

**SRI LANKA:
STATE OF HUMAN RIGHTS 2015**

This report covers the period
January to December 2014

Law & Society Trust
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ABBREVIATIONS & ACRONYMS

BMICH	Bandaranaike Memorial Conference Hall
BASL	Bar Association of Sri Lanka
BSS	<i>Bodhu Bala Sena</i>
CEB	Ceylon Electricity Board
CID	Criminal Investigation Division
FDI	Foreign Direct Investments High Security Zones
HDI	Human Development Index
HRC	Human Rights Commission
IUSF	Inter University Student Federation
ICCPR	International Covenant on Civil and Political Rights
LAA	Land Acquisition Act No.9 of 1950
LLRC	Lessons Learnt and Reconciliation Commission
LTTE	Liberation Tigers of Tamil Eelam
NIRP	National Involuntary Resettlement Policy
NCP	North Central Province
OHCHR	Office of the High Commissioner for Human Rights
OPL	Official Poverty Line
OIC	Organization of Islamic Cooperation
PSC	Parliamentary Select Committee
PTA	Prevention of Terrorism (Temporary Provisions) Act

PSO	Public Security Ordinance
SEZ	Special Economic Zone
TNA	Tamil National Alliance
TID	Terrorist Investigation Division
TISL	Transparency International Sri Lanka
OHCHR	UN Office of the High Commissioner for Human Rights
UNP	United National Party
UNHRC	United Nations Human Rights Council
UDA	Urban Development Authority

FOREWORD

The SHR 2015 report covers 5 main areas of concern in addition to the overview.

This year too it was decided to include a chapter on Religious Freedom as the year 2014 saw an all time low in the promotion and protection of religious freedom due to the attacks on ethnic and religious minorities and the perceived inability of state agencies and their unwillingness to take legal and punitive action against the perpetrators.

The report also carries a chapter on Freedom of Assembly and Association with regard to NGOs and civil society. The year 2014 was characterized by a spate of violations against NGOs and civil society – an attempt to suppress freedom of assembly and association and clamp down on dissent.

After a gap of nearly a decade the report carries a comprehensive chapter on women’s rights touching briefly on the shift in government policy in relation to women’s rights during this nine year period while focusing in detail on the main issues affecting women during the period under review.

The other two chapters included in the report are: Judicial Protection of Human Rights and Human Rights and Development.

The report covers the period January 2014 to Dec. 2014.

Law & Society Trust
Colombo

INTRODUCTION

Editorial

The *State of Human Rights* 2014, reports of serious violations of the violation of religious freedom of minorities; the substantive right to equality of women; and disregard for human rights in development initiatives. According to this report, the judicial remedies for violations of human rights are ineffective; and the government has fallen short of its responsibility and in many cases used its power arbitrarily. Consequently, the Human Rights Council continues in its call for international scrutiny of Sri Lanka's respect for human rights.

In the Overview, Gehan Gunatilleke makes the compelling argument that failures in 2014 in fulfilling the responsibilities of the state towards religious freedom of minorities; towards freedom of expression and association of civil society; and the arbitrary restriction of the right to liberty, particularly of human rights defenders, largely contributed to a regime change by January 2015. He describes 2014 as 'a year of tragic miscalculations' at the international as well as the domestic levels. The then government's refusal to engage meaningfully with the monitoring of Sri Lanka's state of human rights and its indifference (and in some cases the encouragement) of the rise of Sinhala-Buddhist extremism, according to Gunatilleke, came at a heavy price. One of the assumptions underlying this chapter is that given the disregard of the previous government to its responsibility to respect human rights that its defeat at the presidential election is to be welcomed. The Chapter also suggests that the 'impunity, corruption and bigotry that characterised Sri Lanka's post-war era' would be

ended with the election of the new government. Experiences under the new government do indicate a radical improvement in specific aspects of the state's responsibility for human rights. The releasing of land from the Sampur HSZ; the declaration of peace by the President on independence day; and the adoption of the 19th Amendment to the Constitution are but a few examples of such improvements. However, the radical reforms required at the deeper level are yet to be effected, leaving a very real possibility of matters reverting to the *status quo ante*.

