LST REVIEW

Volume 14 Issue 201 July 2004

MIGRANT WORKERS

LAND AND WATER

LAW & SOCIETY TRUST

CONTENTS

Law & Society Trust,
3, Kynsey Terrace, Colombo 8
Sri Lanka.
Tel: 2691228, 2684845 Telefax: 2686843
e-mail:lst@eureka.lk
Website: http://www.lawandsocietytrust.org

ISSN - 1391 - 5770

Editor's Note ... ...

This Issue of the Review combines analysis of a challenging amalgamation of issues with one important theme; the protection of the vulnerable and the marginalised in Sri Lanka.

We commence with a thoughtfully critical examination of the Sri Lankan Foreign Employment Act, No. 21 of 1985 by ***Nura Maznavi*** who discusses the future of labor migration and rights for migrant workers in Sri Lanka and suggests amendments to the Act, based upon precedent established by the Philippines. A crucial part of her recommendations concern the ensuring of voting rights of the migrant workers who have been completely bypassed in the current reforms proposed to the electoral and voting systems.

She takes as her centre point of discussion, the Migrant Workers and Overseas Filipinos Act of 1995 which recognises the right of Filipino migrant workers and overseas Filipinos to participate in the democratic decision making processes of the State. These rights were further buttressed by the Overseas Absentee Voting Act (Republic Act No. 9189) of 2003 granting all qualified Filipino citizens abroad the right to vote by absentee ballot, salient points of which are set out in an annexure to her paper. While the implementation of the Act is yet far from perfect, what is important is that the Philippines has taken the first step towards recognising the rights of migrant workers in this regard.

Her analysis is set within an international law context wherein she calls for a thorough analysis of the International Convention on the Protection of All Migrant Workers and Their Families, (ratified by Sri Lanka in 1996 and entered into force in July of 2003, but which has yet to be implemented into law in this country), in relation to the Foreign Employment Act. Her conclusion that the existing law should be examined for conformity with this Convention as well as other international treaties by which Sri Lanka is bound, warrants close attention.

The Review also publishes two discussion papers that are of immediate relevance to Sri Lanka by ***Sarath Fernando*** and ***Dilhara Pathirana*** relating to recent attempts to privatise water resources and substantially overhaul laws relating to state land grants in this country. Both writers make the point that these policies should be more carefully and publicly reasoned and take the stand that water and state land entitlements are issues of democracy and rights, which ought not to be subjected to the profit based aims of the marketplace.

Kishali Pinto-Jayawardena

Reforming the Sri Lankan Foreign Employment Act: Increasing Protection for Migrant Workers and Employing Lessons from the Philippines

Nura Maznavi[*]

Introduction

There are an estimated one million Sri Lankans currently working overseas.[1] At $1 billion per year, the remittances of these workers have surpassed tea and equaled garments to become one of Sri Lanka's top net foreign exchange earners.[2] The importance of these workers to the Sri Lankan economy is apparent, yet the few measures currently in place to protect their interests are either insufficient or inadequately implemented. With increased globalization, the opening of international labor markets, and rising unemployment, labor migration shows no sign of abating; if protective measures are not put into place, it is expected that the problems associated with labor migration will exacerbate over time.

As such, now is the optimum time for the Sri Lankan government to acknowledge the importance of migrant workers to the national economy and confront and address problems associated with labor migration. The optimal way would be a reformation of the Sri Lanka Foreign Employment Act. An amended Act would send a message that the government is committed to ensuring the rights and protecting the welfare of migrant workers.

The Sri Lanka Bureau of Foreign Employment Act

The Sri Lanka Bureau of Foreign Employment Act ("the Act") was passed in 1985 as a regulatory scheme for migrant workers going abroad. The Act, as it was originally drafted, did not anticipate large numbers or categories of worker migrating overseas; thus, the Act provides for maximum labor migration with minimum worker protection. Since the passage of the Act, the number of migrant workers has increased significantly, radically altering both the demographics of labor migration and the problems associated with it. The changing nature of labor migration since the Act's passage has made the Act obsolete in many areas and has proven ineffective in addressing many of the problems currently faced by migrant workers. A reformation of the Act is necessary and must be undertaken with respect to both community concerns and the incorporation of appropriate and relevant international standards. The reformation of the Act must be approached from the perspective of protecting workers and promoting safe migration and not with the objectives of restricting the freedom of movement or merely increasing foreign exchange.

Under the existing Act, workers lack basic labor guarantees and are vulnerable to exploitation; the structure of the Act is flawed and provides no adequate recourse for workers with grievances. Many problems associated with labor migration, though peripherally mentioned, are not addressed in a constructive or satisfactory manner. This paper is intended to serve as an introduction to the Act and

---

[*] Nura Maznavi is a Fulbright Scholar, affiliated with the American Center for International Labor Solidarity in Colombo, Sri Lanka. She received her BA in Politics from Pomona College and her JD, with honors, from The George Washington University Law School.

[1] American Center for International Labor Solidarity, "The Struggle for Workers' Rights," 2003.

[2] International Office of Migration, "IOM Calls for an End to Violence Against Migrant Women and the Trafficking of Women and Children into Sexual Bondage," March 7, 2003.

background for those interested in its reformation; it will non-exhaustively list major problems faced by migrant workers and identify the Act's treatment or neglect of the particular issue.[3]

In addition to identifying the appropriate provisions of the Act, this article will cite relevant sections from the Migrant Workers and Overseas Filipinos Act of 1995 ("Filipino Act"), a comprehensive foreign employment act that is often cited as a model for sending countries.[4] A review of both the Sri Lankan and Filipino Act will be followed by preliminary recommendations for reformation of the Sri Lankan Act, based on ideas generated through a combination of meetings with NGOs, returned migrant workers, academics, and officials from the Sri Lanka Bureau of Foreign Employment ("Bureau" or "Foreign Employment Bureau").

Current Problems with the Act

A fundamental problem with the Act is its basic purpose of promoting migration and furthering employment opportunities for Sri Lankans abroad while not protecting the rights of current migrant workers. The text itself states that it is "[a]n Act to provide for the establishment of the Sri Lanka Bureau of Foreign Employment and to regulate its powers and duties."[5] The commitment inherent within its provisions to actively promote labor migration is demonstrated through a number of its articulated objectives:[6]

> To promote and develop employment opportunities outside Sri Lanka, for Sri Lankans;[7]
> To undertake measures to develop overseas markets for skills available in Sri Lanka;[8]
> To regulate the business of foreign employment agencies and recruit Sri Lankans for employment outside Sri Lankans;[9]
> To undertake research and studies into employment opportunities outside Sri Lanka for Sri Lankans;[10]

These stated goals clearly indicate that the purpose of the Act is to bolster overseas employment opportunities for Sri Lankans. While there are some objectives relating to the welfare and protection of workers, these provisions are vague and concentrate more on the employment welfare of workers rather than the physical integrity of the workforce.[11] Furthermore, as overseas employment is the

---

[3] The author recognizes that there are many issues that cannot be adequately covered due to the limited scope of this article. Some areas for further research will be discussed towards the end of the paper.

[4] Republic Act No. 8042, Migrant Workers and Overseas Filipinos Act of 1995 ("Filipino Act"). As will be demonstrated in this paper, the Filipino Act contains many comprehensive protections for migrant workers.

[5] *Id.*

[6] Sri Lanka Bureau of Foreign Employment Act, No. 21 of 1985 ("Sri Lankan Act"), pt. I, 15.

[7] *Id.* at 15(a).

[8] *Id.* at 15(c).

[9] *Id.* at 15(e).

[10] *Id.* at 15(k).

[11] Objectives relating to the welfare of workers:

- "To undertake the welfare and protection of Sri Lankans employed outside Sri Lanka." *Id.* at 15(m);
- "To establish a workers' welfare fund." *Id.* at 15(n);
- "To provide assistance to Sri Lankan recruits going abroad for employment." *Id.* at 15(p);
- "To receive donations and contributions from Sri Lankans employed outside Sri Lanka and use such donations and contributions for the rehabilitation, guidance, and counseling of, and the provision of information and assistance to, the families of such Sri Lankans." *Id.* at 15(q);
- "To undertake investments on behalf of Sri Lankans employed outside Sri Lanka." *Id.* at 15(r);
- "To undertake programs for the rehabilitation of Sri Lankans who return to Sri Lanka after employment outside Sri Lanka." *Id.* at 15(s).

primary objective of the Act, these welfare provisions were constructed under the framework of promoting migration, essentially making them only a secondary goal of the Act.

The objectives do not specify making overseas employment contingent on the fair treatment of migrant workers, providing assistance domestically for aggrieved workers, or helping to develop employment opportunities for Sri Lankans in the country. Through the promotion of overseas employment, the Bureau absolves the State of its responsibilities domestically.

Filipino Act

In contrast, the Filipino Act, from the outset, states the goal of the Act: "to institute the policies of overseas employment and establish a higher standard of protection and promotion of the welfare of migrant workers, their families, and overseas Filipinos in distress."[12] The Filipino Act reiterates the State's commitment to providing "adequate and timely social, economic and legal services to Filipino migrant workers" and makes the overseas employment program contingent on the fair treatment of Filipino Workers.[13]

In addition to stating that the primary goal of the Filipino act is to protect and promote the welfare of migrant workers, the Filipino Act also places responsibility for job creation on the Filipino State, not the Overseas Employment Bureau. The Act states that "[w]hile recognizing the significant contribution of Filipino migrant workers to the national economy through their foreign exchange remittances, the State *does not promote overseas employment* as a means to sustain economic growth and achieve national development."[14] It further states that "the State . . . shall continuously create local employment opportunities and promote the equitable distribution of wealth and the benefits of development."[15]

Recommendations relating to Reform of the Act

Since the passage of the Act in 1985, Sri Lanka's migrant worker population has increased significantly. It is clear that the original purpose of the Act which is promoting employment opportunities for Sri Lankans abroad has been fulfilled; a reformation of the Act is therefore timely in order to change the objectives of the Act so that the paramount importance of welfare and protection of migrant workers is recognized. A reformed Act must explicitly state that the purpose of the Act is to protect the economic, psychological and physical interests of Sri Lankan migrant workers and that the State and Foreign Employment Bureau will do everything within their capacity to make sure the Act is properly implemented.

It is also imperative that the Act devolves the responsibility of job creation from the Foreign Employment Bureau and places the burden on the State. Like the Filipino Act, a reformed Sri Lankan Act should state that, while the contributions of migrant workers are noted and appreciated, overseas

---

[12] Filipino Act

[13] "The existence of the overseas employment program rests solely on the assurance that the dignity and fundamental human rights and freedoms of the Filipino citizens shall not, at any time, be compromised or violated." Filipino Act at sec. 2(c).

[14] *Id.* (emphasis added)

[15] *Id.*

employment should not be relied on to promote national economic growth or increase foreign exchange.

BOARD COMPOSITION

Board members are all ministry appointees

Sri Lankan Act

The composition of the Bureau's Board, as articulated in the Act, is the source of concern for many who see it as a recipe for conflicts of interests. All members of Sri Lanka's Bureau of Foreign Employment Board ("Board") are political appointees.[16] These appointees hold their positions at the mercy of the minister who may, without reason, remove any director from office,[17] causing problems in regard to oversight and accountability.

