

The arbitration procedure as it exists in the IDA seems to be a product of the political and social ethos of the 50s. Whether the same procedures can be useful under the completely changed circumstances of the 90s and thereafter needs to be looked into. The use of Emergency Regulations to intervene in labour disputes during the last two decades in particular seems to have changed the social basis of the type of arbitration set out in the IDA. It may be necessary to look into other countries'experience to look for new modes of arbitration, ones which allow dispute settlement between the parties through greater interaction by the parties themselves.

While commercial arbitration procedure may be too expensive for arbitration relating to industrial disputes, a modified procedure may be developed as a form of alternative dispute settlement. What is essential is to reduce the power of the Minister of Labour and of politicians in general to interfere in the process.

Dispute Settlement Regarding State Sector Workers

Rapid globalisation threatens the employment of many State Sector workers. As a result, many disputes arise, leading to many forms of

industrial action. There is no existing mechanism for the settlement of these disputes.

The State thus uses Emergency Powers to disrupt these industrial actions. This in turn leads to instability in the country. Protection of the employment as well as other rights of State Sector workers requires the development of alternative dispute mechanisms suitable to deal with the complex problems involved. There has been no attempt to deal with this matter. Much more discussion and debate are required on this issue.

Dispute Settlement Under TEWA

An important area of labour disputes is terminations unrelated to misconduct by workers. Terminations coming under this heading are ones due to the employers' own need to end the workers' employment. Such employers may want to close their businesses or re-adjust them. In other instances they may not want a particular worker or workers without necessarily having a reason acceptable in law to terminate their employment. Thus, such terminations are unilateral actions on the part of the employers to end the contracts of employment. If employers ended such contracts by full payment of everything due to the workers, no problem would arise. It is when they do not discharge that obligation that it gives rise to conflict. The TEWA is an attempt to settle such disputes. However, in recent times there has been an attempt to advocate a "hire and fire [at will]" policy. This policy amounts to a denial of the employment contract. The advocates of this policy agitate for the abrogation of the TEWA, and various pretexts are given to justify such abrogation. The participants of this Seminar reject the "hire and fire" policy as a primitive doctrine and stress the need to keep the TEWA.

We admit that there are no perfect systems for dispute settlement. However, in a democratic society the search is for methods beset with the fewest number of inconveniences. The methods of dispute settlement available under the IDA are intended to achieve this purpose. However, the process of implementation has been so defective that peo-

ple who seek remedies under the IDA are subjected to enormous inconvenience. While some of these difficulties have been deliberately created by persons who benefit from them--for example, some employer representatives who may want to draw some benefits from the process--most problems are due to the lack of resources and technological facilities. We believe that a considerable improvement in technological facilities can make a great difference to the settlement of labour disputes.

Basil Fernando
Executive Director
Asian Human Rights Commission

Sunil Coorey
President
Vigil Lanka Movement

Resolutions of the Participants

Conciliation

1. If proper use can be made, conciliation procedure has great potential for the settlement of disputes;
2. The scope of conciliation needs to be expanded;
3. Mature, experienced and trained persons should act as the facilitators in these proceedings. It is necessary to emphasise that the parties to the dispute are themselves primary actors in the conciliation process;
4. The existing arrangement for conciliation through the Labour Department is unsatisfactory. Its procedures are not conducive to amicable settlement; further the officers are not particularly trained for conciliation, and the number of officers is inadequate;
5. There is a need for a new set-up for conciliation, with due regard and understanding of the principles of alternative dispute settlement. This may be achieved either by reorganising the Labour Department itself or by establishing the new set-up outside of it;
6. Adequate financial arrangements must be made for sufficient number of staff and for other technical needs; special emphasis must be paid to the provision of such modern technical equipment as computers.

Arbitration

1. Arbitration referrels should be made by the Commissioner of Labour;
2. Disputes that are pending or cases dismissed by the Labour Tribunal should not be referred to arbitration;

3. A separate forum for training in arbitration proceedings should be established;
4. No arbitration should be referred to the Labour Tribunal;
5. As in the Industrial Court, Section 27 of the IDA should be made applicable and the repudiation provisions should be removed;
6. Competent, experienced and trained personnel should be appointed as arbitrators;
7. Termination matters should not be referred to arbitration;
8. There should be a definite time frame within which a matter should be referred to arbitration and settled;
9. Section 31 (B) 2 of the IDA should be repealed.

Enforcement Procedures in the Labour Department

(Labour Tribunal Orders: non-payment of Employment Provident Fund and of Employment Trust Fund; non-payment of statutory dues: e.g., overtime, holiday wages, etc.)