The chapter on Judicial Interpretation of Human Rights finds that the effectiveness of judicial remedies for violations of human rights was minimal in 2014. Reflecting the general ineffectiveness and failure of remedies for human rights violations at the domestic level at political and non-judicial *fora* the judicial remedies lacked independence; competence and institutional empathy for human rights. It is argued in this chapter that the impeachment of Chief Justice Bandaranayake, 'cast its long shadow' over the judiciary in 2014 and that the public seems to have lost faith and confidence in the institution. Twenty-three judgments were issued by the Supreme Court on Fundamental Rights in 2014, out of which sixteen concerned the right to equality and one concerned the right to freedom from torture. However, the case-law on the right to equality contains no judicial engagement with the concept of equality. The right is presented as static and formal. In keeping with the past trends, the right to equality is claimed primarily in relation to access to education and in relation to recruitment and promotions in the public service. None of the critical issues related to allegations of violations of human rights that are being claimed by civil society and being considered at the international level are

articulated before the judiciary or even recognised by the judiciary. That disconnect and the lack of rigour even in the judgments issued, it is argued, strongly suggests that the judicial remedy is in crisis.

Kalana Senaratne writing the chapter on religious freedom in Sri Lanka describes 2014 as ‘one of the worst years in terms of promoting religious freedom and harmony in post-war Sri Lanka.’ In this chapter Senaratne documents violations of religious freedom in 2014 including: the rise of anti-Muslim and anti-Christian rhetoric; attacks on places of worship; attacks on members of minority religious communities; and attacks on business establishments owned by followers of religions of minorities. He points out that the existing constitutional and legislative framework does not provide adequate safeguards for the protection of this right and also that the institutional architecture of the state in fact encourages majoritarianisms and ethno nationalism. Senaratne effectively draws links between the deterioration of religious freedom with the decline in media freedom; the political contestations related to the self-determination claims of Tamils of the North and the East; and the lack of independence and competence of different commissions. As argued by Senaratne the state has failed in its responsibility to guarantee the religious freedom of minorities. Radical and immediate interventions are required to prevent further violations. However, as pointed by Senaratne, the lack of political will or consensus on this need suggests that the problem will continue to persist in Sri Lankan society.

Menaka Lecomwasam analyses the Freedom of Assembly and Association with regard to NGOs and Civil Society in chapter 4.

This chapter documents the arbitrary violation of these rights throughout the year across a wide range of scenarios: from interruptions to workshops and trainings conducted by NGOs to the suppression of organic protests in rural settings to the restriction of protests organised by trade unions and university student movements. The police, with the assistance of the Armed Forces in certain instances, conducts itself as a law unto itself disregarding its obligations to uphold the rule of law, respect for human rights and its duty to use force only in manner that is proportionate to the perceived threat. As pointed out by Lecamwasam the lower judiciary fails in these instances to enforce the law and uphold the rights to freedom of assembly and association. The analysis ends with recommendations including recommendations for repealing laws that violate these rights; for ending militarization; and the sensitization of the judiciary. Lecamwasam rightly emphasises that the freedom of association and assembly are important in protecting and preserving dissenting views and the minority opinion in a democracy.

After a gap of nine years, the SHR of 2014 considers the state of women's rights in Sri Lanka. In a well synthesised chapter Thiagi Piyadasa effectively captures the gravity and complexity of the human rights issues that concern women. Piyadasa considers women's economic rights (migrant workers, women in Free Trade Zones, domestic workers, sex workers and plantation workers); health rights of women; political rights of women; and post-war rights concerns of women; and gender based violence. Through this analysis, Piyadasa argues against formal equality as it does not 'acknowledge structural inequalities between men and women' and argues that equality ought to be understood as

substantive equality. She concludes by noting that ‘women’s rights in 2014 indicates little improvement in the critical issues that have been barriers to women’s equality and empowerment for several decades’ in Sri Lanka.