Of particular concern are the four slots on the Board allotted to representatives of Foreign Employment Agencies; these members are to be appointed by the minister.[18] The presence of employment agencies on the Board pose certain fundamental problems:

The foreign employment agent chosen clearly has ties with the minister. A serious conflict arises if the employment agency of one of these representatives is accused of exploiting workers or if an individual worker lodges a grievance against the offending agency. This conflict clearly militates against the interests of migrant workers and results in the perception that the Board will be less likely to prosecute agencies that have representatives on the Board.

The presence of four employment agency representatives creates a serious imbalance in the composition of the Board. Because there are no representatives of workers, NGOs or trade unions, all Board decisions will necessarily be in the interest of employment agencies.

Employment agents who have a financial interest in migration cannot also play a regulatory role. As a business, employment agencies are concerned with money and increasing profits. It is impossible for employment agents to adequately protect the interests of something in which they have a financial stake. Although the Act includes a 'bias clause', requesting any director who may have a personal investment in a particular proceeding disclose the nature of this interest and recuse him/herself from the matter, this clause is not sufficient.[19] It does not address the fundamental, unsolvable problem of having a representative on the Board who may personally profit from decisions made in his/her official capacity.

In addition to the aforementioned problems involved with having a Board consisting entirely of political appointees, this situation is particularly acute in Sri Lanka, given the political instability in

---

[16] "BOARD COMPOSITION: Bureau shall have a Board of Directors consisting of the following eleven members:

a) One member appointed by the Minister (with consultation from the Minister of Finance)
b) One member appointed by the Minister (with consultation from the Ministry of Foreign Affairs)
c) One female member appointed by minister, with consultation from ministry of women's affairs
d) Eight others appointed by Ministry, 4 of whom shall be reps of foreign employment agencies."

Sri Lankan Act at pt. I, 5(1).

[17] "The minister may, without assigning a reason, remove any director from office." *Id.* at pt. I, 5(6)(a).

[18] *Id.* at pt. 1, 5(1)(d).

[19] "A director who is in any way directly or indirectly interested in any contract made or proposed to be made by the Bureau shall disclose the nature of his interest at the nature of the Board." *Id.* at pt. I, 7.

the country. As members of the Board are all political appointees, the composition of the Board changes with every election. The constant turnover of the Board impedes progress and hinders the continuity needed to implement effective change.

Filipino Act

The Filipino Foreign Employment Act is much more forthright in its prohibition of interested Board members who could potentially cause a conflict of interest. The Filipino Act makes it:

> "unlawful for any official or employee of the Department of Labor and Employment, the Philippine Overseas Employment Administration, or the Overseas Workers Welfare Administration, or the Department of Foreign Affairs, or other government agencies involved in the implementation of this Act, or their relatives within the fourth civil degree of consanguinity or affinity, to engage, directly or indirectly, in the business of recruiting migrant workers as defined by the Act."[20]

The converse of this clause would prohibit a recruitment agent from serving on the Overseas Employment Board or in any capacity where they could affect decisions made in the interest of migrant workers.

Recommendations

Sri Lanka should incorporate a non-conflict of interest provision to make sure that the Board is seen as a legitimate body and one that is capable of ensuring the welfare of workers and bringing about justice without the taint of bias. Employment agents, or those having financial ties to labor migration, whether they are associated with recruitment or travel, should be barred from serving on the Board.

Although ministry appointees will likely remain the preferred method of Board membership, there should be some basic criteria applicable in respect of these appointments. Such criteria could include expertise with labor migration. These appointees should be subject to confirmation and review and should be replaced only for just cause; this would prevent arbitrary or politically motivated terminations.

No defined role for trade unions/NGOs/individual workers

Sri Lankan Act

Despite the importance of labor unions, NGOs and individual workers to the welfare and overall well being of migrant workers, the current Act contains no provisions defining a role for any of these entities. In addition, none of these organizations are represented on the Bureau's Board. The contributions that these organizations have made to the labor migration movement in Sri Lanka are invaluable. They have consistently provided essential services for migrant workers, filling the

[20] Filipino Act at II, sec. 8.

vacuum created by the government's failure to adequately address these issues. Furthermore, they are constant, non-partisan bodies in a political environment that is unstable and constantly changing.

Filipino Act

The Filipino Act clearly sets out a defined role for both NGOs and individual workers. NGOs are recognized as legitimate partners of the State in the promotion of the welfare of migrant workers.[21] Additionally, the Filipino Act contains a provision that specifically recognizes the right of Filipino migrant workers and overseas Filipinos to be represented in institutions relevant to their own overseas employment.[22] The only missing element from the Filipino Act is the imperative role of trade unions, although organized workers are mentioned as part of the Act's commitment to providing full protection to all labor.[23]

Recommendations

A reformation of the Act is necessary to incorporate trade unions, NGOs and individual workers into the hierarchy and leadership positions on the Board. These entities must be given a defined and articulated role to ensure that all interests and groups associated with labor migration are incorporated and represented fairly and accurately. The Act must ensure the representation of these groups, whether through a quota system or mandatory set-asides.

INSURANCE SCHEME

Sri Lankan Act

Many workers complain that the current insurance mechanism in place is unreliable, inefficient, and inadequate. In October of 1994, the SLBFE instituted the Suraksha (protection) insurance scheme. The plan, open to all occupational groups, is non-contributory, and the Bureau covers the premium.[24] This plan was intended to provide a safety-net for migrant workers and covers expenses related to emergency airfare and death transport and compensation for partial and complete disablement. The scheme was extended to cover family members in July of 1995.[25]

There are many problems with this plan including the non-payment of benefits, the unreliability of payments, and the protracted time frame for the receipt of compensation. Furthermore benefits under this scheme do not adequately compensate for the types of injuries suffered by workers or take into account the different types of injuries suffered by workers in different fields.

---

[21] "Non-governmental organizations, duly recognized as legitimate, are partners of the State in the protection of Filipino migrant workers and in the promotion of their welfare, the State shall cooperate with them in a spirit of trust and mutual respect." *Id.* at sec. 2(h).

[22] "The right of Filipino migrant workers and all overseas Filipinos to participate in the democratic decision making processes of the State and to be represented in institutions relevant to overseas employment is recognized and guaranteed." *Id.* at sec. 2(f).

[23] "The state shall afford full protection to labor, local and overseas, organized and unorganized, and promote full employment and equality of employment opportunities for all." *Id.* at sec 2(b).

[24] http://www.ilo.org/public/english/dialogue/govlab/admitra/papers/1998/lanka/ch2.htm

[25] *Id.*

Filipino Act

The Filipino Act provides that the repatriation of the worker and his/her belongings, or the remains of a deceased worker, is the sole responsibility of the agency that recruited or deployed the worker overseas.[26] In cases where the principal recruitment agency cannot be identified, the Filipino Act provides for the creation of the emergency repatriation fund to cover the necessary costs.[27] The Filipino Act fails, however, to provide for the compensation of work related injuries.

Recommendations

The importance of a functioning insurance scheme necessitates that one be incorporated directly into the Foreign Employment Act instead of simply being a separate program of the Bureau. The incorporation of such a provision should be accompanied by guidelines to detail a procedure whereby workers can receive timely and adequate compensation for work related injuries. Additionally, more responsibility should be placed on recruitment agencies, in order to lessen costs for the Bureau. The Bureau should, however, have resources available if recruitment agencies are either unwilling or unable to cover the costs of compensation or repatriation.

TRAFFICKING

Sri Lankan Act

Although there are no concrete numbers on trafficking from Sri Lanka, it is generally acknowledged that trafficking related to labor migration is on the rise. The UN Trafficking Protocol, Article 3 defines trafficking as:

> the recruitment, transportation, transfer, harbouring or receipt of persons by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.
>
> The consent of the victim of trafficking to the intended exploitation set forth above is irrelevant where any of the means set forth above have been used.[28]

Unregulated and unregistered recruitment agencies and sub-agents in Sri Lanka routinely send workers abroad under false pretenses or through deception or coercion. Many of these workers arrive in their host countries without jobs and without agency—after their passports are confiscated, communication is severed and they are subject to abusive working conditions.

---

[26] Filipino Act at III, sec. 15.
[27] *Id.*
[28] UN Trafficking Protocol, Article 3.

Currently, the Act mentions many of the symptoms of trafficking, without explicitly referring to it by its name. The Act classifies unauthorized recruitment, forgery or inducement, and fee charging as offenses. Section 63(b) specifically deals with intoxication, coercion, etc, but it refers to illegal action only in relation to the method of recruitment, not as it pertains to the other steps involved in the process of trafficking.[29] In addition, this provision makes reference to workers being sent into employment situations, but does not address the fact that many workers are sent into exploitative working conditions.

Although there are two penal code provisions that deal with trafficking, neither is sufficient to adequately deal with this increasing problem.[30] Both penal code provisions deal primarily with sex trafficking.[31] As trafficking in Sri Lanka is linked to labor migration, this issue must be addressed in the Act. Separate penal code provisions, while important, are insufficient to adequately address the nuances of trafficking within the labor migration context.

Filipino Act

The Filipino Act also refers tangentially to trafficking under the guise of illegal recruitment. This section makes it illegal for a non-license holder to engage in recruitment and also makes a reference to jobs that harm public health or morality or dignity of the Filipino worker.[32] It also discusses a number of other issues surrounding recruitment, including false advertising, the charging of illegal fees, and altering employment contracts to the prejudice of the worker.[33] But even this clause is inadequate because it does not deal with the problem directly. This section fails to call trafficking by its name and, similarly to the Sri Lankan Act, does not address all the issues in reference to the trafficking process, limiting itself to mere recruitment.

Recommendations

It would be best if a reformed Sri Lankan Act incorporated the international definition to specifically address the issue of trafficking in the labor context. This section must address all the actors in the trafficking process, not just recruiters. It must include middlemen, employers, and officials at the embassy who are sometimes guilty of aiding and abetting traffickers. This section should also be used to deal with the many manifestations of trafficking, including organ, sex, and labor.

GRIEVANCE MECHANISM/LEGAL ASSISTANCE

Sri Lankan Act

At present, the complaint mechanism and redress for aggrieved workers under the Act is ineffective because it is totally insular and at the discretion of the Foreign Employment Bureau. It is estimated that about 10% of female workers currently experience some form of abuse abroad, ranging from

---

[29] Sri Lankan Act at pt. X, sec. 63(b).
[30] For a complete analysis of the penal codes referring to trafficking, see the Center for Policy Alternatives Trafficking Legal Review
[31] *Id.*
[32] Filipino Act at II, sec. 6(f).
[33] *Id.*

verbal to economic to physical harassment.[34] Currently, when a migrant worker has a complaint regarding either the terms and conditions of employment, an officer authorized by the Bureau has the authority to investigate the case.[35] After the inquiry, the officer may make an award he/she deems necessary with regards to the violation.[36] There are a number of problems with the current system in place:

a) The grievance mechanism is set up in relation to employment contracts. This precludes workers who are sent abroad without employment contracts from obtaining relief. Furthermore, this section only addresses contractual grievances and other wage related concerns—it does not discuss redress for sexual and/or physical abuse or harassment;

b) The officer responsible for conducting an inquiry is appointed by the Bureau. The Board cannot act like a neutral, independent investigatory body when four of its Board members are foreign employment agency representatives; there is an implied bias towards the employer at the expense of workers rights and the appointed officer will necessarily be an interested party;

c) The grievance mechanism is too subjective. Decisions to prosecute offending agents or employers should not be left up to the discretion of the investigative officer. Guidelines should be established which objectively outline the criteria under which grievances are to be adjudicated;

d) The current system is inefficient and time consuming. By the time an investigation is concluded, the worker has either suffered irreparable damage or has been forced back to work.