1. The organisational framework of the Labour Department has primary responsibility for the gross delays in enforcement of awards;
2. Inadequate staff and neglect by overworked staff are major causes of inconvenience to litigants and of severely unreasonable delays;
3. Misplacement of files and other unacceptable excuses are offered as reasons for delays;
4. There is widespread accusation of unacceptable practices;
5. Allocation of resources for such technical facilities as computers and for expansion and training of staff is required;
6. The whole institution needs reorganisation to become more efficient.

Labour Tribunals

1. There is a need to develop Labour Tribunal infrastructures by providing tape recorders, computers and staff;
2. At the initial stage, each application needs to be examined to see whether there is a prima facie case;
3. Serious attempts must be made to bring about just settlements by encouraging the parties to discuss the issues of their disputes;
4. In considering affidavit evidence it is necessary to see its uses as well as the forms of possible abuse (it was pointed out by one Seminar participant that an affidavit could easily be used for lying);
5. Records of the proceedings of Domestic Inquiries are not suitable for admission so long as the employer pays for the Inquiring Officers. A prerequisite for proper Domestic Inquiries is the creation of an independent pool of Inquiring Officers. Legislative amendments to make Domestic Inquiries compulsory must be done only after making impartial inquiries possible;
6. The framing of issues prior to an inquiry can shorten the time of the inquiry;
7. Guidelines for compensation must be developed and laid down. The amount of deposit prior to appeal should also be determined;
8. The concept of misconduct needs to be understood in a comprehensive manner and trivial acts must be excluded from the definition.

Termination of Employment of Workmen Act

1. The TEWA should continue in operation. At the moment there is a lot of propaganda against the TEWA. The abolition of the TEWA can lead to drastic consequences;
2. It was dangerous to remove all cases of inefficiency from the TEWA;

3. In Investment Zones, effective measures should be adopted to prevent employers from leaving the country without discharging their obligations. A trust must be established to deal with such situations;
4. Guidelines should be formulated for the basis of computation of compensation;
5. Time limits should be made realistic and strictly adhered to;
6. As the law stands today, liquidators cannot be made parties to applications under the TEWA. This legal position should be re-examined, and suitable provision should be made to grant relief to employees.

Resolution of Industrial Disputes in the State Sector

1. Special machinery should be devised by Statute Law in consultation with the Public Sector unions and representatives for speedy and effective resolution of industrial disputes regarding Public Officers who come within the definitions of Public Officer in the Constitution;
2. An instrument similar to the IDA should be made applicable to such Public Officers, making it possible for State Sector workers to have arbitration as under the IDA.

III

Conciliation

Panelists:

Mr. S. K. S. Ranaweera, Deputy Commissioner of Labour
Mr. W. K. Francis, Labour Department President
Mr. S. Egalahewa, Attorney-at-Law
Mr. Brito Fernando, Trade Unionist

CONCILIATION is no doubt the best method of settling disputes, industrial or otherwise. This is one of the methods set out in the Industrial Disputes Act (IDA)for the settlement of industrial disputes. Provisions for conciliation are contained in Sections 2, 3(1)(B), and 11-15 of the IDA. The purpose of conciliation is to effect an amicable settlement. However, the general opinion of the participants is that the machinery of conciliation is not relied upon by the disputant parties due to the ineffective manner in which conciliation proceedings are currently handled in the Labour Department.

The participants are strongly of the view that much more emphasis should be placed on conciliation than at present. Conciliation is very basic aspect of dispute settlement and as such it requires a different set-up than what is available now. Conciliation is a process of dispute settlement in which the parties to the disputes directly engage each other in discussion. Although the role of the Labour Officer is to provide a healthy atmosphere to facilitate the disputant parties discussing the matter among themselves, these officers can act as facilitators and persuade the parties to come to an amicable settlement. This sort of counseling needs a lot of patience, skill and persuasive ability to make the machinery more effective and the attempt more fruitful.

There is consensus on the issue of providing a separate set-up for conciliation. It is felt that the present form of conciliation through the Labour Department is beset with inherent difficulties and is not conducive to creating a proper atmosphere for amicable settlement.

The Labour Officers handling these disputes are more keen on enforcing the law than on persuading the parties to settle disputes. Their attitudes, approach and methodology are not conclusive to promoting a settlement. Conciliation is only one among their functions and they do not have the time and patience necessary for conciliatory proceedings. The core issues which may have led to the immediate dispute may not be the ones that receive considered action. The Labour Department has its own problems. It has only a limited number of Labour Officers for the various functions entrusted to them throughout the island. It was revealed that the Department has only 210 Officers. These Officers give more attention to enforcement functions rather than to settling disputes. They are trained for these functions and not for more conciliatory functions and they are not especially trained for conciliatory functions. Conciliation is a special function which needs special skills and a thorough training. Counselling is an art.