The final chapter analyses the discourse of development in post-war Sri Lanka from a human rights perspective. The authors consider the right to housing; right to land; right to health and water; right to livelihood; and the right to education within this context. Specific violations of these rights in 2014 are described in an easy to understand way by the authors. They argue that state responsibility for the respect of each of these rights has not been adequately met. The analysis effectively argues that unless economic development, individual empowerment and justice complement each other, particularly in the post-war context, sustainable development cannot be achieved. The writers recommend, among other things, using the Sustainable Development Goals as the approach to development; and to ensure the participation of minorities in development.

The documentation and analysis of human rights violations, issues and concerns in Sri Lanka undertaken in this SHR affirms the findings in other *fora* that in Sri Lanka human rights issues are not merely individual events but rather that they are a result of system problems related to the weakening of democracy, rule of law and respect for human dignity.

Dinesha Samararatne

Editor



Map No. 4172 Rev. 1 UNITED NATIONS
January 2004

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Cartographic Section

I OVERVIEW OF THE STATE OF HUMAN RIGHTS IN 2014

*Geban Gunatilleke**

1. 1. Introduction

Sri Lanka found itself at a critical juncture in 2014. Five years had passed since the conclusion of the brutal war between the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE). By the beginning of 2014, post-war triumphalism had given way to expectations that the government would finally investigate wartime abuses and improve the country's human rights record. The government was accordingly confronted with a choice between two approaches. The first approach was to continue with a strategy of appeasing the international community by offering promises of reform and showcasing improvements in the country's situation. The second was to revert to a familiar strategy of suppressing dissenters and human rights activists, thereby impeding ties between local actors and the international community.

The previous two years saw marginal improvements in Sri Lanka's human rights record.¹ These improvements related

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¹ See Overview Chapters of Law & Society Trust, *Sri Lanka: State of Human Rights 2011-2012* (2014), and Law & Society Trust, *Sri Lanka: State of Human Rights 2013* (2015).

mainly to certain visible forms of rights violations, such as extra-judicial killings and enforced or involuntary disappearances. The author has offered certain insights into the possible motivations for these improvements in previous volumes of this series on the state of human rights in Sri Lanka.² As discussed previously, these improvements must be interpreted in light of international scrutiny of Sri Lanka's human rights record and the corresponding sessions of the United Nations Human Rights Council (UNHRC). The resolutions adopted on Sri Lanka at the 19th and 22nd Sessions of the UNHRC³ called on the Sri Lankan government to implement the recommendations of the Lessons Learnt and Reconciliation Commission (LLRC) and to take additional measures to ensure justice, equity, accountability and reconciliation. The coverage of the situation in Sri Lanka therefore prompted the government to contain visible types of rights violations and to demonstrate some degree of cooperation with the international community. Yet the government continued to restrict the freedom of speech and expression, the freedom of movement and the freedom of association during this two-year period prior to 2014. Moreover, this period witnessed the entrenchment of a culture of impunity. No credible investigations were launched into allegations of grave international law violations, and known actors

² *Ibid.*

³ See UN Human Rights Council Resolution 19/2, 'Promoting reconciliation and accountability in Sri Lanka', adopted at the 19th Session of the UN Human Rights Council, 3 April 2012, A/HRC/RES/19/2 [UNHRC Resolution 19/2], and UN Human Rights Council Resolution 22/1 – Promoting reconciliation and accountability in Sri Lanka, 9 April 2013, A/HRC/RES/22/1 [UNHRC Resolution 22/1].

suspected of extra-judicial killings and enforced disappearances continued to operate with impunity.⁴