Filipino Act

The Filipino Act outlines a grievance mechanism and the introduction makes reference to the need for effective measures to ensure the rights of distressed Filipinos overseas.[37] There is a provision that calls for the establishment of a mechanism for free legal assistance for victims of illegal recruitment.[38] This mechanism is set up independently of the Overseas Commission and is administered through the Department of Labor and Employment with cooperation from a number of different government bodies and NGOs.[39]

The Act also creates a position for an individual to oversee legal assistance for migrant workers; this person is primarily responsible for legal assistance services to all Filipino migrant workers as well as those in distress overseas.[40] The Legal Assistant, appointed by the President, must be of proven

---

[34] Center for Women's Research, "Women Migrant Workers of Sri Lanka: Violence Against Migrant Workers," www.cenwork.lk.
[35] Sri Lankan Act at pt. IV, 44.
[36] *Id.*
[37] "Free access to the courts and quasi-judicial bodies and adequate legal assistance shall not be denied to any persons by reason of poverty. In this regard, it is imperative that an effective mechanism be instituted to ensure that the rights and interest of distressed overseas Filipinos, in general, and Filipino migrant workers, in particular, documented or undocumented, are adequately protected and safeguarded." Filipino Act at sec. 2(e).
[38] *Id.* at II, sec. 13.
[39] "A mechanism for free legal assistance for victims of illegal recruitment shall be established within the Department of Labor and Employment including its regional offices. Such mechanism must include coordination and cooperation with the Department of Justice, the Integrated Bar of the Philippines, and other non-governmental organizations and volunteer groups." *Id.*
[40] *Id.* at V, sec. 24.

competence in the field of law with at least 10 years of legal experience.[41] The responsibilities of this legal assistant include:

> Issuing guidelines for the provisions of legal assistance to migrant workers;
> Ensuing close linkages with government agencies and NGOs to ensure effective coordination of services;
> Tapping into the assistance of law firms and the Bar of the Philippines to provide legal assistance;
> Administering legal assistance fund;
> Maintaining the information system.[42]

Of particular note is the Filipino Act's clause making it compulsory for all preliminary investigations of cases under the Act to be terminated within 30 days of their filing.[43]

Recommendations

A reformed Sri Lankan Act should contain a specific devolution of power to an outside source to adjudicate complaints by aggrieved migrant workers. This independent, neutral, and non-partisan body would provide migrant workers with the semblance of an unbiased investigation. There should be a base investigation conducted within a specified time period by a neutral third party using objective standards—based on the results of this investigation, the case should either be closed or prosecuted in a timely fashion. This would bring more accountability to foreign employment agencies and the Sri Lanka Board of Foreign Employment, as they would be subject to outside scrutiny.

One possible option in terms of the adjudication of migrant worker complaints is the involvement of the Sri Lankan Human Rights Commission ("HRC"). The involvement of the HRC will raise awareness and lend strength to the idea that workers' rights are human rights. Although the Universal Declaration of Human Rights makes a commitment to ensuring and promoting just and favorable conditions of work, workers' rights are often viewed as separate and secondary to more traditional human rights issues.[44] Addressing migrant worker issues in the greater context of ensuring the human rights of all Sri Lankans will enforce the necessity of reforming the laws that regulate labor migration and protect migrant workers. As a statutory body, the HRC has the credibility needed to stress the importance and need for a comprehensive and adequate legal framework to govern labor migration, and has the capacity and resources to adjudicate migrant worker complaints. The HRC can prove invaluable in the establishment and administration of a neutral, non-partisan complaint mechanism for aggrieved migrant workers.

The HRC could get involved with migrant worker issues either by setting up a desk directly in their offices or helping to establish an independent body to adjudicate migrant worker grievances. Due to the huge numbers of migrant workers experiencing some form of harassment in the labor migration

---

[41] *Id.*
[42] *Id.*
[43] *Id.* at II, sec. 11.
[44] Universal Declaration of Human Rights, Article 23:
(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
(2) Everyone, without any discrimination, has the right to equal pay for equal work.
(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
(4) Everyone has the right to form and to join trade unions for the protection of his interests.

process, it might be economically expedient, efficient, and necessary for the HRC to set up a separate tribunal to deal specifically with migrant worker issues. Similarly to the Philippines, the establishment of such a tribunal could be done in collaboration with a number of partners, including the Bar Association of Sri Lanka and NGOs.

LACK OF AGENCY/WELFARE CENTERS ABROAD

Sri Lankan Act

One of the chief complaints of migrant workers is their lack of agency upon arrival in the receiving country. They are frequently isolated in homes, communication with their families back home is severed, and often their passports are confiscated. Many experience both a language and a cultural barrier. The nature of their work often makes them inaccessible to other workers or the Sri Lankan embassy in the receiving country.

To combat these problems, the current Act provides for the stationing of welfare officers abroad. The Bureau may, with the approval of the Minister, appoint one or more persons to be the representatives of the Bureau in any foreign country in which jobs are available for Sri Lankans.[45] This representative is responsible for:

> Promoting employment of Sri Lankans in that country;
> The welfare of Sri Lankans employed in that country;
> Safeguarding the interests of Sri Lankans employed in that country including the settlement of disputes with employers;
> Attending to complaints of Sri Lankans employed in that country and find suitable remedies therefore or make recommendations to the Bureau in respect of such remedies;
> Sending such periodical reports as may be required by the bureau.[46]

Despite the provisions made in the Act for welfare officers, there are many problems with the current welfare system in place:

Welfare centers are optional. The Act leaves the establishment of these centers to the discretion of the Bureau and the Minister. There are no guidelines in place to regulate welfare officers and no standards articulated in the Act to administer the appointment of these officers. Consequently, many of the people stationed at welfare offices are unfamiliar with the nuances of labor migration and the specific needs of migrant workers in distress. Many of these officers are accused of incompetence and exploitation. As these officers are appointees by the Foreign Ministry, there is no real control by the Bureau and no accountability.[47]

Resources for these centers are extremely limited.[48] These resource centers are not given ready access to Sri Lankan embassies abroad and they do not have the resources to help migrant workers in distress.

---

[45] Sri Lankan Act at pt. III, 21.
[46] *Id.*
[47] http://www.ilo.org/public/english/dialogue/govlab/admitra/papers/1998/lanka/ch2.htm
[48] *Id.*

Filipino Act

The Philippines established a mandatory resource center for Filipinos abroad in countries where there are large concentrations of Filipino workers.[49] These welfare centers, open 24 hours a day and available to all Filipino workers overseas, are located within the premises and under the administrative jurisdiction of the Philippines embassy in the countries in which they are located.[50] The provisions articulated in the Act are extremely comprehensive. Amongst the many services that these welfare offices provide, the following are especially noteworthy:

> *Counseling and legal services*;
> *Welfare assistance* including the procurement of medical and hospitalization services;
> *Information, advisory and programs to promote social integration* such as post-arrival orientation, settlement and community networking services for social integration;
> *Gender sensitive programs* and activities to assist particular needs of women migrant workers;
> *Monitoring of daily situations, circumstances and activities* affecting migrant workers and other overseas Filipinos.[51]

In addition, the Act outlines certain qualifications required for welfare officers stationed at these centers. These officers must be Foreign Services personnel, service attaches or officers who represent other organizations from the host countries.[52] Additionally, the Act mandates the stationing of a lawyer and social workers in countries where there is a high concentration of Filipino workers or in countries categorized as highly problematic.[53]

Recommendations

Abuse by individual employers and the overall lack of agency for migrant workers in receiving countries is one issue that is extremely hard to regulate from Sri Lanka. While many of these problems cannot be directly addressed through legislation, an overall reformation of the Act and strengthened welfare offices in receiving countries will address the contributing factors and manifestations of this problem.

The Act must make welfare centers in receiving countries mandatory and increase resources for these offices. Minimum qualifications for officers stationed at these centers need to be articulated and said officers must undergo basic human rights and worker rights training. As with the Filipino Act, a lawyer and social worker should be stationed at welfare offices in countries with a large number of Sri Lankan workers.

---

[49] Filipino Act at III, sec. 19.
[50] *Id.*
[51] *Id.* (emphasis added)
[52] *Id.*
[53] *Id.*

ROLE OF RECEIVING COUNTRIES

Sri Lankan Act

While it may be beyond the scope of the Sri Lankan government to govern how individual workers are treated by individual employers in receiving countries, the government can take preventative measures to ensure the overall safety and welfare of its workers. By creating a role directly for receiving countries in the Act, the government can address this issue. The formation of a bilateral agreement, where Sri Lanka enters into an agreement with the host country to govern the terms of Sri Lankan labor migration, is an important step in this process. By reforming the current Act, and demonstrating a commitment to protecting its workers, Sri Lanka can present itself as a credible negotiating partner. This credibility will provide Sri Lanka with the leverage needed to negotiate adequate bilateral agreements and articulate the expected responsibilities of host countries towards Sri Lankan workers.

At present, Sri Lanka has not entered into any bilateral agreements with receiving countries. The only mention of bilateral agreements in the existing Act is done in an optional manner and within the context of promoting and developing employment opportunities for Sri Lankans overseas.[54] There is no mention of the importance of bilateral agreements in ensuring the safety of Sri Lankan workers or in articulating the accountability of host countries to the Sri Lankan government.

Filipino Act

The Filipino Act restricts its workers to work in countries where their rights are protected.[55] The Act does this by articulating four measures by which receiving countries can guarantee the welfare and protection of Filipino workers:

1) It has existing labor and social laws protecting the rights of migrant workers

2) It is a signatory to multilateral conventions, declaration or resolutions relating to the protection of migrant workers;

3) It has concluded a bilateral agreement or arrangement with the government protecting the rights of overseas Filipino workers; and

4) It is taking positive, concrete measures to protect the rights of migrant workers.[56]

---

[54] "In order to promote and develop employment opportunities outside Sri Lanka, for Sri Lankans, the Bureau may enter into agreements—
(a) with foreign governments, with the approval of the Minister, given with the concurrence of the Minister in charge of the subject of Foreign Affairs
(b) with foreign employers and agencies."
Sri Lankan Act at pt. III, 20(1).

[55] "The state shall deploy overseas Filipino workers only in countries where the rights of Filipino migrant workers are protected." Filipino Act at I, sec. 4.

[56] *Id.*

Such an articulation of the expected role of receiving countries in its Act provides the Philippines with the leverage to demand and expect the fair treatment of its workers. Host countries are aware of their role in the migration process and, consequently, can be held accountable should migrant workers face harassment or exploitation.

Recommendations

Although it is clear that domestic measures cannot protect workers from all grievances or from those out of the State's control, the Act must be reformed to incorporate a role for receiving countries. This role can be manifested in the mandatory and public creation of bilateral agreements or directly into the Act itself. Such a reformation would allow the Sri Lankan government to identify and address countries that have a history of tolerating the abuse of migrant workers and demand that these countries take substantive steps to ensure the welfare of Sri Lankan workers.

The government may fear that creating responsibility, liability or accountability for host countries may make it more difficult for Sri Lankan workers to find jobs overseas. This fear is unfounded based on the Philippines precedent of increasing worker protections without sacrificing employment opportunities.

