

LST REVIEW

Volume 25 Issue 323 September 2014



GOVERNANCE AND CIVIC ENGAGEMENT IN SRI LANKA

LAW & SOCIETY TRUST

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Printed by:
Law & Society Trust
3 Kynsey Terrace, Colombo 8, Sri Lanka
(+94)11-2691228, 2684845, 2684853 | fax: 2686843
lst@eureka.lk
www.lawandsocietytrust.org

ISSN 1391 - 5770

Editor's Note... ..

This Issue of the *LST Review* features the annual critical review of the performance of the Human Rights Commission of Sri Lanka (HRCSL) by the *Law & Society Trust*. The report's findings exemplify a commonly accepted perception regarding the lack of will on the part of the HRCSL to confront abuse of state power in its varied manifestations in Sri Lanka.

Significant challenges to the protection and promotion of human rights became apparent during the year under review, calling for an efficacious response by the HRCSL. Yet apart from issuing statements, holding perfunctory inquiries and expressing concern, the HRCSL's performance in regard to these challenges has been poor. As is observed;

The HRCSL has the mandate to take up individual or collective issues on their own initiative, without a complaint having been lodged (suo motu). Nevertheless, the HRCSL hardly exercises that power to investigate politicized violations. The HRCSL made no effort to investigate on its own initiative, various grave fundamental and/or human rights violations.

The apathy exhibited on the part of Sri Lanka's (supposedly) premier human rights monitoring body covers virtually the entire spectrum of abuses including torture and other ill-treatment of persons in custody by the security forces and police, neglect of the rights of internally displaced persons (IDPs), breakdown in rule of law and the prevalence of widespread impunity, suppression of freedom of expression including violence against media personnel and institutions, continued misuse of the Prevention of Terrorism Act (PTA), arbitrary detention policies, internal displacement and forced relocation and military occupation in the North and East leading to loss of homes and livelihoods.

Further matters of concern which remain un-addressed by the HRCSL relate to the overruling by military mechanisms of local administrative structures regulating civilian lives in previous conflict affected areas, unresolved cases of involuntary or enforced disappearances; repressive economic policies which penalise the poor and continued anti-minority propaganda/violence by the religious militant group 'Bodu Bala Sena'

(BBS). As the writers of this report point out, the HRCSL has denied itself jurisdiction to act in response to allegations of hate speech made against the BBS despite the worsening of religious extremism in Sri Lanka.

Meanwhile, even though the HRCSL has consciously attempted to build relationships with community based organisations (CBOs) and non-governmental organisations (NGOs), these linkages have been *ad hoc* and intermittent; a regular and systematic working relationship therein is still lacking

Importantly in that regard, the independence of the body - and in particular of specific Commissioners - from the government remains a continuing question. Bereft of this most necessary element of independence, the call by the HRCSL for it to be vested with greater powers to compel implementation of its recommendations lacks veracity. The report concludes with several recommendations including crucially, the need for proactive use of its *suo moto* powers where the HRCSL becomes cognisant of state abuse.

We also carry a recent memorial oration of particular interest delivered by *Deepika Udagama* exploring the dimensions of Governance and Civic Engagement in Sri Lanka, the core topic of this Issue. The oration emphasizes several themes that are extremely important to Sri Lankans today. As questioned by her;

As the analyses we make is premised on democratic governance, is it not equally, if not more, important to turn the searchlight on us, the citizens, in whom sovereignty lies under our Constitution? Is it not pertinent to ask ourselves the questions as to what extent we fashion policies through democratic participation?; Do we have faith in our democratic entitlements and powers?; Do we have the confidence that we can positively change policies and practices that affect us through the use of those powers?; Do we possess the necessary knowledge and skills for such purposes?; Or, are we content to be mere political instruments that are occasionally cajoled into taking sides during election time by those who nurse political ambitions?

Dr Udagama makes it clear that 'shifting the focus on the citizenry and on civic values and engagement is not to exonerate public representatives from abuse of authority or relieve them of their sacred duty to govern in a democratic and decent manner.'

But the question remains vital; 'do we have a democratic ethos?' Notably, this question is answered not unequivocally and sweepingly in the negative as some would want to do but rather in the form of several practical illustrations demonstrating civic disengagement in a variety of different contexts. Evidence to the contrary, as sparse as that is, is also cited to buttress the fact that even in the most difficult of situations, collective action to safeguard democracy is still possible.

And radical interrogation of the manner in which propaganda has shaped our way of thinking is also integral to this discussion. As is pointed out, there is a 'novel political lexicon' in use which equates dissent to conspiracy, dissenter to traitor, one who agrees to patriot and the term 'motherland' to the political establishment.

While acknowledging the traumas, historic and recent, that this country and its people have had to undergo, the overall point sought to be made is clear; there is a heavy price to be paid for remaining passive in the face of the deterioration of our civil liberties. The further question that arises is whether 'the more literate and privileged classes in Sri Lanka have consciously abdicated their responsibilities toward democracy?'

In Dr Udagama's mind, the remedy to these grave democratic dilemmas cannot come through a mere reinvention of the law and of the Constitution. Instead, education (passionately re-imagined from the lamentable depths to which Sri Lanka's education systems have degenerated today), remains the key towards a better democratic future for the country. Indeed, this is a conclusion that few would disagree with.

Kishali Pinto-Jayawardena

Sri Lanka: Protecting Human Rights or the Government?

*Law & Society Trust**

1. General Overview

This report endeavours to examine the functioning of the Human Rights Commission of Sri Lanka (HRCSL) during 2013 in terms of conformity to its statutory mandate and constitutional role. It sets out the factual background to the analysis and then critically looks at key components of the functioning of the HRCSL.

During the period under review, several high profile international human rights advocates visited Sri Lanka with the objective of improving the country's record in terms of its national and international obligations.¹ Significantly, the United Nations High Commissioner for Human Rights, Navi Pillay's visit to Sri Lanka was considered pivotal in recent human rights discourse.² The High Commissioner was officially welcomed and supported by the Government of Sri Lanka (hereinafter, GoSL).

However, the post-visit report issued by the Office of the United Nations High Commissioner for Human Rights³ delineated inadequate measures of the GoSL in its efforts to implement recommendations or to receive technical support offered repeatedly by UN bodies and other experts. The GoSL rejected the report "in its entirety" and provided an official response.⁴ Commissioner Pillay faced criticism⁵ during her visit in regard to

* The report was compiled by K. Aingkarana (Human Rights in Conflict Programme) together with Dinushika Dissanayake and Shashika Bandara of the Economic, Social and Cultural Rights Programme, Law & Society Trust. It was prepared based on the information gathered from other human rights organizations, civil society and from media monitoring, and the brief information provided by the Human Rights Commission of Sri Lanka (HRCSL) in its response to the ANNI (Asian Non-Governmental Network on National Human Rights Institutions) questionnaire. In spite of the writers' effort(s) to obtain detailed relevant information from HRCSL officials, including the Chairman, Commissioners, Secretary, Secretary – Legal and Directors, the HRCSL was not forthcoming with the information requested. This report was first published in the *2014 ANNI Report on Performance and Establishment of National Human Rights Institutions in Asia*, coordinated by the Asian Forum for Human Rights and Development (FORUM-ASIA). It has been further edited for the purposes of the *LST Review*.

¹ See: Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, Report of the Office of the United Nations High Commissioner for Human Rights, "Promoting reconciliation and accountability in Sri Lanka.", available at www.ohchr.org/EN/HRBodies/HRC/.../A-HRC-25-23_AEV.doc, accessed on 29th May 2014

² "UN's Navi Pillay to visit Sri Lanka former war zone", BBC News Asia, August 25, 2013, available at <http://www.bbc.com/news/world-asia-23833804> and "Navi Pillay Visits Sri Lanka", Daily Mirror, August 26, 2013, available at <http://www.dailymirror.lk/news/infographics/34392-navi-pillay-visit-sri-lanka.html>, accessed on 29 May 2014.

³ See: Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, Report of the Office of the United Nations High Commissioner for Human Rights: "Promoting reconciliation and accountability in Sri Lanka", Office of the High Commissioner for Human Rights, available at www.ohchr.org/EN/HRBodies/HRC/.../A-HRC-25-23_AEV.doc, accessed on 29th May 2014.

⁴ Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, "Comments received from the Permanent Mission of Sri Lanka on the draft report of the Office of the United Nations High Commissioner for Human Rights on promoting reconciliation and accountability in Sri Lanka", available at http://ap.ohchr.org/documents/E/HRC/c_gov/A_HRC_25_G_10AEV_2.doc, accessed on 29 May 2014.

⁵ "Morality of Navi Pillay's Visit", Daily Mirror, Gammanpila, Udaya, August 28, 2013, available at <http://www.dailymirror.lk/opinion/172-opinion/34482-morality-of-navi-pillays-visit.html>, accessed on 29 May 2014.

the legitimacy of her intentions to which she responded in an end-of-mission press conference in Colombo.⁶ The Government of Sri Lanka also received the UN Special Rapporteur for Human Rights of Internally Displaced Persons, Chaloka Beyani who stressed the importance of conducting a joint needs assessment as well as arriving at durable solutions for Internally Displaced Persons (IDPs) that should include return to normalcy without undue interference from the authorities.⁷

Moreover amidst much controversy,⁸ Sri Lanka hosted the Commonwealth Heads of Government Meeting⁹ (hereinafter referred to as the CHOGM), which two member countries boycotted citing dissatisfaction with Sri Lanka's human rights record.¹⁰ The suppression of protests¹¹ and restraints on media freedom¹² were noted during the CHOGM. These developments contradicted GoSL's prior statement¹³ of not banning protests during the CHOGM.

The first Northern Provincial Council elections held in September 2013 was won by the opposition Tamil National Alliance (TNA) in a landslide victory seen as expressing the will of the people of the region.¹⁴ Pertaining to the human rights climate, Sri Lanka saw continuing reports of attacks on journalists both in Colombo¹⁵ as well as in Jaffna.¹⁶ These attacks raised concerns with regard to the lack of government will in

⁶ "Opening remarks by the UN High Commissioner for Human Rights", United Nations in Sri Lanka, 31.08.2013, available at <http://un.lk/news/opening-remarks-by-un-high-commissioner-for-human-rights-navi-pillay/>, accessed on 29 May 2014.

⁷ See: "Constructing a development based strategy for durable solutions for internally displaced persons (IDPs) in Sri Lanka in the aftermath of conflict is now essential", Office of the High Commissioner for Human Rights, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14086&LangID=E>, accessed on 29 May 2014.

⁸ "Open Letter Regarding Sri Lanka Hosting the 2013 Commonwealth Heads of Government Meeting (CHOGM)", Human Rights Watch, February 6, 2013, available at <http://www.hrw.org/news/2013/02/06/open-letter-regarding-sri-lanka-hosting-2013-commonwealth-heads-government-meeting-c>, accessed on 29 May 2014; and "Commonwealth giving Sri Lanka carte blanche for human rights abuses", Amnesty International, September 27, 2013, available at <http://www.amnesty.org/en/for-media/press-releases/commonwealth-giving-sri-lanka-carte-blanche-human-rights-abuses-2013-09-27>, accessed on 29 May 2014.

⁹ "Commonwealth Heads of Government Meeting 2013 – Outcomes", The Commonwealth Website November 17, 2013, available at <http://thecommonwealth.org/media/event/commonwealth-heads-government-meeting-2013-outcomes>, accessed on 29 May 2014.

¹⁰ "Statement by the Prime Minister of Canada", Office of the Prime Minister of Canada, October 7, 2013, available at <http://pm.gc.ca/eng/news/2013/10/07/statement-prime-minister-canada>, accessed on 29 May 2014, and "PM Not to Attend Commonwealth Meeting in Sri Lanka", Republic of Mauritius, November 13, 2013, available at <http://www.gov.mu/English/News/Pages/PM-Not-to-Attend-Commonwealth-Meeting-in-Sri-Lanka.aspx>, accessed on 29 May 2014.

¹¹ "Court bans protests during CHOGM", Sunday Times, Financial Times, November 11, 2013, available at <http://www.ft.lk/2013/11/15/court-bans-protests-during-chogm/>, accessed on 29 May 2014, and "Sri Lanka: Banning Commonwealth summit protests a blatant attempt to silence criticism", Amnesty International, October 10, 2013, available at <http://www.amnesty.org/en/news/sri-lanka-chogm-ban-protests-2013-10-10>, accessed on 29 May 2014.

¹² "Sri Lanka Blocks Freedom Of Movement During CHOGM", Colombo Telegraph, November 13, 2013, available via web proxy at <https://www.colombotelegraph.com/index.php/sri-lanka-blocks-freedom-of-movement-during-chogm/>, accessed on 29 May 2014.

¹³ "No ban on protests during CHOGM – Govt", The Nation, October 11, 2013, available at <http://www.nation.lk/edition/breaking-news/item/21777-no-ban-on-protests-during-chogm-govt.html>, accessed on 29 May 2014.

¹⁴ "Tamil National Alliance wins Lankan Northern Provincial Polls", Times of India, Karthik, S., September 23, 2013, available at <http://timesofindia.indiatimes.com/world/south-asia/Tamil-National-Alliance-wins-Lankan-Northern-Provincial-Polls/articleshow/22910525.cms>, accessed on 29 May 2014.

¹⁵ "Sri Lanka Sunday Leader's Mandana Ismail Abeywickrema flees", BBC News Asia, September 18, 2013 available at <http://www.bbc.com/news/world-asia-24148142>

ascertaining and punishing the perpetrators.¹⁷ Sri Lanka also continued to block websites that were critical of the government, against which a petition was filed at the Human Rights Commission of Sri Lanka¹⁸ (HRCSL). The arrests of two human rights defenders¹⁹ under the Prevention of Terrorism Act (PTA) led to widespread protests both locally²⁰ and internationally.²¹ Their eventual release was permitted only under strict conditions including restrictions on overseas travel and speaking in public on the circumstances of their detention. Policy advocates voiced concern over the misuse of the Prevention of Terrorism Act.²² It is noted that the HRCSL lodged concern over these arrests; its officers visited the detention facilities where the two human rights defenders were held and advised the authorities to adhere to the rule of law in handling the investigation.²³

Excessive use of state power by the military was evidenced in locations outside the North and East²⁴ such as in relation to Weliveriya, (a small town in the Gampaha district, north of Colombo), where the army was sent in to curb residents who were protesting against a factory that they alleged caused water contamination, and the government's failure to address the issue. The result of an official inquiry justified²⁵ the use of force by the military personnel despite the fact that deaths of innocent civilians had taken place. Critics however pointed to the disproportionate use of military power in a situation where ordinary law enforcement officers might have better tackled the protest.²⁶ As detailed later in this report, the HRCSL conducted an investigation and issued recommendations which had no discernible impact on the abuse of military power by state agents. Cases of torture and abuse of female recruits in the Army were also reported, to which the Sri Lankan military reportedly

¹⁶ "Uthayan reporter attacked.", Ceylon Today, July 11, 2013, available at <http://www.ceylontoday.lk/16-37395-news-detail-uthayan-reporter-attacked.html>

¹⁷ "Attack on 'Uthayan' Newspaper and Other Incidents Affecting Media in the North Condemned by SAFMA", dbsjeyaraj.com, April 13, 2013 available at <http://dbsjeyaraj.com/dbsj/archives/20060>

¹⁸ "Sri Lanka blocks two more websites critical of government: rights group", Reuters, May 21, 2014, available at <http://in.reuters.com/article/2014/05/21/uk-sri-lanka-censorship-media-idINKBN0E11TT20140521>

¹⁹ Ruki Fernando and Fr. Praveen Mahesan were arrested under anti-terrorism laws. See "Sri Lanka arrests prominent rights activists under anti-terrorism law", The Guardian, March 17, 2014, available at <http://www.theguardian.com/world/2014/mar/17/sri-lanka-arrests-human-rights-activists-terrorism-law>

²⁰ "Statement condemning arbitrary arrest and detention of human rights defenders, Ruki Fernando, Fr. Praveen Mahesan, victims and their families", Daily FT, March 22, 2014, available at <http://www.ft.lk/2014/03/22/statement-condemning-arbitrary-arrest-and-detention-of-human-rights-defenders-ruki-fernando-fr-praveen-mahesan-victims-and-their-families/>

²¹ "Sri Lanka: Free prominent human rights defenders Ruki Fernando and Father Praveen", Amnesty International, March 17, 2014, available at <http://www.amnesty.org/en/news/sri-lanka-free-prominent-human-rights-defenders-ruki-fernando-and-father-praveen-2014-03-17>; and "Release Ruki Fernando and Father Praveen Immediately - Stop silencing our voices", Change.org, available at <http://www.change.org/petitions/h-e-mahinda-rajapakse-release-ruki-fernando-and-father-praveen-immediately-stop-silencing-our-voices>

²² CPA on the need to repeal and replace the PTA", Ceylon Today, Center for Policy Alternatives, May 13, 2013, available at <http://www.ceylontoday.lk/51-32209-news-detail-cpa-on-the-need-to-repeal-and-replace-the-pta.html>

²³ "HRCSL Vigilant over the Conditions of Two Human Rights Defenders", Human Rights Commission of Sri Lanka, March 19, 2014, available at <http://hrctl.lk/english/?p=2254>, accessed on 30 May 2014.