The year 2014 therefore presented a dilemma for both the human rights community and the Government of Sri Lanka. On the one hand, the government's credibility in delivering on its promises steadily deteriorated during the previous two years. The government made only superficial progress on implementing the LLRC's recommendations.⁵ Moreover, the independence of the judiciary in Sri Lanka hit a new low when Chief Justice Shirani Bandaranayake was unconstitutionally ejected and replaced by the former advisor to the Ministry of Defence, Mohan Peiris. The impeachment in 2013 was heavily criticised by UN actors including the UN High Commissioner for Human Rights. In her oral update at the 24th Session of the UNHRC, the High Commissioner observed:

The controversial impeachment of the Chief Justice earlier this year, and apparent politicization of senior judicial appointments, have shaken confidence in the independence

⁴ Most notable amongst such suspects is one Iniya Bharathi, a former member of the *Tamil Makkal Viduthalaai Pulikal* (TMVP). Several witnesses who made representations before the Lessons Learnt and Reconciliation Commission (LLRC) claimed that this individual was directly responsible for abducting their family members. Verité Research, *Sri Lanka: LLRC Implementation Monitor – Statistical and Analytical Review No.3* (December 2014) [‘LLRC Implementation Monitor’] for an analysis of 563 original complaints before the LLRC. Many of these complainants directly referred to the role of Iniya Bharathi in abduction, extortion, assault and sexual abuse of civilians in the Eastern Province.

⁵ LLRC Implementation Monitor, at 20.

of the judiciary, and separation of powers in general.⁶

Thus serious doubts were being raised with respect to the government's capacity and willingness to advance justice, equity, accountability and reconciliation. In light of this deterioration of credibility, the human rights community was faced with a decision on whether to escalate its efforts against the government. The 25th session of the UNHRC, scheduled to take place in March 2014, therefore became a decisive event in the equation.

On the other hand, the government became increasingly aware of its failure to convince the international community of its sincerity. This self-awareness perhaps prompted it to rethink its strategy of appeasement—a strategy it had pursued during the previous two years with limited success. In early 2014, a shift in the government's thinking became evident with an unexpected rise in state-sponsored attacks on human rights activists.⁷ By mid-2014, the entire ethos within the country had dramatically shifted, where minorities faced serious antagonism from agents of the state.⁸ The shift

⁶ Office of the High Commission for Human Rights (OHCHR), Oral update of the High Commissioner for Human Rights on promoting reconciliation and accountability in Sri Lanka, A/HRC/24/CRP.3/Rev.1, 25 September 2013.

⁷ For example, the government arrested and detained a prominent activist on disappearances, Balendran Jeyakumari in March 2014. Furthermore, outspoken human rights activist, Ruki Fernando, and Catholic priest Rev. Praveen Mahesan were arrested during this period—although they were subsequently released.

⁸ According to the Secretariat for Muslims, over 200 attacks on Muslims took place during 2014. Over half of these attacks were by political actors, many of whom were aligned to the state. At least 10% of these attacks were by public servants. See Secretariat for Muslims, *Anti Muslim Sentiment in Sri Lanka 2014* (2015).

in many ways justified the corresponding escalation of civil society efforts, which eventually contributed to a remarkable regime change in early 2015.

This overview chapter focuses on three watershed events that took place in 2014 and discusses the common themes and threads that ran through the year. The chapter is accordingly divided into three parts, each of which relates to a watershed event, a particular timeframe in the year, and specific human rights violations. The first part deals with the UN Human Rights Council session, which took place during the first quarter of the year. It also deals with the increase in arbitrary arrests and detentions during this period. The second part deals with the Aluthgama riots of June 2014 and the freedom of religion. The final part deals with the Presidential election campaign, which took place during the latter part of the year. This part specifically deals with political rights including the freedom of association and the freedom of speech and expression.