It is suggested that a special division be set up in the Labour Department with specially trained personnel for the conciliation of disputes. Alternatively, it is suggested to set up a special Conciliation Board

as recommended in the Report of the Commission on Industrial Disputes (Sessional Paper No. IV of 1970).

It is the opinion of the participants that there should be adequate statutory provisions for summoning key personnel of an establishment party to a dispute to the conciliation proceedings. At present, lawyers and/or establishment representatives who are unable to take decisions are sent for these discussions and, invariably, the discussions conclude without a decision. It is also felt that the presence of lawyers in conciliatory proceedings may not be conclusive for the conciliation effort.

The issue as to whether the proposed new set-up should be included within the present Labour Department itself or whether it should be set up outside the Secretariat was raised but there is no final conclusion on that matter. However, the need for a separate arrangement for conciliation is emphasised.

V

Arbitration

Report on the Workshop on Arbitration

Panelists:

Mr. S. Sritharan
Mr. Sureshchandra
Mr. A. W. Atukorale

Mr. Sritharan introduced the topic and the other panelists contributed.

Arbitration according to the Industrial Disputes Act (IDA) is of two types:

1. Voluntary Arbitration under Section 3 (B) of the IDA
2. Compulsory Arbitration under Sections 4 (1) and 4 (2) of the IDA.

In terms of Section 4 (1) only minor disputes can be referred for arbitration. But there is no definition of minor disputes anywhere in the IDA.

Under Section 4 (2) of the IDA any dispute can be referred for arbitration by the Minister.

In both Sections 4 (1) and 4 (2) of the IDA the Minister refers disputes to arbitration. Therefore they are termed Compulsory Arbitration, because parties have no discretion in the matter.

Now the Minister's power in this regard is not regulated by any statutory provision.

There is also no definition distinguishing between minor and major industrial disputes.

Using this power the Minister refers disputes that are already pending in the Labour Tribunal for arbitration; when this is done the Labour Tribunal loses jurisdiction over these disputes.

There is no time limit within which a matter can be referred to arbitration by the Minister. Therefore, this arbitration clause is used to avoid the time limit determined by the prescription clause in the IDA. It is also pointed out that most of the arbitrations are from Colombo and from the Plantation sector. It is significant that there are no arbitrations from the remote areas. This points to the fact that lobbying is necessary for arbitration; the people of the remote areas do not have the facilities for lobbying.

It is at the discretion of the Minister to define what is a major and what is a minor dispute.

Termination matters, which are within the purview of the Labour Tribunal, are referred for arbitration by the Minister, thereby interfering with the jurisdiction of the Labour Tribunal.

This arbitration clause is very often used to interfere with the rights of the trade unions.

The panel of arbitrators changes with the change of Government and new Governments appoint their own sets of arbitrators. There are no specific qualifications for becoming an arbitrator; that is why even a dentist can be an arbitrator.

Arbitrations from all over the country are heard only on the 9th Floor of the Labour Secretariat. Also, there are only three rooms available for Industrial Arbitration.

Any arbitration award can be repudiated by giving notice of repudiation to the Commissioner of Labour and getting it published in the Government Gazette.

Since the Minister refers matters for arbitration, the Minister's power does not come under judicial review. But if tbe Commissioner can refer matters for arbitration then tbe referral can be subject to judicial review.

After considering these facts, the following recommendations were made:

1. Referral for arbitration should be done by the Commissioner of Labour;
2. Pending disputes or cases dismissed by the Labour Tribunal should not be referred for arbitration;
3. A separate forum for training in arbitration proceedings should be established;
4. No case under arbitration should be refer to the Labour Tribunal;
5. As in the Industrial Court, Section 27 of the IDA should be made applicable and the repudiation provisions should be removed;
6. Competent, experienced and trained personnel should be appointed as arbitrators;
7. Termination matters should not be referred for arbitration;

8. There should be definite time frame within which a matter can be referred for arbitration and concluded;
9. Section 31 (B) 2 of the IDA should be repealed.

V

Labour Tribunals

Panel No. 2: Labour Tribunals

Panelists:

Mr. S. Ranhotty
Mr. A. W. Atukorale
Dr. Joe Silva
Mr. V. Wimalarajah
Mr. D. E. M. Wasalatantry

Mr. S. Ranhotty briefed the participants on the subject of the Labour Tribunal.

Mr. A. Atukorale opened the discussion. He said the Industrial Disputes Act (IDA)was set up to provide for the prevention, investigation and settlement of industrial disputes. Section 31 (C) of the IDA

gives power to the Tribunal to decide all applications on just and equitable principles. Appeal Courts have, however, in some instances, described the Tribunal's actions as the "freedom of the wild ass."