²⁴ "Demand for Safe-water turns Weliveriya into a Battleground", ESCR Newsletter, Issue 7, Law and Society Trust, Zahid, Sabra, September 2013, available at http://lawandsocietytrust.org/PDF/resource/ESCR%20NEWS%20LETTER_ENGLISH_IS7.pdf

²⁵ "Press Communique-Weliveriya Incident", Ministry of Defense and Urban Development, August 30, 2013, available at http://www.defence.lk/new.asp?fname=Press_Communique_Weliveriya_Incident_20130830_03

²⁶ "What has happened to the Weliveriya inquiry?", Sunday Times, Pinto-Jayawardena, Kishali, February 23, 2014 available at <http://www.sundaytimes.lk/140216/columns/what-has-happened-to-the-weliveriya-inquiry-85765.html>

admitted guilt.²⁷ The Army promised to punish those who were involved but curiously, also promised to punish those who had filmed this incident.²⁸

Meanwhile, religious political groups such as *Bodu Bala Sena* (BBS—‘Buddhist Power Army’) came under criticism for storming a press conference²⁹ and attacking another Buddhist monk opposed to them.³⁰ Subsequent to a case filed by the police,³¹ the accused members of BBS were later released on bail.³² The BBS has a track record of speaking and acting against Muslim minorities, leading a public campaign to boycott Muslim-operated stores, and ban Halal certification.³³ They have also issued warnings against Christians citing religious conversions as a key issue.³⁴ The *BBS* has publicly decried pluralistic values, claiming that this is “killing the Sinhala race”.³⁵

The period under review witnessed the emergence of more religious and ethno-centered groups carrying out similar incidents against minorities.³⁶ A call for banning BBS along with similar groups such as *Ravana Balaya* (‘Ravana Force’) and *Sinhala Ravaya* (‘Roar of the Sinhala’), is to be presented by the Minister of National Language and Social Integration, Vasudeva Nanayakkara, to the Cabinet.³⁷ The GoSL also came under scrutiny for deporting a British tourist for sporting a tattoo of the Lord Buddha on her arm.³⁸ The government established a special police unit on religious crimes in May 2014³⁹ and created a “Supreme Buddhist Council” which is expected to advise the President on policy with regard to religious issues in Sri Lanka.⁴⁰ However, the Council

²⁷ “Army admits abuse & torture of female recruits”, *The Republic Square*, March 24, 2014, available at <http://www.therepublicsquare.com/politics/2014/03/24/army-admits-abuse-torture-of-female-recruits/>

²⁸ “Sri Lanka Army to take stern disciplinary action on soldiers in leaked video”, *Colombopage*, March 22, 2014 available at http://www.colombopage.com/archive_14A/Mar22_1395499138CH.php

²⁹ “JVP denounces BBS”, *Daily Mirror*, April 10, 2014 available at <http://www.dailymirror.lk/news/45750-jvp-denounces-bbs.html>

³⁰ “Buddhist Monk attacked by Bodu Bala Sena and Police inaction”, *Groundviews*, September 10, 2013, available at <http://groundviews.org/2013/10/09/buddhist-monk-attacked-by-bodu-bala-sena-and-police-inaction/>

³¹ “Police file court report against BBS over press conference invasion”, *The Republic Square*, April 22, 2014, available at <http://www.therepublicsquare.com/politics/2014/04/22/police-file-court-report-against-bbs-over-press-conference-invasion/>

³² “Fort Magistrate advises BBS monks”, *Colombo Gazette*, May 5, 2014, available at <http://colombogazette.com/2014/05/05/fort-magistrate-advises-bbs-monks/>

³³ “The hardline Buddhists targeting Sri Lanka’s Muslims”, *BBC News*, March 25, 2013, available at <http://www.bbc.com/news/world-asia-21840600>

³⁴ “BBS warns against unethical conversions”, *Colombo Gazette*, March 27, 2013, available at <http://colombogazette.com/2013/03/27/bbs-warns-against-unethical-conversions/>

³⁵ “This is a Sinhala country, Sinhala Government: Bodu Bala Sena”, *Daily FT*, June 5, 2014, available at <http://www.ft.lk/2013/02/18/this-is-a-sinhala-country-sinhala-government-bodu-bala-sena/>

³⁶ “Muslim Photographer Attacked by Marching Sinhala Ravaya Protesters”, *dbsjeyaraj.com*, June 19, 2013, available at <http://dbsjeyaraj.com/dbsj/archives/22062>

³⁷ “Ban BBS”, *The Sunday Leader*, Sri Aravinda, Indika, March 31, 2014, available at <http://www.thesundayleader.lk/2013/03/31/ban-on-bbs/>

³⁸ “Sri Lankan officials apologise to British nurse arrested over Buddha tattoo”, *The Telegraph*, April 24, 2014 available at <http://www.telegraph.co.uk/news/worldnews/asia/srilanka/10785323/Sri-Lankan-officials-apologise-to-British-nurse-arrested-over-Buddha-tattoo.html>

³⁹ “Tattoos, Feelings and Religion”, *Law and Society Trust blog*, ESCR Team, May 7, 2014, <http://lawandsocietytrust.blogspot.com/2014/05/tattoos-feelings-and-religion.html>

⁴⁰ “Supreme Buddhist Council to advise Govt. on religions”, *Sunday Times*, May 25, 2014, available at <http://www.sundaytimes.lk/140525/news/supreme-buddhist-council-to-advise-govt-on-religions-100441.html>

comprises solely of Buddhist clergy,⁴¹ raising questions about the lack of representation of other minorities with regard to policy decisions in Sri Lanka.

Contentious issues with regard to land rights also surfaced in the wake of mega development projects⁴² and urban beautification.⁴³ The North and East of Sri Lanka has become a focal point with regard to land acquisition issues.⁴⁴ A protestor campaigning against land acquisition in Wanathamulla was abducted by unknown persons in February 2014, and was later released due to protests by locals.⁴⁵ The residents of Wanathamulla filed a complaint with the HRCSL against the police.⁴⁶

The United Nations passed the resolution A/HRC/25/L.1/Rev.1⁴⁷ at the 25th session of the Human Rights Council that requested the High Commissioner to conduct a comprehensive investigation into alleged human rights violations in Sri Lanka.⁴⁸ The GoSL rejected the resolution as an unacceptable violation of Sri Lanka's sovereignty and vowed to continue with its own reconciliation process.⁴⁹

The HRCSL has published statements on its website, on action taken by it, with regard to high priority incidents such as the Weliveriya⁵⁰ incident, the case of the arrests of two human rights activists⁵¹ etc., that consist of advising, meeting and submitting reports. However, HRCSL's calls for immediate reports on railway safety gates,⁵² or directives with regard to interviews of Irrigation Department seem to carry a higher level of authority in terms of execution. In addition, as understood from the official records, incidents like school admission cases take higher priority consuming energy and time over serious incidents of abuse of state power such as Weliveriya.

⁴¹ *Ibid.*

⁴² ESCR Newsletter, Issue 8, Law and Society Trust, December 2013, available at [http://lawandsocietytrust.org/PDF/resource/ESCR_issue_8_dec_Newsletter%20\(English\).pdf](http://lawandsocietytrust.org/PDF/resource/ESCR_issue_8_dec_Newsletter%20(English).pdf)

⁴³ "Are the poor "lesser" stakeholders of development?", ESCR Newsletter, Issue 9, Law and Society Trust, Mendis, Rasika, May 2014, available at [http://lawandsocietytrust.org/PDF/resource/escr_/ESCR%20Newsletter%20Issue%208%20\(May%202014\).pdf](http://lawandsocietytrust.org/PDF/resource/escr_/ESCR%20Newsletter%20Issue%208%20(May%202014).pdf)

⁴⁴ "Policy Brief: Politics, Policies and Practices with Land Acquisitions and Related Issues in the North and East of Sri Lanka", Center for Policy Alternatives, "March 5, 2014, available at <http://www.cpalanka.org/policy-brief-politics-policies-and-practices-with-land-acquisitions-and-related-issues-in-the-north-and-east-of-sri-lanka/>

⁴⁵ "Duminda chased out of Wanathamulla", Ceylon Today, Indrakumar, Menaka; Weerasinghe, Gihan, February 16, 2014, available at <http://www.ceylontoday.lk/51-56184-news-detail-duminda-chased-out-of-wanathamulla.html>

⁴⁶ "Wanathamulla residents go to HRCSL against police", Ceylon Today, March 6, 2014, available at <http://www.ceylontoday.lk/51-57880-news-detail-wanathamulla-residents-go-to-hrcsl-against-police.html>

⁴⁷ United Nations Human Rights Council, 25th Session, "Promoting reconciliation, accountability and human rights in Sri Lanka", A/HRC/25/L.1/Rev.1, March 27, 2014, available at http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/25/L.1/Rev.1

⁴⁸ "Human Rights Council adopts a resolution on reconciliation, accountability and human rights in Sri Lanka", UN Human Rights Council, March 27, 2014, available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14447&LangID=E>

⁴⁹ "We reject this - President tells AFP", Ada Derana, March 28, 2014, <http://www.adaderana.lk/news.php?nid=26239>

⁵⁰ "HRCSL concludes probe on Rathupaswala crisis", Daily Mirror, May 4, 2014, <http://www.dailymirror.lk/news/46682-hrcsl-concludes-probe-on-rathupaswala-crisis.html>

⁵¹ "HRCSL Vigilant over the conditions of two Human Rights Defenders", Human Rights Commission of Sri Lanka, March 19, 2014, available at <http://hrcsl.lk/english/?p=2254>

⁵² "HRCSL Calls For An Immediate Report From The Railway Authorities", Human Rights Commission of Sri Lanka, July 3, 2013, available at <http://hrcsl.lk/english/?p=2156>

The lack of responses and effectiveness of the rulings issued by HRCSL towards rights violations is noted. For instance, despite starting the inquiry, the response by HRCSL to the petition against website blocking citing national security raises concerns;⁵³ on the other hand Wanathamulla residents remain concerned for their safety, despite a ruling by HRCSL.⁵⁴ Concurrently, the number of fundamental rights petitions filed in the Supreme Court has decreased, which, according to the Bar Association of Sri Lanka, was due to increasing lack of faith in the system. The HRCSL claimed on the other hand that it is due to the elongated process, which leaves out-of-court settlements preferable, saving cost and energy.⁵⁵ In either instance this should be a point of concern for the HRCSL. While the HRCSL reportedly attempted to strengthen their mandate through amendments⁵⁶ and capacity building projects,⁵⁷ much is left to be desired in terms of asserting equal authority and involvement for all cases of human rights violations across the board,⁵⁸ with timely and effective responses.

2. Independence

Establishment of NHRI	
Established by Law	Human Rights Commission of Sri Lanka Act, No.21 of 1996 ⁵⁹
Mandate	To give force to the commitment of Sri Lanka as a member of the United Nations in protecting human rights, and to perform the duties and obligations imposed on Sri Lanka by various international treaties at international level; as well as to maintain the standards set out under the Paris Principles. ⁶⁰⁻⁶¹
Selection and Appointment	
	The selection process is clear. However it is not transparent or participatory. Under the enabling legislation, the members of the Commission were

⁵³Govt. must Modi-fy policy on news websites", Daily Mirror, May 28, 2014, available at <http://www.dailymirror.lk/opinion/172-opinion/47664-editorial-govt-must-modi-fy-policy-on-news-websites-.html>

⁵⁴ "Wanathamulla Residents Raise Concerns", The Sunday Leader, Nathaniel, Camelia, May 30, 2014, available at <http://www.thesundayleader.lk/2014/04/20/wanathamulla-residents-raise-concerns/>

⁵⁵"Drop in FR petition filings", Ceylon Today, Jayakoday, Ruwan, May 26, 2014, available at <http://www.ceylontoday.lk/16-64821-news-detail-drop-in-fr-petition-filings.html>

⁵⁶ "Amendments To The Human Rights Commission Act No. 21 Of 1996", Human Rights Commission of Sri Lanka, December 24, 2013, available at <http://hrctl.lk/english/?p=2234>

⁵⁷ "Commonwealth Secretariat Capacity Development Intervention For Human Rights Commission Of Sri Lanka", Human Rights Commission of Sri Lanka, April 4, 2014, available at <http://hrctl.lk/english/?p=2274>

⁵⁸ "HRCSL should defend human rights, not the regime", Ceylon Today, December 24, 2013, available at <http://www.ceylontoday.lk/52-51045-news-detail-hrcsl-should-defend-human-rights-not-the-regime.html>

⁵⁹ Human Rights Commission of Sri Lanka Act No. 21 of 1996", Human Rights Commission of Sri Lanka, available at <http://hrctl.lk/english/ACT/english.pdf>

⁶⁰Paris Principles (Principles Relating to the Status of National Institutions) available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>

⁶¹ See: Establishment, HRCSL website, available at http://hrctl.lk/english/?page_id=615.

	<p>to be appointed by the President, on the recommendation of the Constitutional Council.⁶² There is little transparency as to the grounds on which certain members of the Commission have been selected.</p>
	<p>The Constitutional Council was meant to be an independent and impartial body which was responsible for selecting members to the Commission.⁶³ However, with the passing of the 18th Amendment in 2010, the Constitutional Council was transformed into a Parliamentary Council according to which the President is merely required to seek observations from the Council, which in effect makes it to a certain extent redundant.⁶⁴ Therefore, the independence and credibility has been severely compromised. The process does not envisage extensive consultations with civil society or NGOs in appointing members to the Commission.</p>
	<p>Section 3(1) of the HRCSL Act⁶⁵ requires the members of the Commission to be chosen from among persons having knowledge of, or practical experience in, matters relating to human rights. This Section does not specify as to how these persons are to be selected, nor does it provide for a mechanism through which the qualifications of such appointees can be measured.</p>
	<p>Section 3(3) of the HRCSL Act⁶⁶ makes a vague statement to the effect that (3) in making</p>

⁶² "Art. 3 (2) Human Rights Commission of Sri Lanka Act No. 21 of 1996", HRCSL Website, available at <http://hrctl.lk/english/ACT/english.pdf>

⁶³ Article 41 (B) 17th Amendment: 'No person shall be appointed by the President as the Chairman or a member of any of the Commissions specified in the Schedule to this Article, except on a recommendations of the Council'. The persons appointed through nominations are required to be persons of eminence and integrity who have distinguished themselves, who are not members of any political party and nominated to represent minority interests. The Constitutional Council comprised of the Prime Minister, the Speaker, the Leader of the Opposition in Parliament, one person appointed by the President, five persons appointed by the President, on the nomination of both the Prime Minister and the Leader of the Opposition, and one person nominated upon agreement by the majority of the Members of Parliament belonging to political parties or independent groups other than those to which the Prime Minister and the Leader of the Opposition belongs and appointed by the President – See: 17th Amendment to the Constitution of the Democratic Socialist Republic of Sri Lanka 1978.

⁶⁴ The Parliamentary Council comprising primarily of members drawn from government and ruling coalition members of Parliament of: the Prime Minister, the Speaker, the Leader of the Opposition, a nominee (who is an MP) of the Prime Minister, and a nominee (who is an MP) of the Leader of the Opposition - Article.41 (A) of the 18th Amendment to the Constitution of the Democratic, Socialist Republic of Sri Lanka.

⁶⁵ "Art. 3 (1) Human Rights Commission of Sri Lanka Act No. 21 of 1996", HRCSL Website, available at <http://hrctl.lk/english/ACT/english.pdf>

⁶⁶ Section 3(3), HRCSL Act, *Supra*.

	<p>recommendations to the President, the Constitutional Council and the Prime Minister shall have regard to the necessity of the minorities being represented of the Commission. Unfortunately, the Section does not define the term 'minorities' and whether this means representation of each racial, ethnic and religious minority in Sri Lanka, nor does the Section encompass gender representation.</p> <p>The Commission also does not strive to be inclusive of diverse sectors of society. There is no process which ensures representation or involvement of NGOs and other civil society actors.</p>
Terms of office	
	As per Section 3(5) every member of the Commission shall hold office for a period of three years.
Next turn-over of members	The latest appointment was in February 2014, therefore the Commissioners must be re-appointed in 2017. ⁶⁷

Appointment/ Selection process & Composition

Human Rights Commission of Sri Lanka appointed its members for the latest tenure on February 18, 2014.⁶⁸ One appointment in particular of an officer of a 'Defence University'⁶⁹ raised the issue of the capacity of that specific Commissioner to independently scrutinize the conduct of the armed forces. Members of the Commission have not changed since the issuance of the 2013 ANNI Report, which explores in depth the qualifications of the individuals within the committee.⁷⁰

The re-appointment of the members of the Human Rights Commission in 2014 of Sri Lanka, needs to be evaluated alongside the fact that the Commission has been downgraded from an 'A' rating to a 'B' rating in 2007, partially due to the concerns relating to the appointment process of the Commissioners.⁷¹ The confidence

⁶⁷ "Appointments Of Members To The HRCSL For The Present Term", HRCSL Website. February 25, 2014, available at <http://hrsl.lk/english/?p=2244>.

⁶⁸ *Ibid*. The HRCSL members nominated by the Parliamentary Council and appointed by the President with effect from 18 February 2014 are: retired Supreme Court Judge Justice Priyantha Perera – Chair of the Commission; Mr. T. E. Anandarajah, former Inspector-General of Police; Dr. Sri Warna Prathiba Mahanamahewa, Dean of the Faculty of Law at General Sir John Kotelawala Defence University, Dr. Bernard de Zoysa, Private Medical Practitioner; and Mrs. Jezima Ismail, former Chancellor of the South Eastern University.

⁶⁹ The Kotelawala Defence University is a military academy primarily established for officer cadets to pursue graduate and post-graduate qualifications.

⁷⁰ "Sri Lanka: The National Human Rights Commission Marionette of the State", ANNI Report on National Human Rights Institutions 2013, Law & Society Trust, pp. 190-216.