2. The 25th Session and the Return to Repression

2.1 The UNHRC

Successive resolutions on Sri Lanka at the UNHRC in 2012 and 2013 provoked serious criticism of the government's handling of foreign relations. By 2014, critical voices even emerged from within the mainstream media—an arena that the government had controlled quite effectively up to that point. Studies by the Colombo-based think tank, Verité Research reveal an interesting shift in the approach of the mainstream media, which perhaps prompted a more critical reading of the UNHRC process. According to this body of research, media reporting in 2014 contrasts significantly from previous years. In 2012, the press almost unanimously

opposed the UNHRC process as a Western imposition, and unequivocally defended the Sri Lankan government.⁹ In 2013, this homogeneity was replaced by bi-polarity; the smaller alternative press adopted a more pragmatic approach in discussing the UNHRC process, while the mainstream media continued to support the government.¹⁰ In 2014, however, the mainstream press itself became divided. A centrist camp adopted a pragmatic view, while a smaller nationalist camp continued to support the government.

The centrist camp differed from the nationalist press by criticising the government's foreign policy management and reluctance to diffuse the UNHRC process through domestic reform. Mainstream Sinhala newspapers including the *Lankadeepa*, *Mawbima* and *Lakbima* with a collective reach of over a million readers, began to reflect this pragmatism by February 2014.¹¹ The government, for the first time, was confronted with strong criticism from within the country. Critics began to see the UNHRC process as reflective of the government's failings rather than a Western imposition.

Meanwhile, the human rights community sought to shift gears in its advocacy efforts against the government at international fora. The resolution on Sri Lanka at the 22nd session of the UNHRC in 2013 was virtually identical to its predecessor in 2012, except for a reference to new reports

⁹. Verité Research, *The Media Analysis*, February-March 2012, Vol.2, Issues. 6,7,8,11.

¹⁰. Verité Research, *The Media Analysis*, February 2013, Vol. 3, Issue. 8.

¹¹. Verité Research, *The Media Analysis*, February 2014, Vol. 4, Issue. 8.

of human rights violations including religious violence during the year.¹² The two resolutions defined a role for the Office of the High Commissioner for Human Rights (OHCHR) in monitoring the situation in Sri Lanka and reporting back to the UNHRC. In this context, the High Commissioner for Human Rights visited Sri Lanka in 2013 and reported back to the Council in September that year. Her oral update was particularly critical of the government's actions during this period, and recommended the sustained involvement of the Council. Her visit and report in many ways signalled a strong possibility of a greater role for the OHCHR in 2014 in terms of conducting investigations.

The resolution adopted by the UNHRC on 26 March 2014 introduced a significant change compared to the two previous resolutions. The previous resolutions placed on the Sri Lankan government the sole obligation of implementing the recommendations of the LLRC and taking 'additional steps' to fulfil its relevant legal obligations and commitments on justice, equity, accountability and reconciliation. By contrast, the 2014 resolution included a more active role for the

¹² UNHRC Resolution 22/1, which states the following in one of its preambular paragraphs: 'Expressing concern at the continuing reports of violations of human rights in Sri Lanka, including enforced disappearances, extrajudicial killings, torture and violations of the rights to freedom of expression, association and peaceful assembly, as well as intimidation of and reprisals against human rights defenders, members of civil society and journalists, threats to judicial independence and the rule of law, and discrimination on the basis of religion or belief.'

OHCHR, given the ‘absence of a credible national process with tangible results’.¹³ Operative Paragraph 10 of the resolution accordingly introduced an expansive role for the OHCHR. Paragraph 10(b) requests the OHCHR:

To undertake a comprehensive investigation into alleged serious violations and abuses of human rights and related crimes by both parties in Sri Lanka during the period covered by the Lessons Learnt and Reconciliation Commission, and to establish the facts and circumstances of such alleged violations and of the crimes perpetrated with a view to avoiding impunity and ensuring accountability, with assistance from relevant experts and special procedures mandate holders.