This unique institution is running into such varied and distinct difficulties as the following:

1. The Tribunal cannot compel any one to give evidence before it, either on its own request or on the request of any party. This is an area where remedies are needed;

2. The Tribunals have now resorted to lengthy proceedings. To avoid this and to cut short the proceedings various methods should be adopted. The acceptance of affidavit evidence is one such method. However, affidavit evidence has its own shortcomings and consideration must be given to determining the truth of the statements contained within them;

3. With regard to relief offered by the Tribunal, reinstatement with backwages has not presented a problem. However, with regard to compensation there is a great deal of ambiguity because of successive Supreme Court decisions. Today, compensation is payable whether the termination is just or not, and whether the justification is due to the worker's fault or not;

4. There must be a guideline for the computation of compensation.

Dr. Joe Silva highlighted the significance of the admissibility of Domestic Inquiry proceedings at the Labour Tribunal inquiries. He, however, pointed out that the findings of the Inquiry Officer at the Domestic Inquiry could not be given the same weight as other factors. The finding of an impartial and independent Inquiry Officer may be considered acceptable to both the employer and the worker. This evidence may be considered admissible in the Labour Tribunal.

Mr. V. Wimalarajah highlighted that the mere absence of an applicant should not warrant dismissal of an application. The Tribunal must look into every aspect of a case before dismissing it. He further stated

that the Tribunals are also acting as conciliators and that Tribunals must make every attempt to narrow down differences and to build up confidence among the parties and to assign relief accordingly.

Mr. Pathmarajaiah summarized the Indian experience with Labour Court terminations and reliefs.

The participants discussed and raised various and distinct issues regarding Labour Tribunals in Sri Lanka.

Mr. Ranhotty summarized the submissions made by the participants as follows:

1. Frivolous applications must be dismissed after investigation to determine the correct position;
2. Affidavit evidence has good and bad points. This must be looked into further;
3. Properly and impartially recorded proceedings of both the Domestic Inquiry and the Settlement of the Grievances should be adopted as admissible evidence in Labour Tribunal inquiries;
4. Legislative amendments should be enacted to make Domestic Inquiries compulsory;
5. Parties should agree to and identify the areas to be determined, or frame the issues prior to the inquiry; the inquiry should then by confined to those issues;
6. There must be guidelines with regard to the Tribunal's assignment of relief and/or compensation. Also the amount of deposit to be made prior to appeal should be determined;
7. The infrastructure for Labour Tribunals, including such facilities as typewriters, tape recorders, computers and staff, must be developed;
8. The issue of misconduct should be decided and defined.

VI

Termination of Employment

Termination of Employment of Workmen Act (Special Provisions)

Panelists:

Mr. R. K. S. Suresh Chandra
Mr. A. W. Atukorale
Mr. Linus Jayatillake
Mr. M. Wansapura

Mr. Suresh Chandra, Chairman of the Panel, in introducing the subject, traced the background of the introduction of the Termination of Employment of Workmen Act(Special Provisions) (TEWA) and com-

mented that it has remained in our statute books longer than was originally intended. The purpose of the TEWAwas to prevent summary terminations and arbitrary closures of workplaces. The TEWA applies to the private sector in the case of non-disciplinary terminations and closures. The TEWA lays down the procedure to be followed in such situations. The TEWA is presently subject to much discussion, with the employers especially the foreign investors, taking the stand that it should be scrapped and with the trade unions lobbying for its continuation. Hence, he recommended that the house discuss this statute from the point of view of both the workers and the employers.

Mr. Ajantha Atukorala, too, traced the historical background to this piece of legislation and its purpose. He posed the following questions for discussion:

1. Whether the employer should be required to continue paying the salaries of workers until the Commissioner of Labour decides upon the application in respect of termination. He pointed out that when application is made under Section 2 of the TEWA the employer has to continue to pay until the decision is pronounced. Should the same procedure apply in the case of closures?

2. Whether terminations on grounds of inefficiency should come within the purview of the TEWA. He pointed out that in light of the decision in the St.Anthony's case such terminations, too, are considered non-disciplinary terminations. He posed the question: How can one achieve greater productivity if one is saddled with inefficient personnel? If a Managing Director is considered inefficient should the employer go through TEWA proceedings? He pointed out that there is a thin line between negligence and misconduct;

3. The TEWA does not provide protection for workers in BOI Zones, especially because investors resort to the tactics of leaving the country without discharging their obligations towards the workers;

4. There is no proper basis for computation of compensation, resulting in arbitrary decisions. Both parties have a right to know the basis on which such compensation is computed;
5. The time limits set out in the TEWA are impractical; viz the TEWA gives three months for the disposal of applications;
6. Whether the liquidators of companies can be called upon pay compensation when closures take place?