⁷¹ "Document - Sri Lanka: Eighth Session of the UN Human Rights Council: Review of Sri Lanka under the universal periodic review: Amnesty International's reflections on the outcome", Amnesty International, June 2008, available at LST Review Issue 323 (September 2014) | 8

of the public seems to be dwindling with actions such as indefinitely postponing the establishment of a National Inquiry on Torture,⁷² which in turn projects an image of unreliability with regard to HRCSL. This indeed has raised questions of the objectivity of HRCSL.⁷³

Replacing a member of the Commission remains a non-transparent process. Replacing members falls under Section 3 of the HRCSL Act,⁷⁴ in terms of which, the selection mechanism and measuring the qualifications of the candidates, remain obscure.

Terms and Conditions of Office

Section 4 of the HRCSL Act⁷⁵ specifies the process in which a member of the Commission may be removed from office, by the President.⁷⁶ Among the several bases on which a dismissal may occur, a Commissioner may be dismissed if the President forms an opinion, (based on a recommendation made by the Prime Minister in consultation with the Speaker and the Leader of Opposition), to the effect that a member of the Commission engages in paid employment outside the duties of his office, which conflicts with his duties as a member of the Commission.

An alternative to the above grounds of dismissal is removal by an order of the President, made after an address of Parliament, on the ground of proved misbehaviour or incapacity. Such order needs to be supported by a majority of the total number of members of Parliament (including those not present). The Speaker will not entertain a resolution for the presentation of such an address to be placed on the Order Paper of the Parliament, unless the notice of such resolution is signed by at least one-third of Parliament and sets out full particulars of the alleged misbehaviour or incapacity.

The process of dismissal is similar to the process adopted in relation to other independent institutions. In fact, the procedure adopted for the presentation and passing on an address of Parliament for the removal of a member of the Commission will be the same process that is adopted when removing a Judge of the Supreme Court or the Court of Appeal.

While the process of dismissal may be elaborate with multiple levels of safeguards, in practice the guarantees seem to be failing. Dr. Shirani Bandaranayake was dismissed from the office of Chief Justice in a blatant violation of due process and without the necessary degree of objectivity.⁷⁷ Given the overwhelming majority on

<http://www.amnesty.org/en/library/asset/ASA37/023/2008/en/1ce995f8-37c8-11dd-9ec6-1d6085451ee8/asa370232008eng.html>

⁷² "HRC Postpones Set Up Of Torture Commission On Alleged Requests By CSOs – Rights Now Asks Chairman To Name The Orgs", Rights Now, 14 December 2013, available from www.rightsnow.net/?p=4347.

⁷³ "HRCSL should defend human rights, not the regime", Ceylon Today, December 24, 2013, available at <http://www.ceylontoday.lk/52-51045-news-detail-hrcsl-should-defend-human-rights-not-the-regime.html>

⁷⁴ Article 3, HRCSL Act, *Supra*.

⁷⁵ Article 4, HRCSL Act, *Supra*.

⁷⁶ Being adjudged an insolvent or being declared to be of unsound mind by a court of competent jurisdiction, or being convicted of an offence involving moral turpitude are valid grounds for dismissal. Furthermore, the President is given wide discretion to remove a member of the Commission for being unfit to continue in office by reason of infirmity of mind or body.

⁷⁷ "President Mahinda Rajapaksa removed Sri Lanka's chief justice from office with immediate effect on Sunday, defying a Supreme Court ruling that the Impeachment process was illegal and setting the stage for a possible Constitutional crisis", LST Review Issue 323 (September 2014) | 9

the side of the ruling party in the Parliament, coupled with the fact that voting in Parliament is strictly based on party lines, garnering majority support for an order dismissing a member of the Commission may not be as difficult as the drafters envisioned when drafting the enabling legislation.

The dismissal process requires the complicity of two branches of the state, the executive and the legislature. Given the political backdrop of Sri Lanka and the composition of the members of the Parliament, these two arms of the state hardly act as a checking mechanism on the other.⁷⁸

With regard to the functional immunity of the Commission, this is allowed in some capacity within Section 26 of the HRCSL Act,⁷⁹ which states that proceedings, civil or criminal cannot be instituted against any member of the Commission (or any officer or servant appointed to assist the Commission), for any act or omission done in good faith.

Staffing and Recruitment

As per Section 25 of the HRCSL Act,⁸⁰ the Commission may make requests for staff members. An officer in the public service may be appointed for such position with the consent of such officer and of the Secretary to the Ministry of the Minister in charge of the subject of Public Administration.

The HRCSL sought to expand their mandate by proposing an amendment to the HRCSL Act.⁸¹ While this amendment would reportedly⁸² allow the Commission more power, the independence of the Commission itself is in question, on the basis of statements by its members that may be considered pro-government,⁸³ and also the early resignation of Dr. Ananda Mendis citing interference from within the HRCSL.⁸⁴ Thus, despite existing provisions within the statute, and proposed amendments, the public reportedly remains skeptical of the independence of the Commission.⁸⁵

Reuters, Jan 13, 2013, available at <http://in.reuters.com/article/2013/01/13/srilanka-impeachment-idINDEE90C05R20130113>

⁷⁸ The January 2013 impeachment of Dr. Shirani Bandaranayake from the seat of Chief Justice, subjected Parliamentary Standing Order 78A under heavy criticism from civil society groups as well as the Bar Association. Standing Order 78A lays down the current internal parliamentary procedure for impeachment of judges. “[T]he process set out in Standing Order 78A, which lays down the current internal parliamentary procedure for impeachment of judges, is flawed”, Groundviews, Jan 10, 2013, available at <http://groundviews.org/2013/01/10/a-legal-primer-the-impeachment-of-the-chief-justice-in-sri-lanka/>

⁷⁹ Section 26, HRCSL Act, *Supra*.

⁸⁰ Section 25, HRCSL Act, *Supra*.

⁸¹ “Amendments to The Human Rights Commission Act No. 21 Of 1996”, HRCSL Website, December 24, 2013, available at <http://hrsl.lk/english/?p=2234>

⁸² “HRCSL should defend human rights, not the regime”, Ceylon Today, December 24, 2013, available at <http://www.ceylontoday.lk/52-51045-news-detail-hrcsl-should-defend-human-rights-not-the-regime.html>

⁸³ “Resolution both toothless and dangerous: Human Rights Commissioner”, Daily FT, 25 March 2013, available at <http://www.ft.lk/2013/03/25/resolution-both-toothless-and-dangerous-human-rights-commissioner>

⁸⁴ “I leave the HRC with a clear conscience”, Ceylon Today, 05 February 2012.

⁸⁵ “HRCSL unconcerned about rights”, Ceylon Today, 3 June 2013, available at <http://www.ceylontoday.lk/16-36636-news-detail-hrcsl-unconcerned-about-rights.html>, accessed on 7 June 2014.

3. Effectiveness

No progress appears to have been made in improving the effectiveness of the HRCSL in addressing allegations of grave human rights violations, in spite of the concerns and criticisms expressed by legal scholars, social activists, human rights defenders and community-based-organisations. No major achievements appear to have been made, though the HRCSL is vested with a broad mandate, including, to make recommendations to the Government regarding measures which should be taken to ensure that national laws and administrative practices are in accordance with international human rights norms and standards,⁸⁶ advise and assist the government in formulating legislation and administrative directives and procedures, in furtherance of, the promotion and protection of fundamental rights,⁸⁷ make recommendations to the Government on the need to subscribe or accede to treaties and other international instruments in the field of human rights⁸⁸ and inquire *suo moto* into infringements of fundamental rights.⁸⁹

A set of benchmarks⁹⁰ based on the Paris Principles and good practices of national institutions⁹¹ is outlined by the International Council on Human Rights Policy and the Office of the United Nations High Commissioner for Human Rights. The Paris Principles state that the National Institutions should have authority to call for evidence⁹² [Section 18(1)(a) of the Human Rights Commission of Sri Lanka Act – HRCSL Act, No. 21 of 1996] and require witnesses⁹³ [Section 18(1)(c) of HRCSL Act] to appear before their officers, that they have the power to recommend sanctions in case of refusal [Section 21(3)(a) of HRCSL Act] and production of evidence [Section 21(3)(d) of HRCSL Act], power to visit all places of detention [Section 11(d) of HRCSL Act], and the authority to initiate and publish inquiries. Public inquiries into specific human rights issues fall within the general monitoring function of national institutions. Such inquiries entail not only monitoring, but also public hearings of witnesses and the release of public reports containing recommendations for action to the relevant authorities. NHRIs that conduct such inquiries find them invaluable to secure official action and raise public awareness of particular human rights issues.

It is a legal requirement for the HRCSL to report annually and to make reports widely available to ensure accountability.⁹⁴ It is noted that the 2012 Annual Report of the HRCSL, and a few of the decisions/activities/events undertaken by the HRCSL, are published on its official website. Apart from this, the HRCSL made no effort in publishing special or periodic reports in respect of matters referred to the commission, publicise the Commission's findings, advice and recommendations to the government and on any action taken by the Commission. This practice would add considerable authority and value to urgently address unresolved or

⁸⁶ Section 10(d) of the HRC Act.

⁸⁷ Section 10 (c) of the HRC Act.

⁸⁸ Section 10 (e) of the HRC Act

⁸⁹ Section 14 of the HRC Act.

⁹⁰ Benchmarks, Assessing the effectiveness of national human rights institutions, International Council on Human Rights Policy, 2005, pp. 11-23.

⁹¹ Neither restraint or remedy: The Human Rights Commission of Sri Lanka, Law and Society Trust, B. Skanthakumar, Introduction part, pp. 7-9 (December 2012).

⁹² National institutions should have authority to call for evidence and require witnesses to appear before their monitors; they should be able to recommend sanctions in case of refusal.

⁹³ *Ibid.*

⁹⁴ Art. 30, Human Right Commission of Sri Lanka Act No.21 of 1996, <http://hrctl.lk/english/ACT/english.pdf>

ongoing violations of human rights⁹⁵ and increase government's accountability, the NHRI's credibility and public legitimacy, as well as public confidence in the HRCSL.

The Paris Principles recognize that relationships with civil society can enhance their effectiveness by deepening their public legitimacy, ensuring that they reflect public concerns and priorities, and giving them access to expertise and valuable social networks.⁹⁶ It further acknowledges that NHRIs, to be more effective, should consult regularly with the public, with community-based bodies and with organizations that have a professional interest in human rights to clearly understand what their public wants and needs.⁹⁷

Even though the Commission made efforts to effectively engage with civil society in early 2013, no progress was made in achieving the goal. It is undeniable that the regional offices of the HRCSL conducted regular meetings in the regions. According to the Secretary, the Civil Society Steering Committee, a committee appointed to facilitate corporation between the HRCSL and the civil society, was actively engaged with the civil society at the regional level. On the other hand, the level of engagement of the HRCSL with civil society at national level deteriorated to an even worse condition. When the Rights Now-Collective for Democracy (hereinafter, Rights Now), a well-known human rights organization, requested the Human Rights Commission of Sri Lanka (HRCSL) to be transparent about real reasons as to why the previously announced National Inquiry on Torture has been postponed, citing a media report⁹⁸, through a letter⁹⁹ to the Chairman of the HRCSL, the HRCSL Chair's was defensive¹⁰⁰ and refused to provide any credible information or response.¹⁰¹

In their final response to *Rights Now*, the HRCSL stated that the Commission respects the right of civil society organizations to inquire into matters and considers the criticisms as part and parcel of that right, and the Commission holds a different view, as opposed to the view held by the civil society organizations (CSO's) regarding some matters. It further stated that the Commission does not anticipate having any further discussions with regard to this matter.¹⁰²

Though the HRCSL continues to claim that they engage in close cooperation with the civil society, in reality the engagement appears highly superficial. There is no mechanism in place to effectively engage with civil society. Although the importance of civil society engagement is repeatedly affirmed in the ICC declarations by allowing the civil society presence in the process, the HRCSL appears to show little interest in working with civil society in implementing its mandates.

⁹⁵ Public accountability, Benchmarks, Assessing the effectiveness of national human rights institutions, International Council on Human Rights Policy, 2005, p. 23.

⁹⁶ Composition and guarantees of independence and pluralism, Principles relating to the Status of National Institutions (The Paris Principles) Adopted by General Assembly resolution 48/134 of 20 December 1993.

⁹⁷ Methods of operation, Principles relating to the Status of National Institutions (The Paris Principles) Adopted by General Assembly resolution 48/134 of 20 December 1993.

⁹⁸ Torture probe postponed, The Sunday Leader, December 8, 2013, available at <http://www.thesundayleader.lk/2013/12/08/torture-probe-postponed/>, accessed on May 27, 2014

⁹⁹ HRC postpones set up of Torture Commission on alleged requests by CSOs – Rights Now asks the Chairman to name the organization, rightsnow.net, December 14, 2013, available at <http://www.rightsnow.net/?p=4347>, accessed on May 14, 2014.

¹⁰⁰ "Rights Now challenges the Human Rights Commission's lame excuses on postponing National Torture Inquiry", rightsnow.net, January 16, 2014, available at <http://www.rightsnow.net/?p=4532>, accessed on May 18, 2014.

¹⁰¹ Information on the list of civil society organisations that had advised the commission not to hold a national inquiry and how a national inquiry could negatively affect reconciliation.

¹⁰² Re: Letter sent to the Chairman Human Rights Commission (2014.1.13)

The HRCSL wrote to the President asking for sweeping powers through amendments to the Human Rights Act No. 21 of 1996. Some of the amendments seek to permit the HRC to be empowered to go to the High Court to implement its recommendations and/or directives. Some of the other recommendations / amendments that the HRC had sought include powers to initiate National Inquiries on specific matters, issue warrants to State Officials who do not appear for inquiries, powers to issue regulations where any document could be recalled, and the right to investigate persons or institutions during which period the person or institution could not be investigated parallel and simultaneously, while the HRC inquiry was continuing.¹⁰³

The HRCSL has the mandate to take up individual or collective issues on their own initiative, without a complaint having been lodged (*suo motu*).¹⁰⁴ Nevertheless, the HRCSL hardly exercises that power to investigate politicized violations.¹⁰⁵ The HRCSL made no effort to investigate on its own initiative, various grave fundamental and/or human rights violations. These violations include attacks on, and harassment of, civil society activists, journalists, and persons viewed as sympathisers of the Liberation Tigers of Tamil Eelam (LTTE) terrorist organization, by individuals allegedly tied to the government, creating an environment of fear and self-censorship.¹⁰⁶ A similarly lackadaisical attitude was evidenced in regard to torture and other ill-treatment of persons in custody by the security forces and police;¹⁰⁷ neglect of the rights of the IDPs;¹⁰⁸ breakdown in rule of law and the prevalence of widespread impunity;¹⁰⁹ suppression of freedom of expression including violence against media personnel and institutions;¹¹⁰ continued misuse of the Prevention of Terrorism Act (PTA) to repress critics;¹¹¹ arbitrary detention policies; internal displacement and forced relocation due to state land acquisition for development and military occupation especially in the North and East leading to loss of homes and livelihoods; military mechanisms overruling local administrative structures regulating civilian lives in previous conflict affected areas; unresolved cases of involuntary or enforced disappearances; repressive

¹⁰³ HRC seeks sweeping powers, Ceylon Today, Ravi Ladduwahetty, December 17, 2013, available at <http://www.ceylontoday.lk/16-50354-news-detail-hrc-seeks-sweeping-powers.html>, accessed on May 17, 2014.

¹⁰⁴ Section 14 of the HRC Act: The Commission may, on its own motion or on and complaint made to it by an aggrieved person or group of persons or a person acting on behalf of an aggrieved person or a group of persons, investigate an allegation at the infringement or imminent infringement of a fundamental right of such person or group of persons caused. (a) by executive or administrative action; or (b) as a result of an act which constitutes an offence under the Prevention of terrorism Act. No.48 of 1979, committed by any person.

¹⁰⁵ Escalation in attacks by militant Buddhist groups against Muslims and Hindus, election violations such as intimidation, violence and improper military interference, arbitrary detention, restrictions on civil society organisations, HRDs and media, military intervention in civilian life.

¹⁰⁶ Sri Lanka must end its aggressive campaign against Ruki Fernando, Father Praveen and other human rights defenders, activists, journalists, lawyers and others: Amnesty International oral statement to the 25th Session of the UN Human Rights Council, (3 – 28 March 2014), 19 March, 2014.

¹⁰⁷ Human Rights Watch World Report 2013.

¹⁰⁸ Protracted displacement, urgent solutions: Prospects for durable solutions for protracted IDPs in Sri Lanka. Centre for Policy Alternatives, Mirak Raheem, Introduction, September 2013, available at <http://www.scribd.com/doc/168824135/Protracted-Displacement-Urgent-Solutions-Prospects-for-Durable-Solutions-for-Protracted-IDPs-in-Sri-Lanka>, accessed on May 17, 2014.

¹⁰⁹ Island of Impunity: Investigation into international crimes I the final stages of the Sri Lankan civil war, International Crimes Evidence Project, February 2014.

¹¹⁰ Journalism and the safety of the journalists, Rights Now, S. Skanda, April 2, 2014, available at <http://www.rightsnow.net/?p=5350>, accessed on May 12, 2014.

¹¹¹ Further acts of harassment against Mr. Ruki Fernando and Rev. Praveen Mahesan, the observatory for the protection of human rights defenders, March 25, 2014, available at <http://www.fidh.org/en/asia/sri-lanka/15011-sri-lanka-further-acts-of-harassment-against-mr-ruki-fernando-and-rev>, accessed on April 26, 2014.

economic policies which penalise the poor,¹¹² and continued anti-Muslim propaganda/violence by the 'Bodu Bala Sena (BBS).¹¹³

In fact the HRCSL denied itself jurisdiction to act in response to allegations of hate speech made against the BBS.¹¹⁴ In the recent past, incidents of religious extremism have worsened in Sri Lanka. A series of high profile attacks on places of worship, (including mosques, Christian Churches and Hindu temples) have been recorded. The GoSL had set up a special police unit to investigate religious issues.¹¹⁵ While there are several conflicting opinions expressed¹¹⁶ by community leaders and politicians on the appointment of the special unit, the HRCSL remains silent on this fundamental rights issue.