The new clause was met with resistance from the Sri Lankan government on the basis that an international investigation would be biased and agenda-driven. Moreover, India’s support for the UNHRC process shifted slightly in response to Operative Paragraph 10. While India voted in favour of the resolutions in 2012 and 2013, it preferred to abstain in 2014 on the basis that it was not in favour of an international investigation. Yet the resolution was adopted by a majority of Council members and the OHCHR received a mandate to begin an investigation into alleged serious violations and abuses of human rights and related crimes. The OHCHR’s

¹³ UN Human Rights Council Resolution 25/1, ‘Promoting reconciliation and accountability in Sri Lanka’, adopted at the 25th Session of the UN Human Rights Council, 26 March 2014, A/HRC/25/L.1/Rev.1 [‘UNHRC Resolution 25/1’], at Operative Paragraph 10.

temporal mandate was broad, as it was linked to the period covered by the LLRC. The LLRC was mandated to inquire and report into matters taking place between 21 February 2002 and 19 May 2009. However, the Commission covered a much broader period. It inquired into incidents ranging from the late 1980s to mid 2011.¹⁴ In fact, in paragraph 8.307 of its final report, the Commission makes a direct reference to the Tamil National Alliance (TNA) report on post-war violations of human rights in the North and East of Sri Lanka, tabled in Parliament on 21 October 2011. The Commission noted that ‘cognizance should be taken of these allegations in terms of their relevance to the Commission’s Warrant.’¹⁵ The period in fact covered by the LLRC thus extended from the late 1980s to mid 2011. In this context, the High Commissioner’s mandate to investigate alleged violations and abuses of human rights and related crimes was interpreted to cover the period from the late 1980s to mid 2011.¹⁶

2.2 Arbitrary arrests and detention

Despite international scrutiny of the human rights situation in Sri Lanka and growing criticism of the government’s handling of the UNHRC process, the first quarter of 2014

¹⁴ Report of the Commission of Inquiry on Lessons Learnt and Reconciliation (November 2011) [‘LLRC Report’] (see para.6.16 of the LLRC report) See reference to eviction of Sinhalese from Ottamvady and Panama in the late 1980s and the incident involving the disruption of a Jaffna civil society meeting on 29 May 2011 (see para.5.158 of the report).

¹⁵ The LLRC Report, at para.8.307.

¹⁶ It is noted that the OHCHR later interpreted its mandate to extend up to 2011. See Oral update of the High Commissioner for Human Rights on promoting reconciliation, accountability and human rights in Sri Lanka, 22 September 2014, A/HRC/27/CRP.2 [‘OHCHR Oral Update 2014’], at para.11.

produced a surge in arbitrary arrests and detentions. In February 2014, the OHCHR reported:

OHCHR continues to receive complaints of widespread harassment and intimidation targeting human rights defenders, activists, lawyers and journalists, including reprisals against those who engage with the United Nations human rights mechanisms and OHCHR.¹⁷

In February and March 2014, the government detained over 65 people, including women, in various areas of the Northern Province on suspicion of terrorist activities.¹⁸ Amongst those arrested during this period was the outspoken activist on disappearances, Balendran Jeyakumari. She together with her 13-year-old daughter was arrested on 13 March under the Prevention of Terrorism Act of 1979 (PTA) on suspicion of harbouring a fugitive.¹⁹ Meanwhile, prominent human rights activists, Ruki Fernando and Catholic priest Rev. Praveen Mahesan were arrested in connection to Jeyakumari, and were questioned in Kilinochchi by the Terrorism Investigation Division of the Police.²⁰ Both Fernando and Rev. Praveen were released the next day without charge. However, they were later produced before a Magistrate in Colombo, who made an order impounding their passports

¹⁷ Promoting reconciliation and accountability in Sri Lanka, Report of the Office of the United Nations High Commissioner for Human Rights, 24 February 2014, A/HRC/25/23 [‘OHCHR Report 2014’], at para.21.

¹⁸ OHCHR Oral Update 2014, at para.42.

¹⁹ *Ibid.*

²⁰ *Ibid.*

and preventing them from disclosing any details about ongoing investigations.²¹ By contrast, Jeyakumari was held in detention without charge for the remainder of the year. Her 13-year old daughter, however, was released into the care of child protection services.