Mr. Linus Jayathilake, responding to the above issues, briefed the house on the real situation that exists on the ground today due to market conditions. He said that it has come to a situation where unions sometimes have to raise matters concerning the employers' interests with the Government and the banks, so that workplaces will remain in business.

He was of the view the TEWA should continue and that employers should be required to pay in all cases of terminations until an Order is made by the Commissioner or agreement is reached between employers and workers.

Mr. Wansapura dispelled the fears that TEWA does not apply to BOI Zones. He emphasized that all labour legislation applies in these areas as well.

After discussion the general consensus of the house on this subject was as follows:

1. The TEWA should continue in operation;
2. It was dangerous to remove all cases of inefficiency from TEWA;
3. In BOI Zones effective measures should be adopted to prevent employers from leaving the country without discharging their obligations;
4. Guidelines should be formulated for the basis of computating compensation;

5. Time limits should be made realistic and strictly adhered to;
6. As the Law stands today, liquidators cannot be made parties to applications under TEWA. The legal position should be examined and suitable provisions made to grant relief to workers.

VII

State Sector

Resolution of Industrial Disputes in the State Sector

Panel:

Dr. Joe Silva (Chairman)
Mr. S. Egalahewa
Ms. Nirmala Perera
Mr. Linus Jayathilaka

Dr. Joe Silva observed that the Industrial Disputes Act (IDA),which was applicable to the Private Sector, was not applicable to the State Sector because of the provision found in Section 49 of the IDA. He further said that there was a conceptual difficulty in applying the IDA to the State Sector, namely to Public Officers, within the meaning of our Constitution. He observed that because Public Officers hold office during

the "pleasure" of the President in terms of Article 55 (1) of the Constitution and because there is no contract of employment between the State and Public Officers, there was a difficulty in applying the IDA to Public Officers. Having referred to the "pleasure" principle, which he considered poses a problem for treating Public Officers in the same way as Private Sector workers, he invited Mr. Egalahewa to address the Seminar.

Mr. Egalahawa pointed out that Industrial Disputes Resolution in the State Sector was an important matter but that it had been neglected for a long period. He pointed out that there were several sectors of employment other than the Private Sector. He referred to workers in Public Corporations, Statutory Bodies, Cooperative Societies and Local Authorities.

He spoke of the immense difficulties faced by the public and the disruption of public life caused by industrial unrest among Public Officers. He referred to the recent trade union action taken by doctors in Government Hospitals and the strike action by Postal Workers in the recent past in Sri Lanka as causing great hardship to the public at large.

Mr. Egalahewa said that strike action by Public Officers is sought to be remedied according to the Emergency Regulations under the Public Security Ordinance, and the Essential Service Orders under the same Ordinance. He was of the view that these regulations and orders were often not sufficient to deal with such situations.

Mr. Egalahewa stated that Public Officers having a labour problem could only appeal first to their Head of Department, next to the Secretary of the Ministry and finally to the Public Service Commission. Apart from that, Public Officers could also make an application to the Supreme Court under Article 126 of the Constitution, alleging a violation of the Right to Equality guaranteed under Article 12 of the Constitution. He said that applications under Article 126 have virtually converted the Supreme Court into a Labour Tribunal for Public Officers. He was of the view that there was inadequate machinery for the resolution of Public Officers' Industrial Disputes. He pointed out that Local

Government Officers had the machinery of the Local Government Service Commission. Cooperative Workers could appeal to the Cooperative Employees Commission under Act No.12 of 1972. On the other hand Public Officers did not have such machinery for resolution of their Industrial Disputes.

He further commented that in India the Indian Industrial Disputes Act had been made applicable to Public Officers as well. He queried why such a position cannot exist in Sri Lankan law.

He said that any machinery for the resolution of Industrial Disputes in the Public Sector will have to take account of the reality of Trade Unions in the Public Sector. He said that Workers' Committees, and later Employees' Councils created by the law in the past failed because those organizations were intended to replaced Trade Unions.

Thereafter Dr. Joe Silva briefly stated that the IDA cannot be extended to the Public Sector due to the "pleasure" principle embodied in Article 55 of the Constitution.

Ms. Nirmila Perera, speaking thereafter, pointed out that in addition to the remedy of an application to the Supreme Court under Article 126, there is also the remedy of petitioning the Ombudsman (Parliamentary Commissioner for Administration). She further pointed out that in a roundabout way even Private Sector workers could complaint of violations of fundamental Rights under Article 12 if, for instance, the Commissioner of Labour arbitrarily refuses to carry out his statutory duties in respect to Private Sector workers.