GENDER DIFFERENCES

Sri Lankan Act

Sri Lanka is currently the only Asian country where female migrant workers outnumber male migrant workers.[57] Approximately 75% of unskilled migrant workers from Sri Lanka are women, going overseas as housemaids.[58] In 1994, the total percentage of women workers leaving for work abroad through both formal and informal channels, was 84%.[59] These women are "vulnerable to exploitation and have little access to training, child care services, or advice on savings and investment."[60] Furthermore, "none of [these women] have acquired new skills that would facilitate upward occupational mobility."[61] Despite the fact that female migrant workers increase their family resources and contribute significant foreign exchange remittances, there is nothing in the current Act to note the specific needs and issues surrounding female labor migration.[62]

Filipino Act

The Filipino Act directly articulates the intention of the State to incorporate "gender sensitive criteria in the formulation and implementation of policies and programs affecting migrant workers and the composition of bodies tasked for the welfare of migrant workers."[63] The Act defines gender sensitive criteria as the "cognizance of the inequalities and inequities prevalent in society between women and

---

[57] Center for Women's Research, "Women Migrant Workers of Sri Lanka," www.cenwor.lk.
[58] International Labor Office, "Structural Adjustment, Gender and Employment: The Sri Lankan Experience," Geneva, 2000, p. 152.
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] "The State affirms the fundamental equality before the law of women and men and the significant role of women in nation-building. Recognizing the contribution of overseas migrant women workers and their particular vulnerabilities, the State shall apply gender sensitive criteria in the formulation and implementation of policies and programs affecting migrant workers and the composition of bodies tasked for the welfare of migrant workers." Filipino Act at sec. 2(d).

men and a commitment to address issues with concern for the respective interests of the sexes."[64] The Act also includes provides for gender sensitive programs in the overseas resource centers.[65]

Recommendations

It is imperative that a reformed Act includes a commitment to gender sensitive programs that adequately address the unique issues faced by female migrant workers, including sexual harassment and violence and gender discrimination. The Act should also make reference to programs to address other issues related to female labor migration such as assistance with financial autonomy, skills training, and family care. Additionally, the Act should provide for comprehensive and gender specific pre-departure, reintegration, and health care training.

VOTING RIGHTS

Sri Lankan Act

The role of migrant workers in Sri Lanka's democratic process is not addressed in the Act. Under the existing system, a Sri Lankan citizen living or working abroad must be present within the country to exercise the right to vote; there are currently no provisions in place for absentee or overseas voting. This gross denial has disenfranchised a considerable segment of the Sri Lankan electorate. The right to vote is a fundamental democratic right, essential to ensuring and promoting the interests of migrant workers and issues that affect their welfare. Granting voting rights to Sri Lankans working overseas will result in increased protections for migrant workers.

As the ability of lawmakers to remain in office depends on voter support, they will be forced to listen to the demands and concerns of migrant workers; the sheer number of votes at stake in any particular election would compel those with power to increase protections and reform legislation. There needs to be a commitment to democratic ideals in the Sri Lankan Act and the granting of voting rights.

Filipino Act

The Filipino Act contains a section recognizing the right of Filipino migrant workers and overseas Filipinos to participate in the democratic decision making processes of the State.[66] This provision was supplemented by The Overseas Absentee Voting Act (Republic Act No. 9189), signed into law on February 13, 2003, which granted all qualified Filipino citizens abroad the right to vote by absentee ballot.[67]

Despite the provisions in place for overseas voting, voter registration among Filipino migrant workers has been extremely low. Although there are currently between 7 and 8 million Filipinos living and working abroad, only 300,000-400,000 had registered to vote by the end of the voter registration period on September 30, 2003.[68] This represents just 4% of the entire population abroad. Many

---

[64] *Id.* at sec. 3(b)
[65] *Id.* at III, sec. 19(f).
[66] "The right of Filipino migrant workers and all overseas Filipinos to participate in the democratic decision making processes of the State and to be represented in institutions relevant to overseas employment is recognized and guaranteed." Filipino Act at sec. 2(f).
[67] http://www.oavs.dfa.gov.ph
[68] Gerald G. Lacuarta and Martin P. Marfil, "4% Turnout in Registration," Inquirer News Services, September 30, 2003.

NGOs and some members of The Philippines Commission on Election blame the low turnout on a number of factors, ranging from the language of the Act itself to the lack of information disseminated to potential overseas voters to voter apathy.

Recommendations

While amendments to the prevailing election laws are necessary, the reformed Sri Lankan Act should, at the very minimum, contain a provision articulating the Bureau's commitment to supporting the democratic rights of overseas workers. This would recognize the fact that although workers are abroad they still have the democratic rights of citizens in the country. Also, by making a base level commitment to democratic rights in the Act itself, that will help later with an absentee voting rights act because it would have already addressed the issue and demonstrated the government's commitment to protecting migrant workers.

Additionally, Sri Lanka can learn from the lessons of the Philippines when developing its own overseas of absentee balloting Act.[69]

ROLE OF GOVERNMENT AGENCIES

Sri Lankan Act

The Sri Lankan Foreign Ministry has, in essence, absolved itself of involvement in migrant worker issues. Although the Foreign Ministry is repeatedly mentioned in the Act, most of the regulatory and decision-making power has been devolved to the Ministry of Labor and Foreign Employment and the Sri Lankan Foreign Employment Bureau.

Filipino Act

The Filipino Act specifically outlines the various roles for the different agencies involved in labor migration: the Department of Foreign Affairs and the Department of Labor and Employment, which includes the subdivisions of the Philippines Overseas Employment Administration and the Overseas Workers Welfare Administration. By doing this, all agencies are clear on their roles and there is no confusion as to who has responsibility over what topic.

Recommendations

The Act should delineate all the different government agencies involved in the migration process and clearly articulate the role and responsibilities of each agency. The Act should properly assign responsibilities to the various agencies, and not have the Bureau engaged in activities beyond its scope. Specifically, it is imperative that the Foreign Ministry has an articulated and defined role. The involvement of this agency is essential in negotiating bilateral agreements and heightening awareness internationally about issues affecting Sri Lankan migrant workers.

---

[69] *see* Annex I

Additional Issues

There are a number of topics that, while a cause for concern for migrant workers and need to be reformed, could not be covered due to the limited scope of this paper. Of particular importance are the recruitment and employment agencies that play a vital role in the lives of migrant workers. The effects of these agencies are far reaching are manifested in many facets of the labor migration process.

Other topics for further discussion include employment contracts, smuggling, pre-departure training for workers, reintegration programs for returned workers, fines and punishments for Act offenders, the information bank, and a loan guarantee fund.

In addition, there needs to be an extensive study of the international conventions ratified by Sri Lanka and other conventions that, while not ratified, deal with labor migration. In 1996, Sri Lanka ratified the International Convention on the Protection of All Migrant Workers and Their Families. This convention entered into force in July of 2003, but has yet to be implemented into law in Sri Lanka. There needs to be a thorough analysis of this Convention in relation to either the existing or reformed Foreign Employment Act to identify the sections of the Convention that need to be addressed and implemented domestically. Other Conventions of particular relevance include ILO Convention No. 97 on Migration for Employment and ILO Convention No. 181 on Private Employment Agencies, still not ratified by Sri Lanka

Conclusion

It is clear that attempts to reform the current Act will be met by a considerable amount of opposition. Many of the recommendations suggested in this paper involve highly charged political and economic issues. Because of the immense contributions of migrant workers to the national economy, there will be many who fear that a reformation of the Act or increased protections for migrant workers will result in a decline of foreign exchange earnings.

Additionally, recommendations that suggest a change in the way that Board members and welfare officers are appointed, will be opposed by political figures intent on appointing their cronies to positions of power. Perhaps the greatest challenge to reforming the Act is the lack of knowledge surrounding migrant workers issues. Protection mechanisms need to be implemented immediately to ensure that migrant workers, who are so vital to the Sri Lankan economy and national welfare, are adequately protected and given the recognition and respect they deserve. It is imperative that migrant worker activists heighten public awareness about the problems associated with labor migration. Public awareness remains the only force that will compel government action in this regard.

ANNEX I

The Overseas Absentee Voting Law of 2003 in the Philippines

President Gloria Macapagal Arroyo signed The Overseas Absentee Voting Law of 2003 ("The Act") into law on February 13, 2003. The Act makes it possible for Filipinos living overseas to vote in Philippine elections. Although there are currently between 7 and 8 million Filipinos living and working abroad, only 300,000-400,000 had registered to vote by the end of the voter registration period on September 30, 2003. This represents just 4% of the entire population abroad. The Philippines Commission on Election (COMELEC) called the registration effort a success, despite its' original targets of 2.5 million registrants and 900,000 registrants respectively. Many NGOs, however, and even some members of COMELEC blame the low turnout on a number of factors, ranging from the language of the Act itself to the lack of information disseminated to potential overseas voters.

Cumbersome Voting Requirements

Permanent Residence Requirement

Section 8(c) of the Act requires an affidavit from an applicant declaring his/her intention to resume physical permanent residence in the Philippines no later than 3 years after the approval of the registration as an overseas absentee voter. This provision discouraged many Filipino voters who have plans to remain in their country of employment. It also negatively affected those who feared their immigration status in their host country would be compromised should they register, including those holding tourist visas, greencards, or undocumented workers.

Dual citizenship concerns

Section 8(c) of the Act also requires an applicant to produce an affidavit attesting that he/she has not applied for citizenship in another country. Although this part of the Act was amended by the Subsequent Republic Act 9225 (Citizenship Retention and Reacquisition Act of 2003) on August 29, 2003, the rules and regulations of the amendment were not disseminated in a timely manner to those living abroad. There was also some confusion as to whether this Amendment applied to overseas voters registering for the 2004 elections. As a result, many overseas workers were unclear as to the consequences of registering, and feared taking an oath to the Philippines would result in a loss of citizenship elsewhere.

Mandatory Information

In addition, Section 8 of the Act requires other mandatory information that proved burdensome for many workers living abroad, including the address of an applicant's last known residence in the Philippines and the name and address of the applicant's authorized representative in the country.

In Person Registration

Under Section 6 of the Act, overseas voter registration must be carried out in person at the diplomatic or consular premises in the applicant's host country. Believing mail registration to expose the process to fraud, ghost voters, and multiple registrants, a provision which would have allowed voters to register by mail was deleted from the final act. The inability to register by mail resulted in a number of problems for overseas voters. Because of the distance between the embassy/consulate and their place of employment, many workers must travel long distances simply to register; this trip usually

requires workers to ask their employers for leave and often results in a loss of pay. Although the Philippine government asked host countries to recognize satellite registration sites as temporary diplomatic or consular premises so as to register more voters, it is unclear how many countries granted this accommodation.

Lack of Information to Overseas Workers

The government contends that voter registration is low because many workers overseas do not know about their rights under the Act. The government asserts that during lobbying for the Act's passage, NGOs pledged to launch an information campaign and mobilize groups overseas to familiarize Filipinos living abroad on the registration proceedings and requirements. The government says that now that the Act has been approved, the NGOs are asking for funds to finance the information campaign—funds the government says it does not have.

Apathy

Some argue that there is widespread apathy among Filipinos abroad, particularly long term residents of host countries. While new arrivals appear excited about the Act, those who plan on staying for an extended period of time in their host country show a lack of enthusiasm and effort to register. There needs to be further research into whether the numbers suggest there is a higher rate of voter registration among newly arrived workers in comparison to long term residents.