The annual report of the HRCSL for the year 2013 is yet to be published at the time of writing (May 2014). Though it is claimed by the Commission that civil society has easy access to their staff both at regional and national level, accessibility to the senior officers at the head office as well as the regional office continues to be a huge challenge as they refuse to communicate without permission from the Secretary. It has been an unspoken rule of the senior officials of the Commission not to communicate with the CBOs and NGOs without permission from the Secretary or the Commissioners.

The response to questionnaires prepared by ANNI for the 2014 Report was received on 10th June 2014, after the second draft of the report was also formulated. However the brief and concise responses make it impossible to analyse the number and type of complaints received by the HRCSL, and measures taken by the commission to address them, during the reporting period, without the co-operation of HRCSL in providing information. Attempts to meet with officials of the HRCSL prior to the drafting and finalisation of the report proved fruitless.

4. Engaging with Other Stakeholders

The HRCSL in its response to ANNI, has stated that it has "discussed the issues and conducted a fact finding mission" in relation to issues faced by the fishing community in Mannar. Though told that the report of the fact-finding mission was ready, no further details have been given on the nature of the issues faced, the result of these discussions and fact finding missions, or the present status of the 'issues'. The HRCSL have also noted that they held consultations with civil society representatives in relation to the water pollution allegations in Rathupaswela, Welweriya, in the Gampaha District, which is discussed in more detail hereinafter.

¹¹² Forced evictions in Colombo: The ugly price of beautification, Centre for policy Alternatives, April 2014.

¹¹³ "Bodu Bala Sena secretary GalagodaAththe Gnasara Thero asked to appear before police", Hiru News, April 10, 2014, available at <http://www.hirunews.lk/81021/bodu-bala-sena-secretary-galagoda-aththe-gnasara-thero-asked-to-appear-before-police-video>, accessed on 30 May 2014.

¹¹⁴ "Monk complains to HRCSL against BBS", Ceylon Today, Niranjala Ariyawansa, February 16, 2014, available at <http://www.ceylontoday.lk/51-56186-news-detail-monk-complains-to-hrcsl-against-bbs.html>, accessed on 30 May 2014.

¹¹⁵ Religious complaints police special investigation unit opened by PM, Financial Times, April 29, 2014, available at <http://www.ft.lk/2014/04/29/religious-complaints-police-special-investigation-unit-opened-by-pm/>, accessed on June 3, 2014.

¹¹⁶ New religious police receive over 200 complaints in first day, the republic square, April 29, 2014, available at <http://www.therepublicsquare.com/politics/2014/04/29/new-religious-police-receive-over-200-complaints-in-first-day/>, accessed on June 3, 2014.

In relation to forced evictions, the HRCSL has merely stated “Ensure rule of law; some interventions were able to suspend the decisions of government authorities”. No further details have been set out.

In relation to accessibility to civil society stakeholders, it appears that by having mobile offices¹¹⁷ as well as 10 regional offices, as well as its head-office in Colombo, the NHRI is fairly accessible geographically. The NHRI reports that it also plans to open several other mobile offices in Mullaitivu, Kurunegala, Hambantota, Moneragala, and Ratnapura Districts.¹¹⁸ In relation to outreach, several examples are cited by the NHRI, and it appears that the NHRI has engaged with school children, with “Non-Governmental organizations, Law Enforcement Officials, Public Officers and students including Law students”, on the occasion of the International Human Rights Day 2013.¹¹⁹ The NHRI reports that a national event as well as 10 regional events were conducted.

In relation to language rights, HRCSL reports that it issued three directives to the Irrigation Department, for having issued letters calling for applications to the post of lab assistants only in the Sinhala language, which the HRCSL has noted is a violation of the language rights enshrined in the Constitution.¹²⁰ The Irrigation Department falls under the Ministry of Irrigation and Water Resource Management.

In a commendable undertaking, the HRCSL, on 22-23 September 2013, along with the Commonwealth Secretariat organized a workshop on reconciliation, in Vavuniya, at which, CSOs from the Northern Province had participated.¹²¹ Thereafter on May 22-23, 2014, conducted a follow-up program of work on reconciliation, bringing in officers from its regional branches, as well as its Chairman, Commissioners and Staff, and reaching out to national and international experts for technical knowledge on how the NHRI can engage better with the reconciliation process.¹²² The HRCSL reports that local resource persons from CSOs also participated.¹²³ The NHRI has reported in its website that Advocate Lawrence Mushwana, Chair of the South African Human Rights Commission, and Advocate John Walters, Ombudsman for Namibia, had shared best practice from their respective countries and institutions, and also included local experts. The workshop reportedly addressed several issues including “the role of civil society, academia and human rights defenders in national reconciliation efforts” and was the fourth in a series conducted under the Commonwealth Secretariat’s Good-Office Remit.

However, while it appears that the HRCSL did reach out to some civil society organizations (CSO), and to local and international experts, for capacity building purposes of the HRCSL, there does not seem to have been any reported attempt to foster closer relations with vulnerable groups through the established networks of such

¹¹⁷ Killinochchi, Vavuniya (since 2012) and Puttalam (opened on 13 October 2013).

¹¹⁸ “Mobile Offices Established for the convenience of the Public”, October 22, 2013, HRCSL available at <http://hrsl.lk/english/?p=2195>, accessed on 29 May 2014.

¹¹⁹ “International Human Rights Day 2013 Celebration by the HRCSL”, 9 December 2013, HRCSL, available at <http://hrsl.lk/english/?p=2202>, accessed on 29 May 2014.

¹²⁰ “HRCSL issues a directive and monitored on Language policy”, 20 December 2013, HRCSL, available at <http://hrsl.lk/english/?p=2231>, accessed on 29 May 2014. Please note that it is unclear however whether these directives were issued on its own initiative or whether it was as a result of a complaint made in that regard. In addition, it is unclear whether the Department had taken action based on the directives of the NHRI.

¹²¹ HRCSL comments/observations to ANNI draft report.

¹²² “Human Rights Commission of Sri Lanka develops Programme of Work on Reconciliation”, May 23, 2014, HRCSL, available at <http://hrsl.lk/english/?p=2283>, accessed on 29 May 2014.

¹²³ HRCSL comments/observations to ANNI draft report.

CSOs.¹²⁴ It appears therefore that the HRCSL continues to fail to understand the importance of engagement with civil society.

The HRCSL has also participated in a capacity building program with the Commonwealth Secretariat, in Geneva, on 10-13 March 2014.¹²⁵ Therefore, certainly there does appear to have been some level of information sharing, capacity building and training, in the year under review, in partnership with CSO's. The NHRI also reports that it conducted a meeting on 7 March 2014, with the participation of human resource departments of relevant Ministries, on the issue of sexual harassment on the occasion of commemorating International Women's Day 2014.¹²⁶

While there has been a working relationship with CSOs on different levels, for example in organizing advocacy on disability rights, and on international human rights day, there does not appear to be evidence of a regular and systematic working relationship with CSOs. In what it describes as an attempt to facilitate dialogue in the issue of the rights of the disabled, the NHRI had organized a conference for 150 participants in December 2013, on the rights of the disabled,¹²⁷ in collaboration with the United Nations Program on Human Rights. The NHRI reports that it "would like to play the role of a moderator as the National Independent Authority for human rights in the Country, to facilitate a consensus among the disabled community, government sectors and local and international non-governmental sectors in order to secure and enhance better rights for persons' with disabilities in our country".¹²⁸ However, evidence of a systematic working relationship with stakeholders on the issue of the rights of the disabled or in any other area of fundamental rights has not been forthcoming. HRCSL has observed that its intervention in the issue was on the request of organizations/societies relating to disabled persons, and that on their intervention, the GoSL provided an opportunity for stakeholders to meet with and discuss the disabled rights bill [sic], and further resulted in the proposal of a fresh bill which would take their issues into consideration.

There also does not appear to have been any robust engagement with CSOs at planning or policy level, for example in relation to the publication of the election guidelines by the NHRI. In a commendable initiative, the NHRI issued a set of guidelines in March 2014 on "Election Guidelines from Human Rights Commission of Sri Lanka".¹²⁹ These guidelines were intended particularly to benefit state officials engaging in election duties

¹²⁴ Please note that attempts to ascertain the ground situation from the NHRI were unforthcoming.

¹²⁵ "Commonwealth Secretariat Capacity Development Intervention For Human Rights Commission of Sri Lanka", April 4, 2014, HRCSL, available at <http://hrctl.lk/english/?p=2274>, accessed on 29 May 2014.

¹²⁶ "HRCSL emphasises the importance of implementing a Policy on Sexual Harassment To commemorate the International Women's day -2014", 7 March 2014, HRCSL, available at <http://hrctl.lk/english/?p=2250>, accessed on 29 May 2014.

¹²⁷ "Urgent call from HRCSL to Government and Non-Governmental Institutions", 11 December 2013, HRCSL, available at <http://hrctl.lk/english/?p=2206>, accessed on 29 May 2014.

¹²⁸ *Ibid.* This is in light of the decision of the Supreme Court of Sri Lanka on the rights of the disabled, as reported in "SC Orders More Facilities For the Disabled", 18 October 2009, News, Sunday Times, available at http://www.sundaytimes.lk/091018/News/nws_26.html, accessed on 29 May 2014. By its' order, the Supreme Court reportedly held that "all new public buildings defined under the accessibility regulations No. 1 of October 17, 2006, should provide reasonable access in accordance with the design standards of regulations in force, to those who are physically challenged". For a more detailed exposition on the currents state of the law in Sri Lanka in relation to the rights of the disabled please see "Rights of Persons with Disabilities", 25 September 2013, Thamarashi Wickramanayake, AAL, Bar Association of Sri Lanka, available at http://www.basl.lk/article_details.php?id=5, accessed on 29 May 2014.

¹²⁹ "Election Guidelines from Human Rights Commission of Sri Lanka", 5 March 2014, HRCSL, available at <http://hrctl.lk/english/?p=2247>, accessed on 29 May 2014.

during the Provincial Council elections. However, there does not appear to have been any collaboration with CSOs or other stakeholders in formulating the guidelines.¹³⁰ HRCSL has observed however that organizations related to election monitoring such as PAFREL, CAFFE, Sarvodaya, and Transparency International had submitted complaints, observations and comments to the HRCSL, and also attended discussions.¹³¹ HRCSL states that it discussed the guidelines with election authorities, and further obtained the opinion of relevant CSOs on the issues in question.¹³²

The relationship of the HRCSL with CSOs would therefore appear to be ad hoc rather than formal. There is insufficient information available to assess the potential overlaps that may occur with CSOs in setting policies and implementation strategies, since the HRCSL, although commendably has undertaken several outreach events over the year under review, has not formally set policies/priorities in collaboration with CSOs.

Among the powers vested in the HRCSL in terms of the enabling legislation, it can advise the GoSL in relation to furthering and protecting fundamental rights via legislation and administrative directions and practices.¹³³ Therefore there is a formal framework, which is statutorily prescribed, for the NHRI to advise and assist the Government in meeting its human rights objectives, and for the NHRI to be involved in the legislative drafting and reform process. Whether the NHRI does in fact get involved in this process is unascertained, and there does not appear to be any publicly available data of the NHRI getting involved in legislative processes, other than having proposed amendments to the Human Rights Commission Act No. 21 of 1996¹³⁴ referred to previously. In this latter process though, the NHRI also appears to have consulted CSOs which is commendable.¹³⁵

There appears to be no statutory requirement for the annual report to be discussed by parliament or for its inclusion in the budget proposals. However, in his budget speech on 21 November 2013, the President of Sri Lanka did mention that the strengthening of the HRCSL is important to facilitate the orderly functioning of the administrative system,¹³⁶ whilst the recurrent and capital expenditure of the NHRIs are also discussed under a separate heading under the Government Expenditure Estimates for 2014.¹³⁷

As will be discussed hereinafter, there is provision for a report by the HRCSL to be tabled in Parliament by the President, where the HRCSL reports that the recommendations by it have not been properly implemented by the relevant authority(s) or person(s). This is in order to ensure that recommendations are properly considered by

¹³⁰ See: Election Guidelines, *Ibid.*

¹³¹ HRCSL comments/observations on draft ANNI report.

¹³² *Ibid.*

¹³³ Sections 10(d) and (c) of the HRCSL Act.

¹³⁴ "Human Rights Commission to amend its Act", Lakmal Sooriyarachchi, Daily FT, 27 June 2013, available at <http://www.ft.lk/2013/06/27/human-rights-commission-to-amend-its-act/>, accessed on 29 May 2014.

¹³⁵ "These are not just our own proposals. The document is the result of intense and long deliberations. Law enforcement organisations in the country too had their share of inputs. All stakeholders have contributed to this outcome", Prathiba Mahanamahewa, Commissioner of the HRCSL, as reported in "Amendments to empower Human Rights Commission", Manjula Fernando, 13 December 2013, Sunday Observer, available at <http://www.sundayobserver.lk/2013/12/15/fea01.asp>, accessed on 29 May 2014.

¹³⁶ Budget Speech, 21 November 2013, President Mahinda Rajapakse, p. 22, para 45.1, available at <http://www.treasury.gov.lk/images/depts/fpd/docs/budgetspeech/2014/budgetspeech2014-eng.pdf>, accessed on 29 May 2014.

¹³⁷ National Summary Expenditure, Summary of Expenditure by Category and Object Code, Department of National Budget, <http://www.treasury.gov.lk/images/depts/nbd/docs/budgetestimates/2014/nationalexpenditure/3.ExpenditureMinistryObjectcodewise.pdf>, accessed on 29 May 2014.

the public authorities. Although attempts were made to ascertain from the HRCSL on the actual situation of whether such reports are submitted and considered and discussed by Parliament, information on this has not been forthcoming at the time of writing. Other than this, there appears to be no statutory basis or administrative practice on which Parliament is required to discuss the annual report of the HRCSL.

In terms of the Human Rights Commission Act No. 21 of 1996, the HRCSL is empowered to “intervene in any proceedings relating to the infringement or imminent infringement of fundamental rights, pending before any court, with the permission of such court”.¹³⁸ The HRCSL can also take steps as directed to it, and inquire and report on such matters, when a matter is referred to it by the Supreme Court.¹³⁹ In fact, in relation to the fundamental rights jurisdiction of the Supreme Court, the prescriptive period of one month will be calculated excluding the period in which the matter is pending before the HRCSL.¹⁴⁰ The HRCSL can also investigate alleged violations of fundamental rights on its own motion.¹⁴¹ In relation to dispute resolution, the HRCSL can recommend prosecution by the authorities where a violation of fundamental rights is discovered.¹⁴² It can also refer the matter to any Court which has jurisdiction to hear and determine the matter.¹⁴³ The HRCSL can also independently make recommendations, that the decision, recommendation, act or omission complained of, be reconsidered or rectified.¹⁴⁴

In relation to enforcement of HRCSL recommendations, the procedure set out in the Act is for the HRCSL to report to the President that the authority(s) or person(s) who were to have acted, have failed to do so, and the President may cause a copy of the report to be placed before Parliament. The amendments proposed by the HRCSL to the HRC Act, include the insertion of provisions for Courts to initiate contempt of court proceedings when NHRI recommendations are not implemented by the relevant authority(s) or person(s).¹⁴⁵

The inclusion of powers for Courts to take action where HRCSL recommendations are not implemented, is essential to properly empower the HRCSL, since some of the recommendations of the HRCSL are ignored, or not properly implemented, by the relevant authority(s) or person(s), since the current procedure is only for a report on non-compliance to be tabled by the President in Parliament. However, Commissioner Dr. Prathiba Mahanamahewa is quoted in September 2013 as having said that under the present Act almost 90 percent of the

¹³⁸ Section 11(c), Human Rights Commission Act No. 21 of 1996 (hereinafter HRC Act).

¹³⁹ Section 11(e) and Section 12(1) and (2), HRC Act, *Supra*.

¹⁴⁰ Section 13, HRC Act, *Supra*.

¹⁴¹ Section 14, HRC Act, *Supra*. In fact, not only is the NHRC empowered to investigate alleged violations by executive or administrative actions, but it can also investigate alleged violations of fundamental rights “as a result of an act which constitutes an offence under the Prevention of Terrorism Act. No.48 of 1979”, by any person, Section 14, HRC Act, *Supra*.

¹⁴² Section 15 HRC Act, *Supra*.

¹⁴³ Section 15 (3) b, HRC Act, *Supra*.

¹⁴⁴ Section 15 (4) (a)-(d), HRC Act, *Supra*.