Mr. Linus Jayathilaka stated that the phenomenon of globalisation tended to reduce employment in the State Sector and that globalisation brought with it several ill-effects.

At this point Dr. Joe Silva invited Mr. Pathmarajaiah to describe the Indian position with regard to Indnstrial Disputes involving Public Offices.

Mr. Pathmarajaiah (a senior advocate from Bangalore, India) stated that under Article 310 of the Indian Constitution Public Officers (namely,

employees of the Central Government) held office at "pleasure." But he said that Article 311 provided that no such Officer could be punished or dismissed except by "due process of law." This, he said, meant that the "pleasure" principle existed only on paper and that Public Officers enjoyed security of tenure. He referred to the case of George Fernandez (now Minister of Defense in India) who while a Public Officer was dismissed without due process. This Officer was able to get his post back by going to court. He also pointed out that in the Indian Industrial Disputes Act, which applied even to Public Officers, "workman" had a restricted meaning. Workers in supervisory grades and workers earning a salary of over Rs 1600 per month were excluded. He further said that in 1995 the Central Administrative Tribunal had been set up for all Central Government workers. This body looked into the grievances of all such workers.

Mr. Nimal Dassanayake said that although Sri Lanka's Article 55 embodied the "pleasure" principle, as in India it existed only on paper in our country as well, because in our country arbitrary action with regard to Public Officers could also be challenged by them in applications to the Supreme Court under Article 126.

Mr. Basil Fernando referred to "globalisation," which is the trend today. He said that globalisation brought about its own problems. He said that due to globalisation there will be in the future the need to protect workers in the State Sector to a greater degree. He said that we may have to consider setting up an authority to prevent large-scale terminations of services in globalised or privatized industries. He said that in the future we will be compelled to look into much wider issues.

Mr. Egalahewa expressed the view that even during colonial days Sri Lankan Public Servants held office at the "pleasure" of the Crown. But that was not considered to be any impediment to certain categories of public servants being permitted in 1947 to form Trade Unions. That happened when, after the General Strike of 1947, the Trade Union Ordinance was suitably amended. He said that in spite of Public Officers holding office at "pleasure" under Article 55, the IDA could be extended

to the Public Officers and special machinery could be devised by law for the resolution of disputes involving Public Officers.

The following two recommendations could therefore be considered:

1. That special machinery be devised by statute law for speedy and effective resolution of Industrial Disputes concerning Public Officers coming within the definition of Public Officer in the Constitution;
2. That the IDA be made applicable to such Public Officers, making it possible to use the disputes resolving procedures, including arbitration, under the IDA.

VIII

Enforcement

The Discussion on Enforcement Procedures

The subject for discussion is enforcement procedures. This is a very vast subject, which covers enforcement of the following:

1. Labour Tribunal Orders;

2. Non-payment of EPF, ETF;

3. Non-payment of statutory dues: e.g., overtime, holiday wages, etc.

The enforcement function is now performed by Magistrates; prosecution is done by the Department of Labour. There is frustration as a result of long delays in enforcement by Magistrates. The workload of Magistrates is far too heavy, as they have to handle many varied matters: namely, criminal, price control, customs, excise, tax, traffic and other offences.

The question regarding enforcement of Labour Tribunal Orders has been discussed at various conferences, seminars, etc., and there has been consensus that Labour Tribunals should be empowered to enforce their own orders.

In this context it is appropriate to examine the historical background of the enforcement of Labour Tribunal Orders.

The Labour Tribunal Machinery was established as far back as May 1959; i.e., 39 years ago. Labour Tribunal Presidents were appointed by the Public Service Commission and were under the control and supervision of the Commissioner of Labour. The enforcement function, too, was under the Commissioner of Labour.

In April 1972, with the amendment of the Constitution, the Labour Tribunals come under the Judicial Service Commission and the Ministry of Justice. Labour Tribunal Presidents are Judicial Officers. It is unfortunate that, although Labour Tribunal Presidents have been Judicial Officers since the year 1972, even now there is confusion in the minds of many as to whether they are Judicial Officers.

Although the Constitution was amended in 1972, specifying that the Presidents of Labour Tribunals are Judicial Officers, no action has been taken during the last 36 years to amend the IDA. As a result of the IDA not having been amended up until now the Labour Department continues to perform enforcement functions with respect to Labour Tribunal Orders.