Illegal fees

There is evidence that in some countries, illegal activity by election officials discouraged overseas voters from registering. In Canada some election officials charged between $40 and $50 for people to register, claiming that it was for affidavit and other expenses. It's not clear how prevalent this practice has been in other countries, but may have negatively affected voter registration.

Lack of resources

There are reports that in some countries, election officials lacked sufficient materials to register overseas voters. This lack of materials made it difficult to open more registration centers and resulted in fewer voters being registered. For example, there are only 360 computers being used by COMELEC abroad; these computers must be shifted from one center to another. Additionally, when machines break down or officials run out of materials such as registration forms, the voter must come back to the registration center. This is often difficult for an employee who has taken time off from work and traveled a distance just to register.

Novelty of the Act

Although the Act was signed into law by the end of the registration period, the Commission of Elections must still draft the law's implementing Rules and Regulations. Procedures need to be put into place that would ensure the maximum participation of overseas Filipinos in the 2004 elections. There was, in addition, not sufficient time to ensure a massive voters' education campaign to inform overseas Filipinos about the Absentee Voting law and how they can participate in the election process.

Land and Water in Sri Lanka; To Whom Do They Belong?

Sarath Fernando[*]

Introduction

Should water and state land be converted into freely marketed commodities? This question contains within itself, the caution that anything that is converted into unrestricted commodities whether they be food, health, education or even essential requirements of life such as pure breathing air, would quickly become subject to profit accumulation processes of the marketplace. Consequently, the poor and also other living beings, animals, plants as well as the natural environment would be deprived of their share of such natural resources.

During the last two decades in particular, the world wide process of introducing neo-liberal economic reforms has resulted in the emergence of global economic powers, namely the transnational corporations, the richest country governments such as the USA, European Union (EU), other G-8 countries and also financial institutions such as the WB, IMF and WTO.

These global economic powers have attempted to expand trade and profit making into new territories or frontiers such as water, health, education and genetic resources, using new bio-technology developments. In order to do this, new international trade instruments such as the GATT (General Agreement on Trade and Tariff), the WTO (World Trade Organization), have been utilized.

The GATT Agreements in 1994, (initially between the most powerful countries such as US, Japan and EU), were then forced upon about one hundred and forty other countries and thereafter used to create the WTO which bound all member countries to obey the trade rules designed to benefit the richest economies. GATT and WTO initially dealt with marketing of commodities but their reach is now attempted to cover not only trade in goods but also services such as water, health, education and many others.

As far as issues relating to water are concerned, the worldwide promotion of the concept that water should no longer remain a freely available gift of nature but should be converted into a "commodity" with "full cost pricing" began with the propagation of the genuine concern about a possible "World Water Crisis" in the near future.

MONSANTO, one of the biggest transnational coprorations now increasingly engaged in essential areas such as seeds development, food production and marketing, decided at one of its meetings of the Board of Directors in 1999, that since there was an emerging water crisis in the world and since water is essential for life, the company should initiate and expand "Water Businesses". Several new international water companies were formed in countries such as U.K, Germany and France, which initiated activities towards building International/Transnational water marketing arrangements.

---

[*] Co- Secretary of Movement for National Land and Agricultural Reform and committee member of the Alliance for Protection of National Resources and Human Rights.

Prior to the WTO meeting in Cancun, Mexico in 2003, there was an attempt by the EU to push smaller countries, (particularly those depending on their loans and loan arranged through the WB and IMF), to introduce water marketing / water commodification policies. There was covert pressure exercised to pressurize Governments to agree with the GATS (General Agreement on Trade in Services) which included water privatization and opening of water as a service to be opened for trade under WTO.

In the report of the "World Commission on Water for the 21st Century" titled "Water Vision" presented at the 1st World Water Forum, it was stated that the single most important recommendation of the commission to prevent a possible world water crisis was to introduce "full cost pricing of water". The World Water Forums conducted so far have clearly shown that their objectives were to introduce and expand water pricing and marketing arrangements throughout the world.

Therefore, it is important to recognize that proposals in Sri Lanka to develop new "National Water Resources Policies" as well as recent legislative attempts such as the "Water Services Reform Bill" in October 2003, did not arise purely as a recognition to better manage and conserve water for the people of the country or to prevent a possible water crisis in Sri Lanka that would affect lives of people and negatively impact on ecological sustainability. A similar warning could be sounded in respect of policies and draft laws pertaining to state land hitherto given on land grants to the rural poor.

This paper will describe and analyze the attempted policies of privatization or "commodification" of water and state land in order to look at their social, ecological and human consequence. It also would present a brief contextual background to the present global economic processes that compel these policies and would attempt to provide certain guidelines towards preventing social, economic and ecological disaster.

In so doing, it will also detail the manner in which ordinary people in Sri Lanka and around the world have begun to mobilize themselves to resist these trends and create alternative ways of meeting the water and land requirements for all human beings and for sustainability of nature's resources.

Recent History of Water and Land Privatization in Sri Lanka

Appreciable social development achieved by Sri Lanka during the first three decades since Independence and high Human Development Indices (HDI) could reasonably be said to be as a result of successive governmental policies that attempted to protect and strengthen small farmer based agriculture and associated policies to reduce poverty, protect social welfare and keep income disparities low.[1]

[1] The 1994 elections campaign coincided with the first reported large-scale farmer suicides, with twenty four farmers in the Polonnaruwa district committing suicide. The promise of the then government to adopt a different policy approach from the previous regime was clear. The Peoples Alliance then in government, appointed a special advisory body to formulate a "New Policy Framework for Agriculture" which stated that protection of small farmer based domestic food production should be given high priority. The agriculture policies introduced by the 1977-1994 Government was critiqued as a "killer agriculture policy" which needed to be changed or reversed back to the former policy direction of all previous governments in Sri Lanka since independence.

An important part of this thinking was the need to conserve state land and water as essential resources freely available to all. In recent times however, there has been an appreciable shift away from this approach. An important landmark in this process was the Policy Recommendations made by the World Bank in the middle of 1995 (finalized as the World Bank's Policy Recommendation "Non Plantation Sector Policy Alternatives (March 1996) which had specific implications for privatisation of land and water resources in the country.[2]

Robert Hunt's (March 1996) WB policy recommendation, ("Non Plantation Sector Policy Alternatives"), identified the main problem in non-plantation sector agriculture (domestic food producing sector) as 'lack of growth' primarily due to non-plantation agriculture growing 'low value crops' such as rice, vegetables and other food crops. Thus, the report recommended a major shift away from low value crops to production of high value crops as the solution.

The report further stated that the large number of small holder farmers in rural Sri Lanka, particularly the paddy farmers, were unwilling to shift from low value crops to high value crops. This recommendation had particular implications; if agriculture in Sri Lanka was primarily to feed the people of Sri Lanka, and since a big majority of the people was very low income receivers, food produced in the country had to be of "low value". What the recommendations meant was that if Sri Lankan agriculture was to grow fast, it had to grow high value crops to meet the export market. This was not possible for Sri Lankan small farmers since they were too poor to make the necessary investments and enter into the export market.

The report made the point that paddy farmers would not give up paddy (rice) farming as long as they receive free water, free irrigation since the returns from paddy cultivated with free water was still good compared to other crops. Therefore, the two major recommendations of the WB in 1996 were firstly, to stop free irrigation and secondly to create a "free land market."

The first recommendation was on the premise that water was a "commodity" and therefore it should be marketed and not given free. Since all commodities should be marketed by the private sector and not by the Government, it was recommended that "Water Property Rights" had to be established in order to create the necessary legal framework for such private sector water marketing

The second important recommendation in regard to land ownership and land marketing was developed on the basis that since a large extent of land in rural areas was possessed by small farmers who were using land for the "useless purpose" of growing low value crops, immediate measures should be taken to create a "free land market" in Sri Lanka.

The WB report was of the view that the land market in the country was not "free" and was not functioning properly. This, it was maintained was due to two reasons. There was a lot of land that had been granted by the state to landless farmers. Since the enactment of the Land Development

[2] The policy document was authored by two experts appointed by the WB named Robert Hunt and Douglas Lister. It is important to note that this policy recommendation was made to the People's Alliance Government who had described the agriculture policy of the previous Government (1977-1994) as a "Killer Agricultural Policy".

Ordinance, all Sri Lankan governments had adopted a consistent policy of granting land allocations to the landless poor. This policy of granting land for food cultivation, with a process of reviving irrigated agriculture in the dry zone areas had been initiated during colonial times, (initially as a result of the experience of severe food shortages during the time of the Second World War), with the realization that it was necessary to strengthen domestic cultivation of food, particularly in order to reach self-sufficiency in rice.

Some 1.2 million such small holder farmers who were growing mostly rice, were identified in this regard. Under the system of such free land grants, the beneficiaries were not legally entitled to sell the land thus received. The land would only get transferred to the children, (generally to the eldest son – to prevent fragmentation). The suggestion of granting "freehold titles" to 1.2 million smallholder farmers first came into the public forum with the WB's policy recommendations. The WB's recommendation was that the Government should adopt immediate measures to regularize land ownership, demarcate land to individual owners, so that they could sell their land freely.

Right to Water and Land to be treated as Issues of Democracy

The above discussion illustrates that the proposals for privatization of water and state land did not originate from any demands made by ordinary people or from a considered policy of any government in this country at a particular point in time. However, claims continue to be made that these are the proposals of elected governments, consequently carrying with them, the stamp of the electoral mandate. This is a tragic illustration of the fate of democracy in the country as is the case in other poor dependent countries as well. It is a pity that most of the organizations in Sri Lanka that are fighting for human rights and for democracy have not yet begun to see these concerns as priority issues of human and democratic rights that need to be defended.

Resistance to 'Commodification' of Water

Ordinary people in Sri Lanka have resisted all attempts made to convert water into a "traded commodity" by giving it a "price", (a money value), instead of it remaining a "freely available gift of nature". The concept of considering water as something that all living beings should have freely is deeply embedded in the minds of people in Sri Lanka as well as in our culture and history

The prevalent argument that providing water to people is a service that requires expenditure and therefore these services have to be paid for by the users, appears to be logical. However, we have had a history of resistance where attempts by any government to interfere with what is perceived as their inalienable rights have been met with fierce resistance.

We saw this in the mid-1980s when the then government tried to introduce a tax on water provided under the major irrigation schemes. Paddy farmers were asked to pay hundred rupees per acre annually at the start, which was increased by hundred rupees each year until it reached a maximum of five hundred rupees per acre annually. In spite of tremendous pressure by the government officers (including charging non-payers in courts), the farmers did not pay as they were too poor to pay and were, even then, not getting a sufficient income. There were also organized protests and movements of resistance in all dry zone irrigated agriculture areas. Some farmers were sentenced to jail but this was fought against in the appeal courts by the farmers' movement. At that point, the hated tax was

called a "maintenance and management charges instead of a "water tax". Finally, the move was done away with. Since then, no government has dared to openly admit any intention of charging for water or selling water.