¹⁴⁵ “When an official or an institution fails to carry out a recommendation by the HRC within the stipulated period, we have proposed powers for the Commission to submit a certificate to the Court of Appeal or Provisional High Court as appropriate, seeking a Court Order to implement the HRC recommendation”, Prathiba Mahanamahewa, Commissioner of the HRCSL, reported in “Amendments to empower Human Rights Commission”, Manjula Fernando, 13 December 2013, Sunday Observer, available at <http://www.sundayobserver.lk/2013/12/15/fea01.asp>, accessed on 29 May 2014. However, note that Section 21 of the Act already provides for the Supreme Court to try every offence of disrespect towards the Commission, as an act of contempt of court against itself¹⁴⁵ and to issue interim injunctions.. Failure to comply with a direction of the Commission, or a notice or written order, can also amount to contempt, Section 21 (3) (c), HRC Act, *Supra*.

recommendations are being implemented.¹⁴⁶ The annual report of 2012 of the HRCSL however reports that non-enforceability has been an issue in 42 of its decided cases (out of 90).¹⁴⁷ The official implementation statistics for the year under review have not been forthcoming. The HRCSL observes in response to this report, that the present Commission has introduced a mechanism where both parties are summoned where the recommendations are not implemented, and the Respondent is directed to comply.¹⁴⁸ This, they state, is the reason for improved figures in relation to implementations.¹⁴⁹

In relation to mediation and conciliation, where an inquiry reveals the infringement or imminent infringement of a fundamental right, the HRCSL is empowered, where appropriate, to refer the matter for non-judicial remedies such as conciliation and mediation.¹⁵⁰ The procedure for such conciliation and mediation is also set out in the statute.¹⁵¹

5. Thematic Focus

a. Protection of HRDs / WHRDs and shrinking civil society space (Freedom of expression/association/peaceful assembly/reprisals)

The annual report of the HRCSL for the year 2013 is yet to be published and the efforts made by the LST staff to communicate with the HRCSL officials proved unforthcoming. Therefore the information used herein are from third party sources/ sourced from previous information publicly released by the HRCSL. It has not been possible to analyse first-hand the efforts undertaken by the HRCSL in the year under review.

The ANNI Report 2014 focuses on two thematic issues, namely 1) The Protection of HRDs/WHRDs and Shrinking Civil Society Space and 2) The Implementation of the APF Advisory Council of Jurists References by NHRIs. Questionnaires prepared by ANNI were sent to the HRCSL regarding its work in the chosen thematic areas, but the Commission failed to respond as of the time this report was finalised.

Since there is insufficient information to analyse the effectiveness of the HRCSL in protecting the rights of HRDs, this report is primarily focusing on international instruments and other documents that guarantee the protection of HRDs and prescribe the obligations of NHRI's in protecting the rights of HRDs, such as the report of the UN Special Rapporteur (SR) on the role of National Institutions as human rights defenders but also their role in protecting other human rights defenders. The HRCSL in response has stated that it took action in relation

¹⁴⁶ "Amendments will strengthen Human Rights Commission", Asela Kuruluwansa, Daily News, 11 September 2013, available at <http://www.dailynews.lk/?q=local/amendments-will-strengthen-human-rights-commission>, accessed on 29 May 2014.

¹⁴⁷ "The non enforceability of the recommendations issued by the Commission has been a matter of concern for many years. In the year under review the Chairman and the Secretary Legal called 90 state parties cases where recommendations of the Commission were not carried out and inquired into the problems faced by them in giving effect to the HRCSL recommendations. This action has been successful in 48 cases where the parties have agreed to carry out the recommendations issued by the HRCSL," Annual Report 2012, Introduction, Human Rights Commission of Sri Lanka, at p. 9, available at http://hrsl.lk/PFF/annual_report_2012/English.pdf, accessed on 29 May 2014.

¹⁴⁸ HRCSL comments/observations to draft ANNI report.

¹⁴⁹ *Ibid.*

¹⁵⁰ Section 15(2), HRC Act, *Supra.*

¹⁵¹ Section 16, HRC Act, *Supra.*

to prominent HRDs, namely Paikiasothy Saravanamuttu and Nimalka Fernando in 2013, and Ruki Fernando in March 2014.¹⁵²

The Special Rapporteur observes that while the HRDs should continue supporting the work of national human rights institutions by cooperating with them, advocating for their strengthening and collaborating in the planning and implementation of their activities and programmes,¹⁵³ the NIs are human rights defenders, being mandated to protect and promote human rights, and recommends that they should work together with other human rights defenders to assess the human rights situation on the ground, ensure accountability and prevent impunity.¹⁵⁴

Several incidents of grave human rights violations were reported in the media with the current plight faced by the general public, human rights defenders and human rights organisations (NGOs/CBOs), across the island, that are subject to and experiencing, extreme forms of repression and crackdowns during the reporting period.

The Human Rights Defenders (HRDs) and human rights organisations (NGOs / CBOs) across the island experienced and continue to experience a rise in repression and crackdowns. Increasingly, the Government of Sri Lanka (GoSL) has been using repressive measures intended to reduce civil society space and restrict the work of human rights defenders and / or not taking any steps to protect people's democratic rights and liberties guaranteed within the constitution itself.

The issue of threats to HRDs' lives and physical integrity, recognizing that physical attacks, arrests, detention, interrogation and torture or ill-treatment are being used to intimidate and silence HRDs and media personnel for fighting against human rights violations and reporting on human rights abuses.

A peaceful demonstration conducted by parents, spouses and near relatives of missing persons in Trincomalee on Human Rights Day (December 10, 2013), was reportedly attacked by unidentified men¹⁵⁵ and it is alleged that no action has been taken by the police. Mr. Sunesh Soosai,¹⁵⁶ an activist and the district coordinator for the National Fisheries Solidarity Movement, (a non-governmental organisation that is engaged in campaigns against enforced disappearances, promoting the rights of fishermen, protesting land grabs by the military and advocating for the rights of the internally displaced) had reportedly been constantly threatened and intimidated by

¹⁵² HRCSL comments/observations to draft ANNI report.

¹⁵³ Strong, dynamic and diverse community of human rights defenders, Report of the Special Rapporteur on the situation of human rights defenders, A/HRC/25/55, December 23, 2013, Para. 123.

¹⁵⁴ See: Recommendations by the SR to member states and NHRIs, Report of the UN Special Rapporteur on the situation of human rights defenders, pp. 20-21, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/101/79/PDF/G1310179.pdf?OpenElement>, accessed on May 2, 2014.

¹⁵⁵ "Corporate report: Human Rights in Countries of Concern: Sri Lanka", Foreign and Commonwealth Office, United Kingdom, April 17, 2014, available at <https://www.gov.uk/government/publications/human-rights-in-countries-of-concern-sri-lanka>, accessed on 30 May 2014, see also, "Attack on the Human Rights Campaigners On the International Human Rights Day - 2013", Suntharam Mahendran, The Committee for Investigation of Disappearances, , December 16, 2013, available at http://www.nssp.info/Action/Human_Rights_Day_Attack_2013.html, accessed on 30 May 2014.

¹⁵⁶ Sri Lanka: Suppressing calls for justice, Amnesty International, 2014, available at <http://www.amnesty.org/en/library/asset/ASA37/003/2014/en/f9207164-9b1b-4def-87da-9923bd78b1bb/asa370032014en.html>, accessed on 30 May 2014.

unidentified men believed to be intelligence operatives. Despite the complaints filed with the police, it is alleged that no actions had been taken.¹⁵⁷

Mr. Sunil Samaradeera, a human rights activist and the organiser of the organisation to protect the ownership of the houses in Wanathamulla, was abducted and later released.¹⁵⁸ Two HRDs, Mr. Ruki Fernando and Fr. Praveen Mahesan were arrested and were later released. It is believed that one of the reasons for their arrest was for gathering information on the arrest of Ms. Jayakumari¹⁵⁹ and the taking into state care of her 13 year old daughter.¹⁶⁰ Eight HRDs and twenty four civil society organisations had been accused of submitting false information to the UN Human Rights Council, on the state owned TV station, Rupavahini¹⁶¹ on March 6, 2014. Two other HRDs, Mr. Sunanda Deshapriya and Ms. Nimalka Fernando had been showed during the prime time news and called local enemies¹⁶² on March 14, 2014. A street drama group of “Society for Socialist Art” had been assaulted, allegedly by persons associated with the government, while they were performing at Panadura bus stand to educate the public about political issues on March 13, 2014.¹⁶³ It appears that no measures or actions, or inadequate action has been taken by the government authorities to conduct investigations and to bring the perpetrators to justice. The HRCSL in its response to the ANNI questionnaire has indicated that it has taken steps to make the environment conducive for HRDs to act, and the steps have been described as “They can complaint to HRCSL for remedial actions”. It appears however that these steps may be inadequate to create meaningful remedies for the issues faced by HRDs.

These incidents highlight the fact that the contribution of NGOs and other representatives of civil society are crucial to monitor Sri Lanka’s effort to implement the recommendations of the LLRC and international laws, standards and norms accepted by Sri Lanka.

¹⁵⁷ Tamil activist gets death threats for his work defending the families of the missing, asianews.it, Melani Manel Perera, October 12, 2013, available at <http://www.asianews.it/news-en/Tamil-activist-gets-death-threats-for-his-work-defending-the-families-of-the-missing-29776.html>, accessed on May 29, 2014.

¹⁵⁸ Wanathamulla residents file FR petition, Ceylon Today, Mirudhula Thambiah, December 13, 2013, available at <http://www.ceylontoday.lk/27-49952-news-detail-wanathamulla-residents-file-fr-petition.html>, accessed on April 26, 2014.

¹⁵⁹ The Sri Lankan government retaliates to the proposed Human Rights Council resolution by arresting activists and witness, Asia Human Rights Commission, March 17, 2014, available at <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-045-2014>, accessed on May 27, 2014.

¹⁶⁰ “Are Sri Lanka's 'anti-terror' arrests an attempt to intimidate activists?”, Tim Hume, CNN, March 22, 2014, available at <http://www.cnn.com/2014/03/19/world/asia/sri-lanka-ruki-fernando-arrest/>, accessed on 30 May 2014. See also, A fundamental rights petition filed challenging the arrest and detention of Ms. Jayakumari is pending before the Supreme Court of Sri Lanka. “Mother and daughter’s FR plea fixed for June 6”, S. S. Selvanayagam, Daily Mirror, 6 June 2014.

¹⁶¹ Reprisals against HRDs in Sri Lanka: Civil Society Organizations accused by state broadcaster for their appeal to the UNHRC, March 8, 2014, available at <http://oneislandtwonationsblogspotcom.typepad.com/blog/2014/03/reprisals-against-hrds-in-sri-lanka-civil-society-organisations-accused-by-state-broadcaster-for-their-appeal-to-unhrc.html>, accessed on May 19, 2014.

¹⁶² Available at http://varunamultimedia.com/videos/btv/vmtube/wimasuma/wimasuma_-28-03-14/play.html?1 (Sinhalese), accessed on April 16, 2014.

¹⁶³ Government goons attack street drama troupe, People’s Liberation Front, JVP-Sri Lanka, available at http://www.jvpsrilanka.com/en/index.php?option=com_content&view=article&id=402:govt-goons-attack-street-drama-troupe&catid=40:jvpnews&Itemid=73, accessed on May 11, 2014, see also, Govt. thugs attack street drama troupe, Lanka Truth, March 13, 2014, available at http://www.lankatruth.com/home/index.php?option=com_content&view=article&id=6602:govt-thugs-attack-street-drama-troupe-&catid=36:top-stories&Itemid=124, accessed on May 11, 2014.

As mentioned previously, little or no action was taken by the HRCSL to stop the attacks on, and harassment of, civil society activists, journalists, and persons viewed as sympathizers of the Liberation Tigers of Tamil Eelam (LTTE) terrorist organization by individuals allegedly tied to the government, creating an environment of fear and self-censorship¹⁶⁴ as the HRCSL is yet to internalise the concept of a HRD as defined in the *UN Declaration on the Rights of Human Rights Defenders* which clearly states that 'everyone has the right individually and in association with others to strive for the protection and realisation of human rights and fundamental freedoms at the national and international levels'.¹⁶⁵ The HRCSL members and staff need to also recognise itself as the primary human rights defender in the country which would perhaps sensitise them to the common goals, risks and obstacles facing other human rights defenders and the legitimate need to protect them.¹⁶⁶ It is, as a HRD and a defender of HRDs, that the HRCSL's obligation arises, to promote and protect the rights of the HRDs, non-governmental organisations and civil society, and to take immediate and necessary actions to enable the human rights organisations, CSOs and HRDs to operate without executive interference.

Margaret Sekaggya, the UN Special Rapporteur on the Situation of Human Rights Defenders, recommends the following measures by any NHRIs to ensure the protection of HRDs: Protection constitutes a wide range of possible measures and interventions, including formal complaints mechanisms and protection programs; advocacy in favour of a conducive work environment for defenders; public support when violations against defenders are perpetrated; visits to defenders in detention or prison and provision of legal aid in this context; mediation when conflicts occur between defenders and other parts of society; and strengthening of the capacity of defenders to ensure their own security. In tandem with the Special Rapporteur's recommendations, the HRCSL should take measures to establish a focal point or unit within the NHRI for human rights defenders to guarantee their protection and safety, support the work of human rights defenders, for example through sharing best practices and holding training workshops, presenting awards, conduct training programs to sensitize the staff of HRCSL, the general public and particular target groups (state institutions, lawyers, etc.) on the importance of respecting the work of human rights defenders, advocate on behalf of human rights defenders at risk, for example through protection programs or by submitting complaints to regional bodies, appoint a Rapporteur on freedom of expression, create a pool of staff who are sensitive to and aware of issues that pertain of protecting HRDs from attacks and reprisals,¹⁶⁷ work in close collaboration with human rights defenders and receive and handle complaints from human rights defenders.

b. Implementation of ACJ reference by NHRIs

¹⁶⁴ Sri Lanka must end its aggressive campaign against Ruki Fernando, Father Praveen and other human rights defenders, activists, journalists, lawyers and others: Amnesty International oral statement to the 25th Session of the UN Human Rights Council, (3 – 28 March 2014), 19 March, 2014.

¹⁶⁵ Article 1, Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, UN GAR A/ RES/ 53/144, March 8, 1999, available at <http://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf>, accessed on May 14, 2014.

¹⁶⁶ Report of the UN Special Rapporteur on the situation of human rights defender; The Role of National Human Rights Institutions in the protection of Human Rights Defenders, p.15-19, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/101/79/PDF/G1310179.pdf?OpenElement>, accessed on May 12, 2014.

¹⁶⁷ Protecting witnesses and HRDs, UNDP-OHCHR toolkit for collaboration with National Human Rights Institutions, United Nations Development Programme-Democratic Governance Group and Office of the High Commissioner for Human Rights-National Institutions and Regional Mechanisms Section (December 2010), p. 183, available at <http://www.ohchr.org/Documents/Countries/NHRI/1950-UNDP-UHCHR-Toolkit-LR.pdf>, accessed on May 16, 2014.

The HRCSL in its response to ANNI has stated that it has conducted advocacy, monitoring, documentation and education, in relation to implementing the ACJ reference. It appears that the three examples given (Rathupaswela, Fisher community in Mannar, and forced evictions), do not provide details on the nature, number of, depth, consistency or results of these interventions.¹⁶⁸

According to the HRCSL, the ACJ references have been set out as useful in, identifying the priority areas to work; to understand the new thematic human rights issues, and to set standards, interpret and apply international law, and to provide information and practical recommendations.¹⁶⁹

The HRCSL has also stated that in the following instances the HRCSL had occasion to use the ACJ references:- (Sexual Orientation and Gender Identity) – the HRCSL states that it re-introduced policy against sexual harassment, conducted a seminar for government officials on the said policy, it used the references to form committees within the institutes, to handle complaints on sexual harassment and to develop a banner to promote gender equality.¹⁷⁰ In relation to the right to education - the HRCSL has conducted '[a] seminar/workshop/meeting to identify areas where human rights education are included to the school curriculum and how to improve it further'.

More importantly, in relation to torture the HRCSL states that it improved the visiting mechanism, conducted night visits, "also quick actions have been taken to monitor detention conditions".¹⁷¹ This appears true to the extent of having visited Ruki Fernando and Father Praveen in their detention facilities, although the HRCSL has not provided any further information or examples.

In relation to terrorism and the rule of law the Commission states that it conducted inquiries and investigations on critical incidents (Weliweriya, Rathupaswala – Right to Water) and issued recommendations to relevant agencies. It is noted that the HRCSL has not set out the basis on which it defines the incident at Rathupaswela (and the right to water), as an issue which relates to terrorism, although the violence that resulted may well be an indictment on the rule of law (or lack of it). In its observations on this report, the HRCSL has stated that its monitoring and review division organized consultation meetings with relevant stakeholders, and received reports from government authorities.¹⁷² A report had been prepared and handed over to the Commission, which has further approved the said report.¹⁷³ The Inquiry and investigation division has also prepared a report, which too has been submitted for approval to the Commission.¹⁷⁴

In relation to trafficking, the Commission states that it has been working on trafficking issues since 2007 along with the American Labour Solidarity,¹⁷⁵ and that the 'legal aspect and human rights aspect of trafficking has been discussion [sic] in the awareness and training programme at HRCSL to different target group'.¹⁷⁶ The target

¹⁶⁸ HRCSL's response to the ANNI questionnaire.

¹⁶⁹ HRCSL's response to the ANNI questionnaire, p. 4.

¹⁷⁰ This appears to be a reference to the activities previously referred to as events held on the occasion of International Women's Day, discussed previously.

¹⁷¹ HRCSL response to the ANNI questionnaire.

¹⁷² HRCSL comments/observations to the draft ANNI report.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ HRCSL comments/observations to the draft ANNI report.

¹⁷⁶ HRCSL response to the ANNI questionnaire.

groups have been identified as police officers attached to the children and women desks at police stations, probation officers, community leaders, as well as school principals in the Nuwara Eliya district.¹⁷⁷

The Commission state that in relation to the death penalty, it conducted meetings with government officials on death penalty and human rights protection, 'decided to recommend to the government [to] signed [sic] the 2nd the Optional Protocol to [the] ICCPR', and that debates were conducted among school children relating to the death penalty.¹⁷⁸ The Commission's stance on the death penalty is not evident in its response. The death penalty is technically in operation in Sri Lanka although executions have not been implemented in the last three decades or more.