The Judicial Service Commission has now given careful thought to this question of enforcement of Labour Tribunal Orders and has decided to appoint Presidents of Labour Tribunals Additional Magistrates for the purpose of enforcing Labour Tribunal Orders. There is a lot of discussion on this subject. Views have been expressed that there could be legal problems with regard to this. What I can say is this: If the Presidents enforce their own orders the workers will get relief... [text missing] in quick time. There cannot be any legal problems as some seen to think... [text missing] for the reason that the decision was made by the

Judicial Service Commission, which is comprised of the Chief Justice and two Judges of the Supreme Court.

The only thing which remains to be done is for the Presidents of Labour Tribunals to get together and formulate the *modus operandi.* We must all do something.

The Labour Officials charged with enforcement in the Magistrate Courts can perform this function before the Labour Tribunals. The Judicial Service Commission can direct the Magistrates to transfer the cases regarding enforcement of Labour Tribunal Orders to the Labour Tribunals.

I propose that this assembly works out the modalities of the enforcement procedure of Labour Tribunal Orders by the Labour Tribunal.

IX

Letters to the Chief Justice and Commissioner of Labour

VIGIL LANKA MOVEMENT
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August 10, 1998

Hon'ble the Chief Justice of Sri Lanka,
Chambers of the Chief Justice,
Superior Courts Complex
Colombo 12

Hon'ble Chief Justice,

We write on behalf of the Asian Human Rights Commission of

Hong Kong (AHRC), and the Vigil Lanka Movement of Sri Lanka. Vigil Lanka Movement (VLM) is an organisation devoted to promotion of legal reforms conducive to the achievement of human rights in our country. VLM and AHRC have held a consultation on Legal Reforms Relating to Labour Law, from 31st July to 2nd August, 1998. The participants were persons with close familiarity with the different areas of labour legislation in this country. They were lawyers, Presidents of Labour Tribunals and trade unionirs. We wish to submit to you certain matters of grave concern that were brought up at this seminar.

The specific purpose of this letter is to bring to your notice one matter of grave concern expressed at this seminar, relating to the administration of Labour Tribunals, namely the shocking limitations relating to the absence of basic infra-structural facilities required for functioning of these Tribunals. During our seminar it became very clear that the single factor contributing most to the immense difficulties in the administration of Labour Tribunals is the absence of basic infrastructural facilities. It was revealed that the building at Vauxhall Street, Colombo, which houses some of the Tribunals, is a dilapidated one, totally unfit for the purpose. There is a gross inadequacy of stenographers for work in the Tribunals. This inadequacy was pointed out as a primary cause of postponement of cases in these Tribunals as well as in inquiries before Industrial Arbitrators who sit at Narahenpita. We are sure that you are aware of the difficulties caused by delays in the administration of justice. In this specific field, the very purpose of the Industrial Disputes Act seems to have been lost. A grave concern was expressed by participants from trade unions about the gradual loss of faith in these institutions among the public.

Perhaps, just the increase of a few more stenographers will not solve this problem. The provision of computers and making provision for tape-recording of proceedings which could later be reduced to writing, may help a great deal to reduce the very serious problems now besetting these institutions. The objection that the making of these provisions may be too expensive does not seem to be sound. Almost

every institution is now reverting to the use of computers and tape recording has become a common practice. In fact, the recording facilities now used in our Tribunals by means of stenographers are primitive by modern day standards. We are also aware that international assistance is available for modernisation of communication systerms in courts. We are aware that at least on one occasion such assistance has been sought by the Government of Sri Lanka.

A further matter of importance is that some basic facilities such as proper toilets are not available to litigants who come before these Tribunals. As litigants spend long hours at these institutions the inconvenience caused is considerable.

The matter raised above were hilighted at the seminar and relate to the dignity of the courts and the basic respect owed by the State to all persons who attend the courts, namely Presidents of Tribunals, staff of Tribunals, parties to litigation, witnesses and lawyers.

We take this opportunity of assuring you of the cooperation of AHRC and VLM in resolving the matters to which we have drawn your attention.

Thank you.

Yours faithfully,

Basil Fernando
Director, AHRC

Sunil Coorey
President, VLM

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August 10, 1998

The Commissioner of Labour,
Labour Secretariat,
Colombo 5.

Dear Commissioner of Labour,

I write on behalf of the Vigil Lanka Movement (VLM), which is an organisation devoted to promotion of legal reforms conducive to achievement of human rights in our country. VLM has held a consultation on Legal Reforms Relating to Labour Law from 31st July to 2nd August, 1998. The participants were persons with close familiarity with areas of labour legislation in this country, such as lawyers, Labour Tribunals Presidents, and trade unionists. I wish to intimate to you the conclusions and resolutions arrived at this seminar.