In modern times, the resistance struggle has manifested itself in a more collective manner. When the " National Water Resources Policy and Institutional Arrangements" Bill was given Cabinet approval in March 2000, many provisions of the Bill were perceived as highly problematic. The cumulative effect of its clauses was as follows;

> All water in the country including ground water and the water in the lagoons to be vested in the state;
>
> Water to be then distributed / allocated to various types of water users by a National Water Resources Authority to be set up by the Government by issuing water entitlements. This opened up the possibility of issuing "bulk entitlements" and other types of entitlements;
>
> Water entitlements for small-scale farmers were not to be issued directly. Instead, the entitlements were to be issued to the irrigation department and the Mahaweli Authority at the beginning and subsequently to farmers' organizations or farmers' companies that were to be set up.
>
> A National Water Resources Secretariat and a Water Resources Council were to be set up to deal with water management issues and to settle disputes respectively;

This Bill emphasized the concept of "multiple uses of water" on the basis that there was a need to diversify the present allocation of water where about 85 % of water in the country continued to be used for irrigation and agriculture. More water was to be allocated for other important uses, such as urban needs, industries, power generation and recreational needs, (such as tourism), etc. This was also intended to diversify water away from "low value to high value uses."

Simultaneously, the government invited international water companies based in countries such as France and the United Kingdom to look at the possibilities of investing in massive urban water supply projects. Private companies could also apply for bulk entitlements and to use water for such uses. These moves were strenuously opposed by activists and grassroots movements who pointed out that the hidden objective behind these clauses was to enable marketing of water for profit making.

Resistance to Subverting Rights to Land

Resistance to the proposed changes to the prevailing system of land grants was much more complicated. On the face of it, the Lands Bill proposed in 2003 seemed attractive in its aim to grant regular ownership of land to those who did not have proper and regularized land titles. The possession of lands has always been the biggest dream of farmers and therefore the Bill held out very "attractive" prospects to the rural farmers.

However, the proposed land law reforms would have resulted in large numbers of the rural agricultural population in Sri Lanka being deprived of their agricultural livelihoods (taken in

conjunction with the abolishing of the prohibitive tax imposed up to that time on foreigners buying land in the country), where farmers already on the brink of financial ruin due to decades of marginalisation by successive governments, would have been easy prey for foreign companies wishing to purchase the land on which they had farmed for generations.

This in turn, would have resulted in the landless destitute who would be compelled to migrate to urban areas in a context of extreme vulnerability from whom one could expect the creation of much greater availability of "cheaper labour". The availability of cheaper labour is envisaged as an essential requisite to attract investments and promote the production of goods such as garments at prices that could compete with competing countries in the export garments market.

Both Bills relating to land and water were struck down by the Supreme Court in 2003. Importantly, the draft legislation, on both counts, was deemed to have disregarded procedures mandated by the 13th Amendment, which calls for the consultation of the Provincial Councils on the proposed bills, which procedure had not been followed. However, there is no guarantee that these proposals would not be re-introduced in the future.[4]

People's movements agitating in Sri Lanka on broad fronts of protection of water and land have demanded that the processes of policy making with regard to these issues should be far more participatory and people-based. Non-adherence to these demands has unfortunately resulted in people friendly/eco-friendly and less costly approaches to water and land conservation and management being completely ignored in the formulation of relevant policies and laws.

Conclusion; A Vision for the Future

Essential requirements such as water (pure drinking water), fresh breathing air, health and education should be ensured for all human beings and all other living beings. All human beings should have the right to live in dignity. The right to develop and express one's creative abilities and potential and the right to decide are essential aspects of human dignity.

The most potent challenge that faces us in our struggle to solve questions relating to hunger, poverty and sickness is the tremendous creative potential of millions of people who are now treated as mere instruments or raw materials for profit accumulation by a few. Such millions are consciously prevented from utilizing their creative potential.

Ideally, the process of utilizing total creative human potential should proceed with the objective of "re-building the regenerative capacity" of the earth, of nature and nature's resources. What we should oppose is exploitation of humans and of nature. There is already recognition that the present systems of extraction and exploitation cannot last for long and serious attention devoted currently to 'conservation' and 'sustainability' But, these discussions are often about slowing down a fundamentally destructive approach and about sustaining a basically irrational system for a little longer.

[4] Both major parties in this country, (viz; the People's Alliance Government of 1994-2001 and the UNF Government of 2001- April 2004), have attempted to introduce certain policies and plans in relation to water and land that are inimical to people based and/or sustainable development.

My argument, as set out in this paper, is that mere conservation and sustainability is insufficient. Instead, what we need is re-creation of the re-generative capacity. We need to do this, commencing with the restoration of the re-generative capacity of our soil, the earth, land and nature which can be accomplished practically at no cost by almost all households, in all villages in Sri Lanka, under prevalent ecological conditions as well as in most urban areas, if one uses one's ingenuity.

An important part of this process is the regeneration of land in the hill country, which is essential for regeneration of the entire eco-system. Plantation workers who have contributed immensely towards our wealth for more than one and a half centuries have a right to food and nutrition, health, housing, education and dignity. The only way to achieve this is by recognizing their right to land and their right to access to resources, to be used in the manner that would permit them to be human and "masters or mistresses of their lives".

Regeneration of the eco-system would also result in regeneration of pure drinking water at no cost, throughout the country with more water retained in our soils and our wells, reservoirs, lakes and springs. Inevitably, providing for the needs of the urban population in this context would be rendered much easier.

Our potential for creating fruitful livelihoods[5] is inherent in the transformation of our land, the earth and its ecological wealth. If we are unable to do this, then we will have to resign ourselves to losing the precious riches that this country has hitherto bequeathed us, in natural resources and wealth.[5]

[5] Recent figures about economic (income) poverty in Sri Lanka detail the fact that 39% of the people receive an income of less than Rs 950/month as specified in the "Regaining Sri Lanka" – Poverty Reduction Strategy presented by the Government of SL at the Tokyo donors meeting in June 2003. The "Samurdhi Movement" statistics in relation to poverty state that 2.1 million families receive less than Rs. 1500 per month. If these figures are assumed to be correct, more than ½ the population in Sri Lanka receive about US $ 0.5/day as financial income in a country where about 90% of the poor live in rural areas.

Privatisation of water resources and human rights

Dilhara Pathiriana[*]

Water sustains all life and is replete with important biological, religious, cultural and symbolic values. Therefore, in such a context, it is not surprising that moves to privatise water resources in Sri Lanka, as well as in other countries have given rise to human rights concerns.

The World Bank and other international financial lending institutions recommend privatisation of water as one of the strategies for the alleviation of poverty in developing countries. It is ironic that privatisation which is prescribed with such evangelical zeal by international financial institutions as a poverty reduction strategy should result in such developing countries becoming further mired in poverty and deprivation. The privatisation experiment in Bolivia can be cited as a classic example where the attempt at privatisation of domestic water supply led to severe hardship to the poor.

This analysis looks at relevant issues regarding water privatisation processes in Sri Lanka and critically examines government policies relating to the same within the overall framework of water as an inalienable right for all.

Water as a socio-economic right

Human rights are based on the notion that every human being has an inalienable right to such resources that are essential to human life. The right to clean air, food, safe water, right to housing and clothing are some of these rights.

Although a perusal of the International Covenant on Economic, Social and Cultural Rights (ICESCR) reveals that the right to clean air and water is not expressly included in it, such rights may be implicit in the right to health, (Article 12 of the ICESCR), and the right to an adequate standard of living. At the time the International Covenant was drafted, in the 1950s, clean air and water were fairly abundant, so it may have not occurred to the drafters to expressly include it in the covenant.[1]

Fresh water is now a scarce resource. There is a global awareness on the issues of water quantity, quality and distribution. More than 1 billion people in the world do not have access to basic water supply and an estimated 2.4 billion people lack access to adequate sanitation.[2] Thus, billions of people in the world are denied the right to water, which is a basic human right.

The United Nations Committee on Economic, Social and Cultural Rights took the historic step of declaring the right to water for personal and household use as a human right in its General Comment No. 15 on the right to water, which it adopted in November 2002. A General Comment provides interpretative guidance to assist state parties in fulfilling their obligations under the ICESR.

---

[*] LL.B (Colombo), Attorney-at-Law

[1] Copyright – the American Association for the Advancement of Science, http://shr.aaas.org/report/xxii/water.htm

The UN Committee on Economic, Social and Cultural Rights declared that:

> "water is a limited natural resource and a public good, fundamental for life and health. The human right to water is indispensable for leading a life of human dignity. It is a prerequisite for the realization of other human rights"

As the right to water is not expressly mentioned in the Covenant, the Committee derived the right from its interpretation of other provisions stated in the Covenant such as Article 11, which ensures the right to an adequate standard of living and Article 12, which ensures the right to health. The General Comment details the necessity for adequate water for domestic and personal use, while defining adequacy in relation to its availability, accessibility, quality and quantity.

Thus, member states are legally bound to protect and fulfil these socio-economic rights in conformity with principles of equality and non-discrimination. States are required to give special attention to the needs of marginalized and vulnerable people.

In the case of *the Government of the Republic of South Africa v. Grootboom and others*[3], the Constitutional Court construed the right to the access of adequate housing broadly so as to include the provision of water, sewerage removal, electricity and access to roads. Likewise, the Committee on Economic, Social and Cultural Rights has stated that adequate housing implies: "sustainable access to natural and commercial resources, safe drinking water..."

The International Covenant on Economic, Social and Cultural Rights which prescribes the rationale of state obligations towards the realisation of the right to health and to an adequate standard of living, does not rule out a central role for the private sector. However, it does require that all states who are bound by the Covenant norms take the necessary steps towards the progressive achievement of the right of everyone to an adequate standard of living, including access to water and sanitation.

The Sri Lankan Constitution of 1978 does not contain economic and social rights, unlike the South African Constitution. In the Sri Lankan Constitution, the emphasis is on civil and political rights while socio-economic rights are contained in the Directive Principles of State Policy. While an argument could be most certainly made that the Directive Principles impacts in a positive manner on state obligations, (as held on several occasions by the Supreme Court), it would have been preferable obviously that certain of these socio-economic rights are contained in the directly enforceable rights chapter itself.

Neither does the 1978 Constitution contain the right to life, which right is contained in the Indian Constitution. However, the draft provisions of the proposed Constitution of the Republic of Sri Lanka, 2000 in its Fundamental Rights Chapter, contain the right to life. Article 8 of the proposed Constitution states that every person has an inherent right to life and no person shall be intentionally or arbitrarily deprived of his life. The proposed constitutional reforms of 2000 are however of academic interest at this moment in time given the lack of political consensus between the two major parties in Sri Lanka on the need for immediate constitutional reform.

---

[2] *Ibid*

[3] 2001 (1) SA 46 (CC) para 37)

In contrast, the Indian courts[4], interpreting the provisions of the Indian Constitution which guarantees the right to life, have held that the right to life does not mean only the right to mere existence, but the right to a substantive quality of life which would include basic health care, housing, right to water and other related rights.

The Supreme Court in the case of *Kottabadu Duruge Sriyani Silva v. OIC Paiyagala Police & Others*[5] held that the right to life is impliedly recognised, even though it is not specifically mentioned in the prevalent fundamental rights chapter of the Constitution. This would mean that the infringement of a person's right to life is actionable under the provisions of the Constitution. However in this instance, the right to life was narrowly interpreted, (understandably in the circumstances of the case), to mean the right to physical life. The Court proceeded on the premise that, while the Constitution recognises rights such as freedom of expression, freedom of livelihood and freedom from torture, it has no specific provision granting the right to life. The Supreme Court referred to Article 13(4), which states, "No person shall be punished with death or imprisonment except by the order of a Competent Court. The Court held that, when positively expressed, this article recognises that a person has the right to life, in the sense of primary existence.