In relation to child pornography, the Commission states that this issue was discussed in child rights awareness programs with Police Officers/Probation Officers/Child Rights Promotion Officers.¹⁷⁹

There is no indication of the HRCSL having taken any action on corporate accountability for human rights violations, which is another key concern for NHRIs.¹⁸⁰ In its final report, the ACJ has noted that soft law initiatives have made some headway in relation to holding transnational corporations accountable for human rights violations.¹⁸¹ The ACJ also recommended that NHRIs should 'use their core functions of monitoring, education, advocacy and complaint handling to promote corporate respect for human rights'.¹⁸²

Sri Lanka has seen an exponential rise in foreign investment, particularly in relation to public private partnerships, since May 2009.

In one incident, in or about July 2013, Dipped Products PLC, a subsidiary of Hayleys Group, was embroiled in a controversy involving the pollution of ground water in Weliveriya, in the Gampaha District. The Group describes itself as a multinational conglomerate with operations in all major international and strategic markets.¹⁸³ Dipped Products had established its factory in Weliveriya almost 18 years prior to the incident.¹⁸⁴

¹⁷⁷ HRCSL comments/observations to the draft ANNI report.

¹⁷⁸ HRCSL response to the ANNI questionnaire.

¹⁷⁹ HRCSL response to the ANNI questionnaire.

¹⁸⁰ The Advisory Council of Jurists (ACJ), in July 2008, issued a series of references on this issue. Asia Pacific Forum, See: *ACJ Reference on Human Rights, Corporate Accountability and Government Responsibility*, The 13th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions, Malaysia, 27-28 July 2008, pp. 13-19, www.asiapacificforum.net/support/issues/acj/references/corporate-accountability.

¹⁸¹ *Ibid*, These initiatives include the OECD Guidelines for Multinational Enterprises, and the ILO Declaration of Principles for Multinational Enterprise.

¹⁸² *Ibid*.

¹⁸³ Hayleys PLC Annual Report 2012/2013, available at http://hayleys201213.annualreports.lk/pdf/this_is_hayleys.pdf, accessed on 29 May 2014. The official website of the group states as follows :- "In addition to Sri Lanka, Hayleys today has manufacturing facilities in Indonesia and Thailand, and marketing operations in Australia, India, Bangladesh, Italy, Japan, The Netherlands, UK and USA." Hayleys, available at <http://www.hayleys.com/about>, accessed on 29 June 2014. For the purpose of this discussion, the Hayleys Group is considered a transnational corporation in line with the definition adopted by the United Nations Conference on Trade and Development (UNCTAD). Hayleys Group has both manufacturing operations and marketing operations in several other economies, and controls the UNCTAD threshold percentage of assets of several international investment partners (holds more than 10% equity stake in entities in other economies), which is taken to amount to foreign affiliates within the meaning of the UNCTAD definition of a transnational corporation for the purpose of this discussion. Please note that this is an opinion of the writers and is not an authoritative conclusion of the same. United Nations Conference on Trade and Development, available at [http://unctad.org/en/Pages/DIAE/Transnational-corporations-\(TNC\).aspx](http://unctad.org/en/Pages/DIAE/Transnational-corporations-(TNC).aspx), accessed on 27 March 2014.

The violent protests sparked as a result of allegations by residents that effluents from the factory had polluted the ground water in the area, and the violent means used to quell these protests led to several deaths at the hands of the military, that was called in to quell the protestors, as well as property damage.¹⁸⁵ An inquiry was held by the military, whilst several court cases were also instituted in this connection. In relation to the role of the NHRI, it appears that apart from having questioned the Water Resources Board on the water in Weliveriya,¹⁸⁶ the HRCSL does not appear (from publicly available information), to have taken any meaningful steps to monitor the situation, to educate the people on their rights, or to advocate a human rights based approach to resolving the issue between the transnational corporation and the residents. It has not been possible to ascertain at this time whether a complaint was made invoking the complaint mechanism of the Human Rights Commission. Meanwhile Human Rights Watch expressed its dissatisfaction with the possible inquiries that were being made by the National Human Rights Commission.¹⁸⁷ The HRCSL, in its response to the ANNI questionnaire has stated that it conducted inquiries and investigations and had consultations with civil society, in relation to this incident.¹⁸⁸ Attempts to meet the officers to ascertain further facts prior to drafting this report proved fruitless.

The HRCSL has reported that it held a special discussion on the incident, with civil society, religious dignitaries and the public (with no mention made of the corporation involved), as a 'preliminary step' to monitoring the situation, but no further action appears to have been forthcoming thereafter,¹⁸⁹ especially in terms of advising corporations on their responsibilities in relation to human rights. It appears that the HRCSL could have taken its role more seriously in terms of monitoring and advocating for corporate responsibility for possible human rights violations, both prospectively and retrospectively in the year under review in relation to the ACJ references.

The HRCSL has also significantly not cited any steps taken in relation to the Right to Environment, in using the ACJ references thereof, in its response to the ANNI questionnaire, although it also observes that it has made several landmark recommendations on environmental issues, referred to in its website and annual report.¹⁹⁰ The only difficulties identified by the HRCSL in implementing the ACJ references has been that "(a) Ground situation is not suitable to implement or discuss some ACJ references" and "(b) Attitudes of general public". It appears that this is an overly optimistic view of the HRCSL's commitment and ability to use and implement the ACJ references, and a more realistic and internalized self-audit may reveal institutional gaps that challenge the HRCSL's ability to implement the references. This is evident for example, in what the HRCSL considers to be a terrorism and rule of law issue, and its response to environmental rights.

¹⁸⁴"Dipped Products Awaiting Green Light", The Sunday Leader, Faraz Shauketaly, available at <http://www.thesundayleader.lk/2013/08/18/dipped-products-awaiting-green-light/>, accessed on 27 May 2014.

¹⁸⁵ "Woes of Weliveriya Water War", The Sunday Times, Aanya Wipulasena, 4 August 2013, available at <http://www.sundaytimes.lk/130804/news/woes-of-weliveriya-water-war-55854.html>, accessed on 27 May 2014.

¹⁸⁶"Dipped Products Awaiting Green Light", The Sunday Leader, Faraz Shauketaly, available at <http://www.thesundayleader.lk/2013/08/18/dipped-products-awaiting-green-light/>, accessed on 27 May 2014.

¹⁸⁷"Human Rights Watch tells Sri Lanka to conduct an independent inquiry into protest deaths", Aug 10, 2013, 12:36 pm SL Time, Colombo Page News Desk, Sri Lanka, available at http://www.colombopage.com/archive_13B/Aug10_1376118375CH.php, accessed on 27 May 2014.

¹⁸⁸ HRCSL responses to the ANNI questionnaire.

¹⁸⁹ "Special discussion on the issue of problems faced by the public in a large number of villages including Rathupaswala in Weliveriya, on having discovered a high level of acidity or toxic chemicals in the water in their wells", 6 August 2013, available at <http://hrctl.lk/english/?p=2161>, accessed on 27 May 2014.

¹⁹⁰ HRCSL comments/observations to the draft ANNI report.

6. Conclusions and recommendations

a. Recommendations to the HRCSL

Information: It appears that the biggest difficulty faced on analyzing the work of the HRCSL has been in relation to the lack of timely and detailed information. Whilst the HRCSL may be undertaking meaningful steps to address human rights concerns in Sri Lanka, if such information is not available and disseminated to the public in a timely manner, the purpose is lost- justice should not only be done, it should also be seen to be done. It is therefore strongly recommended that the HRCSL issue its annual reports within one month of the end of the calendar year at a minimum, and that its website be periodically updated with its activities. It must be commended that the news link of the HRCSL is fairly updated on some events- but much needs to be done in this connection (time frame one year). The HRCSL observes that translation of the report to all three languages requires at least three months and therefore that a one month time frame is not viable.¹⁹¹ However, even as of mid-July 2014, the 2013 annual report has not been uploaded to the HRCSL website.¹⁹²

Engagement with other stakeholders: It is noted that there has been no formal and sustained working relationship that the HRCSL has displayed in relation to CSOs. It is also clear that partnerships with CSO will enable the HRCSL to tap into established networks, to build its own capacities, and to create sustained relationships in defence of human rights. It is recommended therefore that the HRCSL build policy level dialogue and engage with CSOs in this connection (time frame six months). The HRCSL observes however that it has a strong working relationship with CSOs, with regional level committees that meet once a month.¹⁹³

Transnational corporations and human rights: It is noted that Sri Lanka does not have domestic guidelines or laws which specifically address the ACJ references on the responsibility of transnational corporations for human rights violations in the country. Given that much foreign investment is currently taking place in post-war Sri Lanka, it is urged that;

- i. the HRCSL take the leadership and initiative to formulate guidelines based on the ACJ reference (time frame one year); and
- ii. take action against existing transnational corporations for human rights abuses in line with the ACJ recommendations (time frame one year);
- iii. provide support to transnational corporations to take proactive preventive measures to prevent human rights abuses (time frame one year); and
- iv. move independently to set up preventive structures/advisory services, such as regulatory institutions and dedicated officers within the HRCSL to monitor such corporations, to discourage such abuses (time frame one year).

¹⁹¹ HRCSL comments/observations to the draft ANNI report.

¹⁹² As of 15th July 2014.

¹⁹³ HRCSL comments/observations to the draft ANNI report.

Suo Moto investigations of human rights abuses: The HRCSL should vastly exercise its mandate to take up individual or collective issues at their own initiative, without a complaint having been lodged (*suo motu*). Regardless of the 'political' nature of the human rights violation, the HRCSL should exercise its power to intervene and investigate into fundamental rights issues. This practice would enable the HRCSL to address unresolved or ongoing grave violations of human rights and increase government's accountability, the NHRI's credibility and public legitimacy as well as public confidence in the HRCSL (time frame one year).

It is, as a HRD and a defender of HRDs, the HRCSL's obligation to promote and protect the rights of the HRDs, non-governmental organisations and civil society and to take immediate and necessary actions to enable the human rights Organisations, civil society organizations and HRDs to operate without executive interference. Having said that, it is urged the HRCSL should

- v. form an advisory committee at a meeting of civil society partners of the HRCSL (time frame six months).
- vi. conduct quarterly (at least bi-annual) discussions with the advisory committee to have facilitated dialogues and share information about human rights situation.
- vii. in line with the SR's recommendations, take measures to prepare a set of guidelines, in consultation with the advisory committee that outlines the protection mechanism and (HRD related) complaints handling procedure (time frame twelve months).
- viii. establish a focal point to support HRDs' work and respond rapidly when they are in danger (time frame three months).

The HRCSL should develop a plan / mechanism for follow-up on investigation & recommendations, monitoring of the implementation of its recommendations and decisions on the resolution of complaints. To function more effectively, the HRCSL should

- ix. create a multi-stakeholder committee to monitor the implementation of recommendations (time frame six months)
- x. publish, as and where appropriate, the details and status of petitions filed on HRCSL's official website in a timely manner (time frame four to six months).

The HRCSL observes that it has already established a mechanism by appointing/allocating a dedicated officer to follow up on recommendations.¹⁹⁴

The HRCSL should develop a mechanism to effectively engage with the ANNI member in Sri Lanka, the civil society counterpart of APF that aims at enriching both the civil society and NHRIs through a synergistic pattern of working.

¹⁹⁴ HRCSL comments/observations to the draft ANNI report.

- xi. establish a focal point / assign an officer to coordinate with the ANNI member in Sri Lanka (time frame three months).
- xii. quarterly meetings between the HRCSL senior officials (Secretary, Secretary – Legal and directors) and the ANNI member.

Recommendation to Parliament and Government

Engagement with other stakeholders: It is noted that parliament does not appear to be periodically updated on the work carried out by the HRCSL. Periodic reports and issuance of timely annual reports can eliminate these informational lapses. The subject of human rights to be specifically assigned to a Ministry and require such Ministry to periodically report the work of the HRCSL to parliament, ensuring executive knowledge of and support for, the work of the Commission (time frame one year).

Engagement with other stakeholders: It is noted that the HRCSL faces a grave concern of non-implementation of its recommendations and directives. It is recommended that urgent amendments be made to the statutory powers of the HRCSL, permitting the HRCSL to move the High Courts of Sri Lanka in contempt proceedings against any person who fails to implement a recommendation or directive of the HRCSL. It is also recommended that the jurisdiction of the HRCSL be expanded to include other human rights, beyond the fundamental rights jurisdiction set out in the statute per the Constitution (time frame one year).

“We the People”: Reflections on Governance and Civic Engagement in Sri Lanka

Deshamanya Professor Nandadasa Kodagoda 17th Memorial Oration

Dr. Deepika Udagama

August 1, 2014, Sri Lanka Foundation

It would not be an exaggeration to say that I was deeply humbled by the invitation to deliver the 17th Deshamanya Professor Nandadasa Kodagoda Memorial Oration. At the outset, let me thank the members of the Nandadasa Kodagoda Memorial Trust for the honor of the invitation. Let me express my appreciation to the Trust for deciding to celebrate the life of Prof. Kodagoda in this fitting manner—that of offering an immensely valuable platform to engage in public conversations.

A few decades ago, when I was a law student and then a young academic at the Faculty of Law, University of Colombo, Professor Nandadasa Kodagoda was a huge star in the academic firmament of Sri Lanka. When I think of him, the image that comes to mind is that of a man with a larger than life personality, with a booming and authoritative voice, brilliantly accomplished not only in his chosen field of academic specialization, but also in a myriad other fields. He was the Dean of the venerable Faculty of Medicine of the University of Colombo and later the university’s Vice-Chancellor – dizzying heights for an academic.

However, as one coming from another academic discipline, the enduring image I have of him is that of Nandadasa Kodagoda, the public communicator par excellence. I still recall how enthralled I was watching his television programs on the Vanniyela Aththo community or on public health issues, his baritone beautifully modulated, his impeccable Sinhala diction flowing forth like rich honey. He was the quintessential inter-disciplinarian. He recognized no boundaries to knowledge. The study of the human body, of the aesthetic of language or of music, or of social anthropology were, I believe, interconnected parts of a larger whole for him. What fascinated me was his wide ranging intellectual curiosity. The education we received generally boxed everything into compartments. And so, to see a man of western medicine waxing eloquent about the cultural characteristics of an ancient community or the fine arts was truly inspiring. In retrospect, I think it was the likes of Prof. Kodagoda who taught us, wittingly or unwittingly, the value of inter-disciplinary education and the potential of academics to enrich the lives of people in a myriad ways.

I do have vivid memories of my first meeting with Professor Kodagoda. Emboldened by the post-graduate education she had received in a rather radical seat of learning in the US, the then recently returned young Udagama invited the eminent professor to speak to students in her human rights law class. The topic was how forensic sciences dealt with sexual violence. Well, as many of you can imagine it was a morning to remember! He patiently explained the scientific dimensions first and then regaled the class with anecdotes, some of which did not go down well with the gender sensibilities of the young academic. The expected combustion did not take

place as the good professor dealt with dissenting views with charm and grace, never losing his cool. I could see that he tolerated the 'impudence' of the young academic with some amusement and a twinkle in his eye! The students learned a great lesson on how to agree to disagree irrespective of age, gender or seniority.

Professor Kodagoda's journey from the small temple school in the village of Ahangama in the South to prestigious Nalanda and Mahinda Colleges on a government scholarship and then on to medical school and eventual great professional heights, in many respects, typifies the Sri Lankan success story of the early to mid-Twentieth Century. Such personalities of that era, more often than not, gracefully straddled the ways of rural Lanka with urban sophistication. They became fully bi-lingual, and in some instances tri-lingual. They were familiar with, and appreciated, both eastern and western thought. Professor Kodagoda's appreciation of the ancient Ayurveda medical system and his serving on the Board of the Institute of Indigenous Studies, while rendering yeoman service to promote public education on western medical thought, is a reflection of that open mindset. Today, while there are many more avenues for educational and social advancement, one very rarely witnesses among the beneficiaries of those opportunities the mellow richness of thought, the learned qualities, the tolerance or the public service orientation which were integral parts of the combined world that the likes of Prof. Kodagoda inhabited.

In sum, I see the late Professor Kodagoda as a colorful, multi-faceted and multi-talented personality who contributed positively to Sri Lankan society in a great many ways. He was a fully engaged citizen who richly deserved the national honor "Deshamanya" (Pride of the Nation). It is that very idea of citizenship—specifically of civic engagement in Sri Lanka—that I wish to explore in this oration dedicated to the memory of the Late Prof. Kodagoda.

Why Focus on Civic Engagement?

My objective here is to engage in a conversation with you about how we in Sri Lanka view our role as citizens—i.e. our civic rights and responsibilities and whether we adequately engage in shaping decisions on matters of common concern to us. If we do, then what are the reasons that animate us? If not, what are the underlying reasons for civic disengagement and apathy? This, by no means is a presentation of scientific findings on any of those questions. I also am not a political scientist. I am first and foremost a citizen and then a student of public law. The purpose of this proposed conversation is to discuss with you certain observations on the topic and to nudge all of us into collective thinking and action. With those caveats let me proceed.

One could very well question the need to focus on the citizenry of Sri Lanka and how we participate in governance, when all important political decisions are made, and indeed political mischief is committed, by those in control of centers of State power. So, why not continue to study what politicians do and unearth the reasons as to why they do what they do? It seems to me that that approach is precisely the problem with our politics and our political culture.

For far too long, we have been obsessed with the study and analysis of the doings and the idiosyncrasies of the political elite. We thoroughly scrutinize their public statements, autobiographies (though there are very few in

Sri Lanka) and biographies and so on. Just as much as history is written and seen through the prism of elite actors, so also in our study of contemporary politics our focus is almost entirely on the political movers and shakers. Will politician A fall out with politician B? If so, what will happen to the government and the making of policy X ? That is how our political discourse goes. It is almost by chance we discover that they are nothing but political creatures of our own making. We have voted for them, sometimes lionized them and acknowledged them (with varying degrees of enthusiasm) as our political leaders who can show us the way forward. That they are our political representatives who are there to do our bidding is, well, mostly a secondary thought. What all of the above means is that the sense we have of our own political agency is minimal.