The specific purpose of this letter is to bring to your notice one matter of grave concern expressed at this seminar relating to the administration of labour legislation, namely the immense difficulties experienced in the enforcement of awards of Labour Tribunals. At this seminar a general dissatisfaction was expressed relating to this matter. The long delays in enforcement, many visits the litigants have to make to departmental officials, and the misplacement of records in many instances, were specially mentioned. Procedural difficulties in statutory arbitrations was another matter of concern raised at this seminar. There was general concern that whatever might be achieved by the machinery set up under the Industrial Disputes Act, the Termination of Employ-

ment (Special Provisions) Act, and the Workmens' Compensation Ordinance, was lost due to difficulties in the enforcement process.

I take this opportunity to assure of the cooperation of VLM will extend to you and to the officials of your Department in whatever action you might consider taking towards resolving these problems.

Thank you.

Yours faithfully,

Sunil F. A. Coorey
President, VLM

VIGIL LANKA MOVEMENT (VLM)

President: S.F.A. Coorey (Attorney at law)
Secretary: W.P.A. Fernando (Attorney at law)
Project Coordinator: A.W. Athukorale (Attorney at law)
Treasurer: T.M.S. Nanayakkara (Attorney at law)
Editor: P.Nanayakkara (Attorney at law)
Assistant Secretary: N. Dassanayake (Attorney at law)

Reply from the Chief Justice of Sri Lanka

CHIEF JUSTICE'S CHAMBERS
SUPREME COURT
COLOMBO 12

31.8.1998

Mr. Sunil Cooray,
President
Vigil Lanka Movement
55/7 Nimala Maria Mawatha
Hendala
Wattala

Your letter dated 10.8.1998 addressed to the Hon. Chief Justice was received on 25.8.98.

I am directed by the Chief Justice to inform you that the matter relating to the administration of Labour Tribunals referred to by you fall with the purview of the Ministry of Justice, E.A. & N.I. A copy of your letter was forwarded to the Secretary, Ministry of Justice, E.A. & N.I., for his information and necessary action.

(signed)
Secretary to Chief Justice

X

Participants of the Seminar

Ajantha Atukorala, Attorney-at-Law

Sunil Coorey, Attorney-at-Law

Nimal Dassanayake, Attorney-at-Law

D. L. Dharmaratne, Attorney-at-Law and N. P.

S. Egalahewa, Attorney-at-Law

Anthony Fernando, Attorney-at-Law

Basil Fernando, Executive Director, Asian Legal Resource Centre and Asian Human Rights Commission, Hong Kong

Britto K. J. Fernando, Trade Union Activist

Sunil Fernando, Attorney-at-Law

Daya S. Ferndinandsz, Attorney-at-Law and N.P.

W. K. Francis, President, No. 8 Labour Tribunal

Sudarshana Gunawardana, Attorney-at-Law

K. M. G. Hemachandra, President, Labour Tribunal

Linus Jayathilake, President, United Federation of Labour

Priyanthi Liyanarachchi, Attorney-at-Law

Mahinda Nanayakkara, Attorney-at-Law

M. S. Padmarajaiah, Professor of Law, Senior Central Government Standing Counsel and Advocate, Bangalore, India

Nirmala Perera, Head, Faculty of Law, University of Colombo

Sunil Gamini Perera, District Judge, Kandy

Cecil Rajaratne, Attorney-at-Law

S. Ranhotty, President, Labour Tribunal

T. Sachithanandan, Attorney-at-Law

Vyjayanthi Senaratne, Attorney-at-Law

Dr. H. J. F. Silva, Principal, Law College

M. Sritharan, President of Labour Tribunal

R. K. S. Sureshchandra, Attorney-at-Law

V. Vimalarajah, Attorney-at-Law

D. J. Wansapura, Director, Bureau of Overseas Investment

D. G. M. Wasalatantri, Attorney-at-Law

Terrence Wickremasinghe, Attorney-at-Law

M. Willaddara, President, Labour Tribunal, Kandy

THIS CONSULTATION on labour law reforms was preceded by a series of other discussions on human rights-related law reforms. They were the Consultation held in Bangalore, India, in 1996 on Basic Criminal Law Reforms; the Consultation on Social Justice and the Judiciary, which concentrated on judicial reform; the Seminar on the Independence of the Judiciary; and the Consultation on Sub-judice. Many similar meetings have been held in some countries in Asia. Prominent examples include Consultations on Judicial Reforms in Cambodia and in Mainland China. There is a series of publications explaining the methodology of these consultations as well as the conclusions reached in each seminar. They are:

Human Rights Related Legal Reforms (Sri Lanka);

Judiciary and Social Justice (Sri Lanka);

The Problems Facing the Cambodian Legal System (Cambodia).

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