Developing this argument further in other cases that are factually appropriate for such submissions, it could be easily contended that if one does not have the right to life and socio-economic rights such as the right to health, water etc; mere existence in terms of the right to physical life or for that matter, other essential civil and political rights such as freedom of speech, freedom of expression, assembly, right to occupation and freedom of religion become a farce.

However, as our judges are not, in general, prone to engage in judicial activism, unlike Indian judges through the many decades in the past, the express inclusion of socio-economic rights in the fundamental rights chapter of the Constitution would lend greater clarity to the applicable legal principles.

Privatisation of water (essential services) and its impact on developing countries

Privatisation has become a dominant economic policy recommended by international financial institutions such as the World Bank, International Monetary Fund (IMF) and multinational corporations, to developing countries.

Water is an essential service which is vital to the health and well being of the community. Thus, the privatisation of water, particularly in developing countries without taking into consideration basic human rights norms, can be a perilous exercise

Writers have described the perils of privatisation graphically.[6] The privatisation of municipal water services is stated to have a terrible record that is well documented. Customer rates have doubled or tripled; corporate profits have risen as much as 700%; corruption and bribery has become rampant,

---

[4] *Subash Kumar v. State of Bihar* AIR 1991 SC 420/1991(1) SCC 598; *Olga Tellis v. Bombay Municipal Crpn* AIR 1986 SC 180

[5] *SC. (FR) 471/2000, SCM 818/2003*

[6] Water is a basic human right – or is it? Maude Barlow, Toronto Globe and Mail, Canada, 11th May 2000.

water quality standards have dropped, sometimes drastically and customers who were unable to pay have been cut off.

Case studies of several countries have shown the devastating effect privatisation can have on vulnerable sections of the population in developing countries. The failed attempt of water privatisation in Bolivia can be taken as an example to illustrate the adverse effects of privatisation and also an inspiring example of how concerted civil action prevented multinational corporations from depriving them of a basic right.

In Bolivia, the World Bank refused to guarantee a US $25 million loan to refinance water services in Cochabamba, Bolivia's 3rd largest city, unless the government transferred the ownership of the public water system to the private sector and passed the costs to the consumer. No proper tender procedure was followed. Only one bid was considered and the public water system was turned over to a subsidiary, a conglomerate led by Bechtel, the engineering company implicated in the infamous Gorges dam in China, which caused the forced relocation of 1.3 million people.

The Betchel Corporation, after taking over the water system, increased water rates by 40% - 50%. For most Bolivians, this meant water would be more expensive than food for those on a low wage or unemployed. Water bills consumed half of their monthly budget. To add insult to injury, the World Bank granted monopolies to private water concessionaires, supported full cost water pricing and refused to grant any loans, which could be used to subsidise the poor for water services. All water, even those from community wells, required permits to gain access. Peasants and small farmers even had to buy permits to gather rain water on their property.[7]

Thus, the move towards privatisation of water was perceived as a violation of the people's right to affordable water. The Bechtel corporation, the Bolivian government and the World Bank violated the people's right to water. Bechtel violated this right by increasing prices, making water unaffordable to the poor. The price increase was made partly to finance an enormous 16% profit margin, which the corporation included in its 40-year contract. The Bolivian government violated its people's socio-economic right to affordable water by negotiating and signing the Bechtel contract without regard to its international human rights obligations, and by approving the giant price hikes. Thousands of people marched to Cochambamba in an anti-government protest. Under such public pressure, the government ordered Bechtel to leave Bolivia and revoked the water privatisation agreement.

At the time of opposition to the Bechtel contract, the government violated basic civil and political rights of the protestors. When the Bolivians sought to exercise their right to assemble and demonstrate peacefully against the privatisation deal, the government sent armed troops into the streets to break the protests. More than one hundred and seventy people were injured and a seventeen year old boy was shot in the face and killed. Protest leaders were arrested in their homes in the middle of the night and flown to a remote jail in Bolivia's jungle. This illustrates the extreme manner in which governments are compelled to protect the interests of foreign corporations in an economic globalised environment.

---

[7] *Ibid*

Bechtel is in the process of suing the government of Bolivia for $ 25 million, a portion of the profit, the corporation had expected to make and was unable to due to mass agitation. The case is being heard by a trade court handled by the World Bank (The International Centre for the Settlement Investment Disputes). However, the process appears to be shrouded in secrecy and members of the public and the media are neither permitted to attend nor given any details of the proceeding *in camera*. If the Bank's panel grants Bechtel's demand, those costs will have to be directly borne by the Cochabamba water users, which will result in a dramatic price increase of water once again.

In Indonesia, water privatisation schemes have resulted in an increase in the price of water consequent to joint management by Thames Water International UK and the France based Suez – Lyonnaisse. The increase has been justified on account of covering the company's cost. Meanwhile, the multinational companies, which control 70% of the global water business, Suez-Lyonaisse and Vivendi from France, have been accused of anti-competitive practices. It has been observed by J.F. Talbot CEO of SAUR International, the world's 4th largest multi-national company that private water management companies experienced financial loses and more importantly failed to serve the poor and even exploited them. [8]

The whole illustrates very well the manner in which water privatisation schemes, especially in developing countries have not been a success and have, in fact, resulted in gross human rights violations.

The pro-privatisation and anti-privatisation lobbies

The anti-privatisation lobby is strongly opposed to the privatisation of water as it converts water into a 'commodity' and subjects it to market forces. It considers 'water' as a human and environmental right accessible to all persons. This imposes an obligation on the government to provide water at an affordable price and even at a subsidised rate for those who do not have the means to pay.

On the other hand, those who advocate privatisation argue that it has the potential to enhance operational efficiency, competition, economic growth and development. Privatisation is also said to result in increased production of the privatised service, enhancing competition leading to lower costs. Thus, it is argued that there is better enjoyment of socio-economic rights.

However, it is debatable whether privatisation does, in practice, result in increased access to socio-economic rights. Opponents of privatisation contend that there is little practical evidence to suggest that it, in fact, result in increased efficiency, economic growth, development or competition. When it has been established that there has been an improvement in economic performance after privatisation, the difficulty in pinpointing privatisation as the cause of the positive growth remains.[9]

Proponents of privatisation lay much emphasis on micro-objectives such as efficiency, competition, economic growth and development. But, achievement of these objectives does not always mean more availability, access of basic services to all people, especially to the poor.[10]

---

[8] Down to earth – IFI's Fact Sheet 28, No 28, March 2003 http//www.dte.gn.apc.org/af28 htm
[9] ESR Review, Vol. 4, No. 4 Nov. 2003
[10] ESR Review, Vol 4 No. 4 Nov. 2003

Another contention of the anti-privatisation lobby is that privatisation of essential services like water means less democratic control. It argues that democratic and community involvement in water management decisions is essential. According to this lobby, World Bank agreements are considered to be "intellectual property" and therefore the public has no access to the terms or details of the Bank's projects that affect their lives. It is further argued that the IMF, ADB and the WB are not appropriate institutions who should be allowed to make decisions about water management, as they are not democratic, accountable or transparent institutions.[11]

The wisdom of water supply and distribution being a government monopoly is also an issue in this debate. Pro-privatisation advocates contend that the costs of operation in a government owned enterprise is generally much higher than if the same enterprise was run by a private entity. State enterprises carry excess staff. They are generally over-manned and undermanaged . So they are said to be less efficient and their productivity is lower. Countries like Singapore and South Korea which are said to be an exception to this rule, follow the modern management practices and not the "pork barrel" practices followed in countries like Sri Lanka, where state institutions are heavily politised. Government enterprises allow too much wastage of water and pad their staff with excess so that the cost of operation is higher than that of the private sector [12]

Here again, those who oppose privatisation argue that private companies have no incentive to provide water to poor rural communities. The pro-privatisation camp argue in return that, whether it is the government or the private sector, the cost of providing water will have to be recovered. Poor people do not have safe access to safe drinking water, since the government lacks the financial resources to invest in water infrastructure. Consequently, those sections of the populace with no access to good water are compelled to pay healthcare bills for waterborne diseases. It is argued that water users pay a nominal rate for the water they consume which does not cover the costs of operations. According to the World Bank, the ones who are connected pay less then 1/3 of the costs of water.[13]

The ultimate paradox is that governments do not have the resources to invest in water systems or even maintain and operate them adequately. Hence, poor people remain unconnected to clean water supply and/or have to pay a lot for such water supply, while the well-to-do people receive variable quality water and tend to waste water.

As we can see, there are cogent and compelling arguments from both the pro-privatisation and anti-privatisation lobby in defending their respective positions. Thus, it is necessary that policymakers engage in a detailed study of the negative and positive implications of privatisation prior to making any decisions regarding the privatisation of water services in this country.

The proposed privatisation of water resources in Sri Lanka

The first water policy was prepared by the World Bank in 1993, known thereafter as the Water Resource Policy. In 1996, the Ministry of National Planning and the Government of Sri Lanka, with the technical assistance of the Asian Development Bank (ADB) commenced on the preparation of a

[11] AID/WATCH –Campaigns: Water Privatisation – http://www aidwatch.org. au
[12] Drinking water is not a free good – R.M. B. Senanayake – Business Standard 5.12.03
[13] *Ibid*

National Water Policy.[14] In 2000, the government prepared a Draft National Water Resources Act on the lines recommended by the ADB and WB. The Cabinet of Ministers was said to have approved the policy thereafter.

When the government in office delayed the economic and infrastructure development package relating to water privatisation, the WB/IMF imposed pressure on the government by restricting and delaying loans badly needed by the government. The government that came into office at the end of 2001 undertook to legalise the full package relating to economic reforms. Agreements were reached with the WB, IMF and other concerned parties in June 2002 on the Poverty Reduction Strategy Proposals (PRSP) which contains proposals with regard to privatising almost all remaining government enterprises, services as well as national resources such as forests, minerals, fisheries and water. The PRSP clearly indicates, "full cost pricing of domestic water supplies" to enable private water companies to charge commercial rates for water.

Based on these agreements, the government finalised a new Water Resources Policy and a National Water Resources Act, which enabled public – private sector partnership in water supply projects in urban areas, leading to pricing and marketing of water by international water companies on invitation.

The proposals regarding water resources envisaged public-private service sector partnership in water, sewerage and sanitary services and suggested the issuance of water entitlements by the National Water Resources Authority, a mechanism suggested for diverting water away from irrigation and agriculture to other issues such as urban supplies, for industrial purposes, electricity generation, tourism and related purposes.

The proposals also included mechanisms and infrastructure development for water marketing despite the fact that tradable water rights and transferable water entitlements could be looked upon as another device of getting farmers who have traditional water rights, to sell away these water rights.

On March 6th 2003, the then Prime Minister made a public statement that he was against the introduction of the water policy bill in Parliament. The then government was thereafter compelled to slow down its water privatisation drive as a result of public agitation against privatisation.

Protests campaigns against the privatisation of water were spearheaded by affected parties and public interest groups who pointed out that privatisation of water resources would lead to a gradual increase in water rates and eventually deprive reasonable and affordable access to water to thousands of poor and middle class people.[15]

Water Services Reforms Bill

Regardless of the government promises and the public protests, the "Water Services Reform Bill" was tabled in Parliament on October 22, 2003 with the objective of privatising pipe borne water services throughout the country. The Bill did not deal with water for irrigation purposes and Clause 8 (1) of the bill excluded bottled water.