As the analyses we make is premised on democratic governance, is it not equally, if not more, important to turn the searchlight on us, the citizens, in whom sovereignty lies under our Constitution? Is it not pertinent to ask ourselves the questions as to what extent we fashion policies through democratic participation?; Do we have faith in our democratic entitlements and powers?; Do we have the confidence that we can positively change policies and practices that affect us through the use of those powers?; Do we possess the necessary knowledge and skills for such purposes?; Or, are we content to be mere political instruments that are occasionally cajoled into taking sides during election time by those who nurse political ambitions?

Those are important questions we have to address if we are invested in the idea of a meaningful democratic future for Sri Lanka. As the purpose of this address could be misunderstood, let me state categorically that shifting the focus on the citizenry and on civic values and engagement is not to exonerate public representatives from abuse of authority or relieve them of their sacred duty to govern in a democratic and decent manner. Indeed, if any politician were to maintain by way of defence that abuse of authority and misrule by the political establishment takes place because of a weak citizenry, such a position must be dismissed as cynical and irresponsible nonsense. Anyone holding elected office, or is expecting to seek such office, should know better.

Do We Possess a Democratic Ethos?

As we all know, Universal adult franchise was introduced to Sri Lanka (then Ceylon) in 1931 by the British colonial authorities through the progressive Donoughmore Reforms. We were one of the first colonies in the British Empire to be granted universal adult franchise. Since then we have changed governments only through electoral politics, even during periods of tremendous political violence and upheaval. One could well maintain that there are three pillars that have sustained and shaped modern Sri Lankan society—universal adult franchise, the public education system and the public healthcare system (in my opinion, the latter two being more pivotal than the first). As we have had a long history of multi-party electoral politics and of democratic institutions (what Robert Dahl calls ‘polyarchy’¹), could we say that we Sri Lankans have developed an abiding liberal democratic ethos over the decades?

The Oxford Dictionary defines ‘ethos’ as –“*The characteristic spirit of a culture, era, or community as manifested in its attitudes and aspirations*”. So then, are our attitudes and aspirations animated by democratic values such as free speech and expression, the right of dissent, the right to information, freedom of association

¹ Dahl, Robert A. *Democracy and Its Critics* (Yale University Press: 1989), pp. 218 -224.

and assembly, the right to claim our rights through democratic institutions? On the other hand, if our thoughts, actions and ideals are animated by other values (e.g. those that make us ask for 'favours' from political patrons), what are they? Or, is it the case that democratic values and non-democratic values exist side by side to be used selectively as the occasion suits? Investigating the political value base of Sri Lankan society in a nuanced and comprehensive manner is going to be a vast future research endeavour, but that must be done. The results will reveal quite a lot about ourselves and also perhaps explain the enormous contradictions we see in our literate society.

Even in the absence of comprehensive scientific findings, what we experience or observe on a daily basis are common enough for us to come to at least some initial conclusions about our political values that inform our responses to issues of concern. Let me present some of my own observations/experiences to illustrate the point. Please recognize that these situations are being recounted not in a spirit of ridiculing the parties concerned, but in order to recognize certain ground realities:

i) A working class mother complains that the principal and teachers of her child's school constantly ask for money for various purposes. This time the complaint is that each child is required to bring Rs. 2000/- to paint the class. There are 48 students in the class, and the collection then will be Rs. 96,000/-. "How can painting the class cost so much?" the mother asks me. "We don't know how they spend the money" she laments. When asked what the PTA is doing about it, she says that nobody wants to question the teachers for fear of the child being ill-treated. "Api bhayay (we are fearful/afraid)" she says. "So, what we all do is keep quiet. Each parent is only concerned about one's own child. Because we are not together the teachers constantly exploit our silence".

ii) I am at a human rights education program in a school in the North Central province. The students and the teachers, a lively group, ask me during the tea break whether I can please request the MP, who had been invited by the principal to the event, whether they could be given a good science laboratory and a library. So, why don't they ask him—after all the MP is from their area? "Appo api bhayay" comes the answer. "Because you are from the university he will not scold you."

iii) A group of academics complains that irregular appointments are being made in their university because of political influence. Another complaint is that an irregular extension of service has been made, again through political interference. So what are they going to do about those irregularities? In the first instance, the academics say that their group is pressing ahead with their complaint, but they lament that there is very little support from other academics as they are very worried about their promotions, scholarships and leave and so on (i.e. "we don't want to get into trouble" response). In the latter case, I was told that most staff members of the faculty concerned feel that as it is difficult to fight "these political cases", what they want to do is to also ask for similar extensions of service for everybody. In other words, their position is— if you cannot beat them, join them.

iv) Students complain to a Head of Department that it is very difficult to understand the lectures of a particular lecturer. Have they spoken to the lecturer about it? "No, we are scared" they say "the lecturer will take it out on us". So, why don't they go in a large group? "Very few will join us, and only those few who will go will get penalized".

v) Academics and other professionals stating at meetings, seminars and even in the classroom that “it [whatever matter under discussion] is a controversial issue, I do not want to comment on that”.

vi) I ask a member of the legal profession why he had accepted an appointment to an independent commission when the appointment was clearly unconstitutional as it was made without adhering to the Seventeenth Amendment to the Constitution. “What can I do when the highest in the land appoints me?” was his response. He studiously avoids answering the question on the legality of the appointment. Then he chastises me –“The problem with you Deepika is that you live in an ideal world; we don’t”.

vii) Some years ago, an environmental organization came forward to petition the courts about a powerful generator that had been installed by a private company in a residential area, causing severe health problems due to noise pollution. As public interest litigation is of narrow scope under the law of Sri Lanka, they solicited volunteers from the neighbourhood to be petitioners. Although almost everybody in the neighbourhood complained of the noise, hardly anyone wanted to join in as petitioners. But when the organization persisted and won the case, they all were delighted. Human rights lawyers too, I am sure, could provide many such examples.

viii) We all know that sexual harassment, or “eve teasing” as they say in India, is rampant in our public transport system. But very few women, who are harassed, will raise cries or complain. My students tell me that it is so, because most of the time other passengers not only do not support the victim, but they look at her as if she is the guilty party. Now that I too constantly commute to Peradeniya, I can confirm what they say. “Speaking up is wrong” is the general message one gets—“just why can’t you put up with it and save everybody the embarrassment of a public spectacle”.

ix) A CEO of a company that is a giant in the retail business tells a university audience that compared to consumers elsewhere, Sri Lankan consumers are a meek lot. “We get away with a lot” he says.

I am certain that almost all of you can relate to the instances and responses I have recounted. Commonly recurring responses to the query about inaction are: “we are fearful”, “we don’t want to get penalized”, “we don’t get the support of others, so we too keep quiet”. Let me add another response I keep hearing often—“Well, you can afford to dissent or talk about controversial matters because you are a human rights person. But if we say that it will not go down well (with the authorities)”. My response to the last is that all in a democracy are expected to be “human rights persons”.

This ever-present “fear psychosis” and the failure to mobilize around common causes have to be further explored. My observation is that expressions of fear are of two types: one is about fear to personal security, and the other is about fear of losing benefits or entitlements such as one’s job, promotions, titles and perks. Fear that is entertained is perhaps amplified by the knowledge that others will not come to one’s assistance and also the lack of faith in institutions and processes that are expected to provide remedies. It is also clearly the case that we suffer from the described “fear psychosis” because our democratic orientation is very weak. If we were fully convinced of the critical value of freedom of association, freedom of assembly and freedom of expression in a

democracy, we would not fail so often to take collective action in the face of violations of our rights and liberties.

Of course, during the many cycles of violence our country has gone through, thousands were victims of violence unleashed by all parties concerned, be it torture, abductions, enforced disappearances and extra-judicial killings. It is also no secret that the dismal state of the rule of law in the country does not inspire confidence in the citizenry to seek protection through the law. While there is merit to those arguments, we must also seriously give thought to the consequences of remaining passive. In the long run, are we not saving our individual interests through passivity by sacrificing the future of a nation? It would be rather preposterous to suggest that citizens should be engaged only when the zone is clear.

One can cite many comparative instances in which citizen action prevailed over entrenched authoritarianism and violence. Some of the best examples that come to mind are the Arab Spring, the Civil Rights Movement in the US, people's resistance against the apartheid régime in South Africa and the generals in Burma and how the people of India valiantly resisted the state of emergency declared during Prime Minister Indira Gandhi's tenure in 1975. If the Indian citizenry caved in to authoritarianism then, the India of today would have been a very different one. It also must be said that a healthy democracy depends not only on large scale people's movements; but on the everyday small steps that we take individually and collectively to articulate our ideas and views, question what is illegal and assist others who have been victimized to obtain redress.

In many public institutions in Sri Lanka, including the higher education sector, there is grave concern that deliberative bodies have fallen silent. There is a sullen deference to authority citing some of the above reasons, but the dissent and discontent that is not articulated are palpable. The end result of this silence is that decision-making happens almost by default without the benefit of a process of informed deliberation. The entrenchment of authoritarianism through this silent disengagement is all too obvious. Yet, the erosion continues unabated.

Of course, you may rightly pose the question as to why instances of successful public interventions are not been recounted here. The truth is that such instances, are very few and far between. The two recent examples that come to mind are the FUTA (Federation of University Teachers' Associations) campaign to improve the education sector, which almost turned into a social movement, and secondly the campaign launched by the Allied Health Sciences Students to obtain a better quality degree. My observation is that there is more successful citizen mobilization and intervention among the working class communities than among the middle or upper classes. We all know that democracy thrives with an enlightened middle-class. But most middle class civic bodies—such as chambers of commerce and professional bodies—are disengaged from public issues. It is indeed a welcome change to see the Bar Association of Sri Lanka at present being very active on behalf of the rule of law and the right and liberties of the people.

If the above observation is correct, is it that the more literate and privileged classes in Sri Lanka have consciously abdicated their responsibilities toward democracy? Is it the case that greater possibilities of rapid social mobility in Sri Lanka, made even more rapid through political patronage and a liberalized economy, blind us to larger social issues? Whatever the causes are, it is hard to envisage us having well established democratic

social movements here such as the right to information and anti-corruption movements or the massive “brave heart” campaign against sexual violence in India. Instead what have gained ground in Sri Lanka are movements based on ethno-religious nationalism.

Democracy & Civic Engagement

According to the Oxford Dictionary, ‘Democracy’ is derived from the Greek word *demokratia*. It is coined from the words *demos* (people) and *kratia* (power). In other words, it denotes people’s power—hence, “we the people”.

As we all know, the idea of democracy is premised on the principle of the will of the autonomous individual, who is a citizen of an organized political community (*polis*). Sovereign authority to govern is vested in the individual who is deemed all powerful. In other words, to use monarchical parlance, in a democracy it is us, the people, who are kings and queens and princes and princesses. We are supposed to be the prime movers and shakers who decide on our futures, our destinies. The design of democratic governance of a State, therefore, must have as its primary objective the serving of the will of the peoples—of course not only the will of those in privileged groups, but of all, recognizing the diversity and pluralism of aspirations among us.

The difference between democracy and forms of authoritarian governance is just that. In authoritarian systems, power is concentrated in an individual, such as in a hereditary monarch or a dictator, or in a group of persons, as in an oligarchy. Powers of governance or of decision making do not lie with the people in such a system—we are merely obedient subjects, dependent on the whims and fancies of those who possess power. It is precisely because of the stark difference between democracy and non-democratic political systems that the citizen’s role in a democracy—with attendant rights and duties—is of such vital importance.

Democratic constitutions are expected to establish institutions and systems of governance that function entirely on behalf of the people and which are accountable to the people so that our needs, rights and liberties are protected to a maximum. Fundamental features of liberal democratic governance such as separation of powers, checks and balances, protection of human rights, independence of the judiciary and the franchise are all expected to be a part of modern democratic constitutions for that reason. The overall expectation, however, is that the institutions and systems put in place will function optimally and effectively not on their own, but through active public opinion and scrutiny.

When one studies the evolution of democracy, however, the participatory role of the citizen has varied in different models of democracy. One could say that the citizen’s role was of primary importance in systems of direct democracy, i.e. assembly democracy, which prevailed in the Greek City States. Similarly, members of Buddhist Assemblies of yore were the primary participants in direct democracy practiced within those assemblies. Athenian democracy, which is considered to be strongest among the Greek city-states, was based on the idea of **civic virtue**—i.e. a citizen’s worth was measured not through wealth, education or social status, but through the level of civic participation in public matters. The celebrated funeral oration attributed to Pericles, a prominent Athenian citizen, declares that:

Here [in Athens] each individual is interested not only in his own affairs but in the affairs of the state as well: even those who are mostly occupied with their own business are extremely well-informed on general politics—this is a particularity of ours: we do not say that a man who takes no interest in politics is a man who minds his own business; we say that he has no business here at all.²

The concept of civic virtue was also very important in the later Renaissance Italian city-republics.

However, the idea of direct democracy gradually went into abeyance and its validity was questioned in view of the expansion of scope and size of the State. Could direct democracy function in States with larger populations? The answer was in the negative. The answer to that dilemma was provided by the rise of representative democracy in the Seventeenth Century, primarily through the work of English political philosopher John Locke (1634-1703). Locke was a contractarian who believed that the ideal form of government should be based on a social contract forged between the people and their representatives. In his celebrated work *The Two Treatises of Government* (1690) he presented the idea that sovereign powers lay in the people. The people should form a government by transferring some of their powers temporarily to their chosen representatives. They were, in turn, expected to attend to the needs of the people and protect their 'life, liberty and property'. If the representatives did not fulfill their duties toward the people and violated their rights, then the people had the right to remove them from office. The idea of representative government was further developed by liberal philosophers, chief among who was John Stuart Mill (1806-73).

While representative government was a practically effective form of democracy in large States, it did eventually result in the dilution of active citizenship. People became active during election time and thereafter largely left governance to their elected representatives. Mill argued for the need to have a well informed citizenry which was very active in public life—in voting, in local government and jury service. Theorists like Barber have pointed to the need to entrench 'strong democracy', where a well-informed citizenry actively participates in public life because of a strong conviction in self-government, as opposed to what he calls 'thin democracy', where the citizens use democratic systems in a self-serving or instrumental manner.³

Although one can witness a downward trend in civic engagement all over the world, it is abundantly clear that at least a certain minimum level of civic participation is needed to sustain effective democratic governance. We do observe that in more mature democratic systems civic consciousness is still greatly valued and actively promoted. In aspiring democracies, we have seen remarkable spurts of citizen mobilization in recent times such as in North Africa, the Middle-East and Eastern Europe.

The latest form of democracy to emerge is what John Keane calls "monitory democracy"⁴—meaning the development of citizen's initiatives for checking governmental excesses. The development of citizens' initiatives on election monitoring and the right to information, citizen's tribunals and community initiatives to

² Pericles' Funeral Oration, in Thucydides *The Peloponnesian War* 145,147 quoted in Held, D. *Models of Democracy* (3d edn.) (Polity Press, 2006), pp. 13-14.

³ Barber, B. *Strong Democracy: Participatory Politics for a New Age* (1984).

⁴ John Keane *The Life and Death of Democracy* (Simon & Schuster UK Ltd.: 2009) Part Three on 'Monitory Democracy', p. 585.

check corruption are good examples of monitory democracy. India's right to information movement, the Anna Hazare anti-corruption campaign and the all woman anti-corruption outfit "The Pink Brigade"⁵ are people's initiatives that have captured the imagination of people the world over. It is also the case that citizen activism has moved from national confines to reach global heights as in the anti-globalization campaigns in Seattle and elsewhere and in the form of international advocacy groups such as Avaaz.org that use modern technology to achieve a global reach.

So, while there does appear to be a slump in civic engagement in many countries, yet there are also counter developments in various regions and, indeed, at the level of global citizenship that offer future promise.

For our purposes, we need to look at where Sri Lanka stands in regard to all those developments. Can we, who have had the right of universal adult franchise for 83 years and who are also heirs to the rich legacy of free education and public health care, and consequently who possess high social indicators, be satisfied that we are the driving force of governance in our country? Or are we content to be mere subjects resigned to whatever destiny that is crafted by our representative guardians? If the answer to the first question is in the negative and the latter is answered in the positive, then the democratic scheme in the country is in crisis. It means that our success stories—that of high levels of literacy and social mobility and a long history of exercising the franchise have not been translated into an abiding democratic culture.

What Accounts for Strong Democratic Cultures?

A democratic culture by definition is one that is grounded in an entrenched democratic value base, or in other words, in an entrenched democratic ethos. So, what accounts for the fact that some societies seem to be more successful than others in sustaining democracy? That is a question that social anthropologists and political scientists are best qualified to answer.

What I wish to raise here is just one point for reflection—and that is whether or not the idea often expressed, both by politicians and some of our fellow citizens, that we cannot be expected to be exemplary democrats as we are not of the west (i.e. the Occident) is justified. A strong assumption that colors political thinking in non-western societies, including ours, is that democracy is a western invention as are human rights. Therefore, this transplanted value system, we are told, will take time to take root, if at all.

I do not agree with that position. To say that ideas of human liberty, human dignity and people friendly governance emanated only from the west is a frontal insult to all non-western societies. Equality—the most revolutionary political idea of human kind—freedom of thought and of expression, right of dissent, the right to a remedy, consultative forms of governance and religious pluralism are among democratic ideas that have been created by indigenous thinking and practiced in non-western societies for millennia. That fact is borne out by both eastern and western scholars. This does not mean to say that all eastern thought is democratic. Just like some forms of western philosophical thought, some eastern thought is also not compatible with democratic values.

⁵ See their website :<http://www.gulabigang.in/> accessed on 23/07/2014.

In my opinion, what is perhaps exclusively western is the form of liberal democracy practiced today. The idea of government via a social contract, of separation of powers between three branches of government and of checks and balances, independence of the judiciary and so on could be argued to be inventions by western political thinkers. However, to say that democratic values and principles and, indeed the spirit of democracy, are all exclusively western is an absolute fallacy, in my opinion. Even if structures of modern governance are all western and are alien to us, why is it that we are unable to develop structures relevant to us and infuse governance with democratic values and traditions that are inherent in our cultures?

That makes me come to our giant neighbour India. How has India remained such a vibrant democracy? That is a question that often puzzles us. The enormity of its physical scale, coupled with its diversity and competing claims surely would make governance a nightmare? India's modernity attempts to co-exist with its ancient past. The social and economic gaps are vast. The country abounds with various forms of conflicts. But yet, for all those internal contradictions and upheavals, India never ceases to amaze one with the robustness of civic engagement, the huge capacity of the people, irrespective of literacy levels or social status, to form social and political movements and prevail over government. Then there is the constant cacophony of voices articulating various ideas and demands. I always say that my civic senses come fully alive when in India. Recently, I had the privilege of teaching comparative constitutional law recently at a prestigious seat of legal education in Delhi. The vibrancy of student participation in the discussions and the vigour and passion with which they would articulate their viewpoints, and indeed dissent, were simply breath taking. The classroom was a riot and I simply loved it!

In his celebrated and engaging essay "The Argumentative Indian"⁶ Professor Amartya Sen gives us some clues as to why India's democracy is so vibrant. He points out that there is a long argumentative and deliberative tradition in India that celebrates diverse and unorthodox views, including dissent. He points to the enormous influence of the ancient Hindu epics, the *Mahabharata* and the *Ramayana* which articulate values more in a deliberative than prescriptive manner. In particular, he discusses at length the famous debate between Arjuna, the righteous warrior, and Krishna, Arjuna's charioteer (a human incarnation of Lord Krishna), in the *Bhagavad Gita*, perhaps the most well-known section of the *Mahabharata*.

On the eve of the great battle between the honorable *Pandavas* and the rogue *Kauravas*, Arjuna expresses his remorse at the terrible consequences of war, although he concedes that the war is a just war. Krishna, engages Arjuna in a great debate in which Krishna urges Arjuna to heed his duty to engage in the just war and not be distracted by thoughts on the ensuing carnage. Krishna eventually prevails over Arjuna. Of course, modern sensibilities may not necessarily agree with the outcome of that debate, but what is celebrated about this episode in the *Gita*, aside from its poetic beauty, is the dialogical manner in which the tension between morality and duty is presented. Similarly, Prof. Sen points out that the key players in these great debates include powerful female characters such as *Draupadi*, the outspoken queen of King Yudisthira in the *Mahabharata*, and also those belonging to what were considered to be lower rungs of the caste hierarchy.

⁶ Sen, A The Argumentative Indian: Writings on Indian History, Culture and Identity (Penguin Books, London: 2005), p. 3.

Sen is also a great admirer of the Buddhist deliberative tradition in India. In the same essay “The Argumentative Indian”, he discusses at some length the contribution of the “Buddhist Councils” to India’s dialogic and democratic traditions. In particular, he refers to the third of the Councils held in the Third Century BCE in Pataliputra, the capital of the Ashokan Empire, believed to have been held under the patronage of the great Emperor himself. While the Councils were held after the death of Gautama Buddha in order to resolve disagreements over religious principles and practices, they also appear to have addressed social and civic issues through encouraging open dialogue. Of course, Buddha himself was a master of dialogic reasoning and set the standard to his followers by the deliberative manner in which he presented his discourses.

The Buddhist Emperor Ashoka was an avid promoter of public discussions and civic participation. He was committed to the principle that public discussion should take place without ill-will or rancour. He demanded, according to Sen ‘restraint in regard to speech, so that there should be no extolment of one’s own sect or disparagement of other sects on inappropriate occasions, and it should be moderate even on appropriate occasions’. He insisted that ‘other sects should be duly honored in every way on all occasions’. Certainly, a far cry from what passes off as Buddhist practice in Sri Lanka today.

It follows then that another great democratic tradition of India is the appreciation of pluralism. Despite the sectarian strife that flares up in India from time to time, it is inconceivable that the teeming masses of India would survive together for so long without an underlying acknowledgment of pluralism. That secularism has been adopted as a fundamental pillar of the Constitution of India is no surprise, Sen argues. Two of the greatest monarchs of India—the Buddhist Emperor Ashoka and the Moghal Emperor Akbar were proud flag bearers of that noble tradition. Sen traces the long history of religious diversity and tolerance in India, which provided vast public spaces for agnostics and atheists as well. Buddha, he correctly points out, was a non-believer who challenged the concept of God, but who nevertheless had a large following in a society that was traditionally theistic, or God-fearing.

Where there is religious pluralism, cultural pluralism too follows. Sen cites many examples of literary classics of India which appreciate the rich cultural diversity of the Sub-Continent, one of which is the great poet *Kalidasa*’s classic, the *Meghaduta*. In it, the wondering cloud, carrying a message from a lovelorn husband to his wife, celebrates the great beauty of the variety of customs and behaviour it observes down below as it floats onwards on its journey.

All those traditions, Sen argues, have captured the popular imagination of India, and have contributed to the continuing tradition of public reasoning and debate, of dissent and unorthodoxy, and the appreciation of pluralism. That has, in great measure, helped sustain democracy in that fascinating country. Certainly, one cannot forget how the vibrancy of the Indian Independence Movement and the constellation of extraordinary leaders it attracted helped consolidate democracy.

What of Sri Lanka? It could be said that Sri Lanka too is a beneficiary of a multitude of such democratic legacies. A small island nation, situated at the cross roads of the Indian Ocean, it attracted migration of various peoples to form an exotic potpourri of communities, some of who were assimilated into existing groups while

others co-existed side by side. As Sri Lanka's eminent anthropologist Prof. Gananath Obeyesekere points out, ethnic and religious identities were fluid for a major part of the history of the country, with some possessing multiple identities. An interesting example cited by Obeyesekere is King Kirti Sri Rajasinha (1747-1782) who was "both a Buddhist and a Saivite [Hindu], a speaker of both languages and one who initiated a great revival of Buddhism that had a profound influence right down to the end of the 19th century".⁷

Just as much as cultural pluralism was an established facet of Sri Lankan life for centuries, so also was the tradition of public debate and dialogic reasoning. Home to all the major religions in the world, Sri Lankan society has been enriched by the various strands of philosophic thought and traditions from South Asia and elsewhere. The overarching influence of the rationalist and intellectual tradition of Buddhism, however, in this multi-religious society is undeniable.

The dialectical conversation between *Arahath Mahinda* (thought to be the son of Emperor *Ashoka*) and King *Devanam Piyatissa* in the famous mango groves of Mihintale in the third century BCE, which as legend has it, resulted in the king's conversion to and spread of Buddhism within the country marks a significant event that points to the appreciation of debate and reasoning. That *Arahat Mahinda* engaged the monarch in a debate is impressive. That I assume was the Buddhist tradition of discourse, no matter the social rank of the party. On the other hand, if a king was open to debate and challenge by a saffron robed ascetic who he did not know before, it is an indication of a tradition of openness and dialogue in that early Sri Lankan society.

Similarly, we have the example of the *Milinda Prashnaya*,⁸ the conversation between King *Milinda* and *Nagasena*, a scholar monk, thought to have been written about 500 years after the *parinibbana* of Buddha. There, the monk answers probing questions of the king on Buddhist doctrine. The monk insists that he will engage in the conversation only if the king wishes to engage as a scholar and not as a king. Scholars admit to mistakes and are keen on unraveling through reason, whereas kings do punish when they do not agree says Rev. Nagasena. The good king readily agrees. Thus, the two engage in spirals of philosophic conversation. It is said that this elegantly crafted work of Buddhist literature written in India and lost to the world for centuries, eventually surfaced in Sri Lanka and was held in such high esteem that King Kirti Sri Rajasinha got it translated into Sinhala in the eighteenth century.

There is then the legend of the great *Panadura Wadaya*. The point I wish to make here is not about who won the debates, but it is that we have had a long tradition that greatly admired debate, public reasoning and dissent. Similarly, we have had a long history of standing up to tyranny and oppression.⁹

Given those rich legacies of free thinking, enquiry and challenge, why is it that we are so fearful and disengaged as citizens today? The great irony about the rather alarming level of civic disengagement is that it has set in, and has got worse, in the republican era. Of course, one could argue the State became very violent post-1971 and

⁷ Obeyesekere, G. Buddhism, Political Violence and the Dilemmas of Democracy in Sri Lanka CSDS Occasional Paper (CSDS:2009), pp. 1-16.

⁸ Translation from Pali by T. W. Rhys Davids accessed at: <http://www.sacred-texts.com/bud/sbe35/sbe3502.htm>

⁹ See: e.g. Jayawardena, K Perpetual Ferment: Popular Revolts in Sri Lanka in the 18th & 19th Centuries (Social Scientists' Association, Colombo: 2010).

that democratic governance has seen a downward spiral since then. But the issue is whether there were sufficiently strong civic responses against rising authoritarianism and spirals of violence.

In my opinion, the catalog of people's grievances on undemocratic governance in Sri Lanka is a long one: We have had two republican constitutions thrust on us within six years of each other with hardly any public consultations; the second republican Constitution thrust on us the executive presidency even before we could really debate the concept and understand what it would mean to governance and to our lives; more recently it was made monolithic by the Eighteenth Amendment rushed through Parliament as an urgent Bill; despite the powers of the executive presidency, spirals of political violence taking place both in the north-east and south of the country due to the failure of successive governments to find meaningful political solutions to grievances; the use of ethno-nationalist sentiments to entrench political power; the rising and unchecked tide of intolerance and sectarian violence even after the ending of the civil war in 2009 ; constant onslaughts on the independence of the judiciary and democratic institutions of the people; governance through emergency powers for nearly forty years coupled with the draconian provisions of the PTA; suppression of free expression and association through attacks on the free media and civic organizations; the steady erosion of the rule of law and the militarization of many spheres of civilian activity; and the entrenchment of patronage politics in place of participatory politics. Quite a long list! The sadness is that, in fact, the list is much longer.

We also have been subjected to a novel political lexicon that defeats our democratic rights—e.g. dissent = conspiracy; dissenter = traitor; one who agrees = patriot; motherland = political establishment. People's responses range from outrage to mirth, and of course agreement by some, but overall, in my opinion we have not done enough to sufficiently challenge the serious threat this terminology poses to democracy in the country.

The emasculation of the idea of “we the people” can be seen all around us, if only we care to look. It was vividly brought home, at least to this citizen, when a few months ago she opened the daily news paper and saw a large photograph in the front page depicting a venerable school principal of a leading Colombo school struggling to get into a military uniform in full view of the cameras. She had just completed a military training program conducted for school principals. I was stunned. Would she have really agreed to this on her free will? I thought. Would she have wondered like many of her fellow citizens in Sri Lanka, “How can I refuse, because if I do I will surely get into trouble, and no one will be there to support me”?

Education to the Rescue?

I do believe that there is broad agreement that something is radically wrong with our political culture. Some people call it the “political rot”. But, as I stated at the beginning of this address, mostly we focus on the venality and callousness of the political establishment. Perhaps, just a few of us acknowledge the linkage between civic disengagement and the crisis in democracy in the country.

Be that as it may, there are many solutions suggested to correct the problematic trajectory of governance in the country. Almost all of them pertain to constitutional or legal reform, be it the abolition of the executive presidency, the re-introduction of the Seventeenth Amendment (to the 1978 Constitution), power sharing and

reform of election laws. Even though a student of the law, I am very skeptical that constitutional and legal reform alone would succeed in democratizing our political system. Of course, good laws are essential. But laws, after all, are interpreted and implemented according to the socio-political ethos of a society. We see how laws, including the Constitution, are so blatantly violated with impunity today. So, without a change of the mindset can we expect deeply rooted change? I do not think so.

That is why I would put my stock in education. Real change can come only in the long term. As a society that has passionately invested in education as a social good, I think education has to be used as the primary tool for democratization harnessing existing democratic traditions. It is education, whether formal or informal, that can attempt to foster a relevant value-base or sharpen an existing value base. In well-established democracies the goals of the education system generally tend to go hand-in-hand with the country's political and constitutional ideals. One can think of the models of education in the USA and Scandinavia as examples.

I am, of course, not an expert in the philosophy of education. But as an academic and also as one who has both studied and taught in Sri Lanka and overseas, I wish to share some thoughts with you in that regard. When I say that the education system in Sri Lanka should be used as a change agent, I do not mean the formal education system as it exists today. The current education system, it seems to me, is the very anti-thesis of democratic education. Meeting the demands of the economy and the related employment market is the key goal, we are told. Science, mathematics, English and IT are emphasized with the social sciences downgraded as being almost irrelevant to the market. Fostering democratic values and a civic consciousness are, if at all, very peripheral to the major objectives. What is promoted now in World Bank parlance are “soft skills” (e.g. skills relating to communication, team work, organizing and also promoting ethnic harmony). Such skills are taught more through extra-curricular activities than as integral parts of the curriculum. The Social Studies curriculum at secondary education level has some lessons on the political system and the Constitution. Teaching is generally top-down and the classroom is still not an open space for challenging ideas and debate. Students spend a major portion of their time at cram shops—there's hardly any time for anything else for them other than a tele-drama or two at the end of the day. Life's worth is determined by exam results, even when you happen to be in grade five. Examinations are largely traumatic events, both for students and the parents. But everybody soldiers on expecting to achieve the Sri Lankan Dream.

Among those deemed the best and the brightest (based entirely on exam results) and who gain admission to our public university system, knowledge of current events, whether local or global is appallingly weak. Very rarely does one come across a student who reads a daily news paper or who is a keen observer of current events who can give you an informed analysis on a public issue. One gets blank stares when you refer to major public happenings such as the impeachment of the Chief Justice or the CHOGM conference. In one class of about 65 students it seemed that most had not heard of the Burgher community of Sri Lanka. When a question is asked about the political system of the country, there are many students who would say “but we don't know; we didn't study political science for A Levels”. Hardly a system that educates for life, leave alone democracy! The youngsters are bright and have tremendous potential. But the system has let them down, together with the country, very badly.

In contrast, I found the US education system to be one which encourages experiential learning; is interdisciplinary; is based on the Socratic method of deliberation in the class room; encourages free thinking; rewards unorthodoxy and outspokenness, volunteerism and civic duty; and assesses a whole range of skills before judging a student's academic performance. Education is not the dreary process one has to go through for social advancement. The Constitutional principles of government, civil rights and civic obligations are brought to the attention of students at a very young age. As for Indian citizens, the moment of Independence from British colonialism and the founding of the new republic and its value base, is a defining core theme in the lives of US citizens.

Recently, our Department of Law joined via video link a global conversation with Justice Sandra Day O'Connor, the first woman justice of the US Supreme Court. When she was asked for her thoughts on what a young lawyer should do to start up his/her career, I think she surprised a good section of the global audience. She advised that one of the key things to do is to join as many community organizations as possible and make oneself relevant to the community. That way, she said, one learns a lot about governance as well.

The influence of John Dewey on the US education system has been profound. Dewey (1859 – 1952) was the most influential US thinker on the philosophy of education in the twentieth century. In his authoritative work **Democracy and Education** (1916) he advocated the need to make democracy the central focus of the educational process. Education must address the individual as part of society and impart the necessary values and skills to strengthen that relationship. The idea of experiential learning, as opposed to theoretical learning, also stems from Dewey's philosophical thought.

I also do believe that liberal arts education widely held in high esteem in the US has played a key role in advancing a democratic ethos within US society. It is also worth noting that in **The Heart of the Matter: The Humanities and Social Sciences for a Vibrant, Competitive Nation** released in 2013, the American Academy of Arts and Sciences emphasizes the need to focus on and invest in education in the humanities and the social sciences in order to sustain civic engagement and democratic leadership in the US while meeting modern challenges of all types. Sri Lankan policy-makers, on the other hand, keep reminding us of the futility of "arts education" as arts graduates are not employable. What a narrow vision of life, society and our collective future!

Finally, it does seem that democratizing the individual and a society is a whole process—not just about introducing a subject or two on civics and political science and tinkering with an already tired and socially irrelevant education system. We do have a lot of thinking to do on that score.

Conclusion

When the war ended five years ago, on the balmy shores of the Nanthikadal Lagoon, most Sri Lankans thought that it was a political watershed that would bring about change and a new beginning for a pluralist and democratic Sri Lanka. That moment has yet to happen. We are not only dealing with unresolved issues from the past but also with new demons such as religious bigotry. As we face the political cross roads we are at today, it

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is imperative that we reflect on our role as citizens and decide on whether we are going to wait for change, or recognize our power and worth as citizens and be the driving force of the new beginnings we wish for.

Stimulating thinking in that direction was the purpose of this address, and I hope I have succeeded in giving you some food for thought.

Let me leave you with the immortal words of Gurudev *Rabindranath Tagore* from *Gitanjali*:

Where the mind is without fear and the head is held high;

Where knowledge is free;

Where the world has not been broken up into fragments by narrow domestic walls;

Where words come out from the depth of truth;

Where tireless striving stretches its arms towards perfection;

Where the clear stream of reason has not lost its way into the dreary desert sand of habit;

Where the mind is led forward by thee into ever-widening thought and action—

Into that heaven of freedom, my Father, let my country awake.

Thank you.

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