---

[14] Myths in water privatisation – Hemantha Withanage, Daily News 13.1.04, p 28)
[15] Daily Mirror 5.11.03 – Undercurrents of the Water Reforms bill

The Bill immediately met with strong resistance from many public interest groups owing to the fear that multinational companies would charge exorbitant prices for water. The main contention put forward against the water services reform Bill was that it would convert pipe borne water for urban and rural areas into a commercial commodity to be supplied through private commercial agreements

The preamble to the Bill stipulated the necessity to formulate a rational policy to enable Sri Lanka to meet the increasing demands for portable water of high quality and standard. It provided for a regulatory body and mandated compliance with consumer protection requirements.

Under Clause 3 of the Bill, the Public Utilities Commission, (PUC), established under the Public Utilities Commission of Sri Lanka Act No. 35 of 2002 acted as the economic and technical regulator for the water services industry in Sri Lanka. Its functions included approving water service agreements, (signed between asset holders and service providers), issuing licenses to service providers etc.

Under the existing law, it is the National Water Supply and Drainage Board, (together with the Local Authorities set up under Act No. 2 of 1974), which is the public authority providing water services. Under Section 21 of the National Water Supply and Drainage Board Law, it is the Board that undertakes exclusively the supply and distribution of water. The Bill authorised the WSDB and Provincial Council/Local Authority to lease its assets and equipment to private commercial water service providers.

In terms of the Bill, public authorities presently providing water services such as the National Water Supply and Drainage Board, local authorities and community organisations, were deemed to be licensed under this Act for a period of five years. Within that period, they were required to submit an application for a license which applications would be evaluated on the same criteria that will be applied to commercial entities applying for a license.

Commentators opined that as a result of these provisions, the NWDB, which is the supreme authority in providing water services, would be in a position of subordination to the PUC. Additionally, the NWSD is a state agency which supplies water to consumers not based on strictly commercial principles but reflecting rather the costs incurred by the Board in providing water services that include: cost of abstraction, cost of treatment, transmission, cost of administration overheads and related expenditure. By bringing in private sector service providers whose primary motive is to maximise its profits, the consumer would have to pay a much higher rate for water services.

In terms of the Bill, persons presenting receiving water from an asset holder such as the NWDB did not have an automatic right to receive a water supply from a licensed water service provider to whom the assets of the said asset holder are transferred but must enter into a fresh contract on the licensee's terms. It was in this context that the Bill was viewed as being arbitrary and discriminatory in its operation and therefore inconsistent with Article 12(1). Again, it discriminated against the consumer by permitting the unilateral cancellation and variation of a valid contract entered into by the consumer (Clause 20)[16]

[16] Opinion: 'World War iii over Water', Premila Canagratne , Daily Mirror E-edition 13.12.03

Moreover, the Bill did not distinguish between different classes of consumers. No provision was made for the poor and middle class or those who are less affluent. Thus, the Bill had the effect of treating unequally placed persons as if they were equals and therefore was inconsistent with Article 12 (1) of the Constitution.[17]

Under Clause 29 of the Bill there was an insidious device of altering the basis of payment from the prevailing meter system, by the introduction of the use of 'other devices'. It stated that water supply is to be monitored by meter or by any other device. An example was the prepaid water card system. In the metered system, the consumer pays for the water he has consumed, whereas the water card system requires the consumer to pay for the water before it is actually supplied. This water card system has already been declared illegal in some countries. For instance, in the UK it was declared illegal in 1998 for public health reasons. Why then, should Sri Lanka think of adopting this system?

Those in favour of the Bill argued that the interests of consumers were amply protected under the Public Utilities Commission, which was the Regulatory Body under the Bill. Clause 4(1) of the Bill, which sets out the objectives of the PUC, stated that the interests of consumers will be protected by promoting universal access to water. Under Clause 4(2) "interests of consumers" (including existing and future consumers) covered the price charged for water services, availability, continuity, quality and service levels.

However, while these provisions on the face of the Bill seemed to protect the rights of consumers, the PUC was also obliged under the provisions of the Bill to protect the rights and interests of service providers for water services (clause 4(1) h). Reasonably therefore, the entire Bill could be said to provide a legal framework for the privatisation of pipe borne water supply with little discretion vested in the state or local elected bodies to maintain or resume water services as a public service.

Under Clause 11(1), the NWDB and LA are considered to be asset holders – i.e. those who hire out their assets and equipment to private water service providers. While these provisions did not expressly forbid the NWDB and LA to be water service providers, the fact that they have a new status/role as asset holders under this Bill, could be said to hinder to a great extent their function to supply water as a public service. This was maintained to amount to an abdication of the responsibilities and duties of the State under Article 3 read with Article 4d of the Constitution.[18]

Water Services Reforms Bill - Judgement

The constitutionality of the Water Services Reforms Bill was challenged in the Supreme Court by certain petitioners who invoked the jurisdiction of the court in terms of Article 12(1) of the Constitution.[19] The contention of the petitioners was that provisions of the Bill, taken as a whole, were inconsistent with the Constitution in its substance and the procedure followed wherein it was placed on the Order Paper of Parliament.

The constitutionality of the Bill was challenged on three grounds. The main contention was that the provision of "water service" as defined in the Bill is a function of the local authorities and in terms of

---

[17] *Ibid*
[18] *Ibid*
[19] S.C. (SD) 24/2003, S.C. (SD) 25/2003

the 13th Amendment to the Constitution, it would be a matter set out in the Provincial Council List, which requires compliance with Article 154 G of the Constitution. The 13th Amendment to the Constitution which sets up Provincial Councils, vested legislative power in such Councils (to be exercised) to deal with subjects coming under List 1 of the 9th Schedule, referred to as the Provincial Council List (PC List).

Article 154G (3) provides that no Bill dealing with a Provincial Council subject set out in the PC List shall become law unless such Bill has been referred by the President after it is published in the gazette and before being placed on the Order Paper of Parliament, to every PC for its views. It after such reference, every Council agrees to the passing of the Bill, it may be passed by a simple majority. In the case where one or more Councils do not agree to the Bill, it has to be passed by a special majority required by Article 82.

Item 4 of the Provincial Council List 1, in the 9th Schedule, specifies "local government", as a subject coming within that List. The petitioners contended that water supply has always been a function of local authorities. Although the National Water Supply and Drainage Board Law passed in 1974, (under the provisions of the previous constitution), established a public authority known as the National Water Supplies and Drainage Board, it did not *ipso facto* take away the function of the local authorities in relation to water supply.

The petitioners further contended that the Bill contains specific provisions with regard to "service providers" which applies to Provincial Councils and local authorities who are deemed to be licensees to provide water for a limited period of five years. Thereafter, the function of providing water services would rest in "service providers" who are granted licenses under the Water Services Reforms Bill. Thus, in this instance, the Bill attempted to legislate in respect of a subject set out in the PC list and the provisions of Article 154G(3) would be applicable. It was on this procedural irregularity that the Supreme Court declared the Bill to be unconstitutional. The Court did not deem it necessary to look into the other two substantive grounds of challenge.

These remaining grounds were firstly, that the powers of persons licensed as "service providers" under the bill are weighted in their favour, which would work to the detriment of the consumers. Thus, the Bill gives the licensee an undue advantage over the consumer, which would result in an unequal application of the law, inconsistent with Article 12(1) of the Constitution.

The second ground of challenge was that the Bill violated international obligations. In terms of the General Comment No 15 of 2002 of the Economic and Social Council of the United Nations, the right to water comes within Article 11 and 12 of the International Covenant on Economic, Social and Cultural Rights. The General Comment gives specific recognition to water as a human right and since Sri Lanka is a signatory to the International Covenant, the provisions of our law should be interpreted in the light of the obligations under the covenant and the General Comment made by the Council.

On this basis, it was argued that the right to water should be given the status of a fundamental right as referred to in Article 3 of the Constitution as the right forms a portion of the principle of sovereignty of the people. Taking away the function of providing pipe borne water from state agencies and vesting it in the private sector is tantamount to an alienation of the principle of the sovereignty of the people and consequently is inconsistent with Article 3 of the Constitution. Further, it was pointed out that

there was hardly any public consultation to ascertain the views of the people regarding this important piece of legislation, which fundamentally affects the lives of millions of people in Sri Lanka amounting to another facet of the violation of the sovereignty of the people.

It is unfortunate that the Supreme Court did not feel it necessary to rule on these two grounds of challenge – namely in regard to the equality provision/clause in the constitution and Sri Lanka's international obligations under the International Covenant on Economic, Social and Cultural Rights, given the tremendous impact that such a ruling would have had on future moves that any government in this country might be persuaded in engage in regarding privatisation of water supply.

Conclusion - The Current Realities

We appear to face a reality where recent moves to privatise water have receded to the background.[20] While admitting that it would continue with the privatisation plans of the previous regime, the current administration has stressed that areas of social welfare, such as education, health, transport and water will not be privatised.[21]

However, one wonders whether such an independent stand can be confidently asserted in relation to service sectors, when one takes into account commitments made by us in respect of the World Trade Organisation, (WTO), regime. Sri Lanka has been in the forefront of the trade liberalisation measures, being one of the first signatories to the General Agreement on Trade and Tariffs. (GATT) subsequent to ratification of the Marrakech Agreement in 1994.

The Marrakech Agreement came at the end of the 'Uruguay Round' of trade (1986 – 1994) in terms of which, the agenda was broadened to include commodities other than goods. The General Agreement on Trade and Services (GATS) was part of the Marrakech Agreement. Signatories to this agreement, which include Sri Lanka, are bound under GATS to progressively open their service sectors to foreign investment and trade liberalisation.

Commitments under the GATS are to be taken seriously. Once a country commits itself to open a sector, there is little scope to withdraw. Under the GATS, service sectors are opened under a system of 'request' and 'offer'. Making a request is essentially a cost free act. It makes no commitment on behalf of the requesting country. By contrast, an offer has far-reaching consequences for the economy of the country making the offer and developing countries often lack the resources to evaluate the impact of making such a commitment. They may also be reluctant to turn down a request from trading blocs on which they rely for aid. The GATS process is carried out in a very secretive manner. There is little transparency. Industrialised countries do not make their requests public and governments of developing countries are reluctant to open up the process to public debate.

---

[20] Public interest groups met with representatives of the International Monetary Fund (IMF), Asian Development Bank (ADB) and the World Bank (WB) in Colombo recently, and urged them not to pressurise the new government formed by the UPFA (United People's Freedom Alliance) to implement the pro-privatisation policies, see Daily News 12.5.2004

[21] Island 7th May 2004

Akin to any other developing country, Sri Lanka is heavily dependent on aid from international lending agencies. The expectation is that the country will not be able to escape the pervasive influence of globalisation, unless its negative impact is softened through massive people power. In the event that Sri Lanka is pushed into privatising essential services, one can only fervently hope that it will be privatisation with a human face.[22]

[22] http://www.itdg.org/html/advocacy/docs/gats and electricity in-sri-lanka pfd

Subscriptions

The annual subscription rates of the LST Review are as follows:

Local : Rs. 800 (inclusive of postage)

Overseas :

South Asia/Middle East	US$ 32
S.E. Asia/Far East/Australia	US$ 37
Europe/Africa	US$ 42
America/Canada/Pacific countries	US$ 47

Individual copies at Rs. 75/- may be obtained from the Trust, No. 3, Kynsey Terrace, Colombo 8, and BASL Bookshop at No. 153, Mihindu Mawatha, Colombo 12.

For further details, please contact

Law & Society Trust
No. 3, Kynsey Terrace
Colombo 8
Tel: 2691228, 2684845
Fax:94 11 2686843