These incidents signalled a very serious shift in the Sri Lankan government's approach to dealing with dissent. During the previous two years, the government tolerated dissenting voices to some extent in the hope of showcasing progress. However, the same dissenting voices that were permitted space were also responsible for highlighting the grave shortcomings of the country's human rights record. Jeyakumari and Ruki Fernando were amongst the most vocal of such voices. Jeyakumari for instance was actively campaigning for the return of her 15-year old son who she claimed she personally handed over to security forces in compliance with orders to surrender persons with past links to the LTTE.²² Rights groups thus condemned her arrest as an attempt to silence activists who exposed the inaction of the government and the continued impunity enjoyed by

²¹ International Federation for Human-Rights, *Sri Lanka: Further acts of harassment against Mr. Ruki Fernando and Rev. Praveen Mabasana*, 25 March 2014, at <https://www.fidh.org/International-Federation-for-Human-Rights/asia/sri-lanka/15011-sri-lanka-further-acts-of-harassment-against-mr-ruki-fernando-and-rev>.

²² Asian Human Rights Commission, *Sri Lanka: Ms. Balendran Jayakumari and Daughter Illegally Detained and Held without Charge*, 8 April 2014, at <http://www.awid.org/Library/Sri-Lanka-Ms.-Balendran-Jayakumari-and-daughter-illegally-detained-and-held-without-charge>.

perpetrators.²³ Similarly, Ruki Fernando was an outspoken activist and critic of the Sri Lankan government with years of experience campaigning for human rights. He also regularly lobbied Member States of the UNHRC. His arrest may be seen as part of a distinct agenda to silence dissenters and prevent them from cooperating with the UNHRC process.

- Two observations could be made with respect to the government's curious approach during the first quarter of 2014. First, the government's suppression of human rights activists reinforced the need for an alternative mechanism to investigate rights abuses and related crimes. The government's own actions appeared to justify the international scrutiny that it virulently opposed. In this context, the government's targeting of prominent activists was ostensibly counterproductive. It hastened rather than impeded the international investigation the government so desperately resisted. Second, the Sri Lankan government's approach signalled a new form of intransigence. It appeared that the government—for the first time in the post-war era—was making preparations to enter into a new geopolitical space where pressure from international community would have little or no bearing on its policies. This intransigence perhaps explains the otherwise inexplicable timing of Jeyakumari's and Ruki Fernando's highly publicised arrests. The arrests took place merely days before the UNHRC was to take up the resolution on Sri Lanka.

²³ See Amnesty International, *Urgent Action: Activists in Northern Sri Lanka at Risk (Sri Lanka)*, UA 070/14 (21 March 2014); Amnesty International, *Amnesty International Report 2014/15*, February 2015, at <https://www.amnesty.org/en/countries/asia-and-the-pacific/sri-lanka/report-sri-lanka>.

They almost certainly made the case for an international investigation more reasonable. It is likely therefore that the regime under Mahinda Rajapaksa came to a realisation that it had exhausted options to restore its relationship with the West. With increased support from China at the time (support that would eventually leave the country in economic turmoil²⁴), the government was perhaps calculating an alternative trajectory—one altogether devoid of dependency on Western support. With such a trajectory in mind, an approach of appeasing international actors concerned about human rights was being replaced by a strategy of distancing the country from scrutiny. 2014 thus witnessed a radical shift in the government's approach from appeasement to intransigence. In this context, the arbitrary arrest and detention of dissenters became—once again—the preferred option.

3. Aluthgama and the Culture of Fear

3.1. The anti-Muslim riot

On 15 June 2014, ethnic riots erupted in Aluthgama, Dharga Town, Valipanna and Beruwela—towns located in the South of Sri Lanka. The incident that reportedly triggered the riots was an altercation between a Buddhist monk and three Muslims from the area.²⁵ Following the incident, Galagoda Aththe Gnanasara Thero, the General Secretary of the *Bodu*

²⁴ See 'Sri Lanka seeks new funding sources in shift away from ally China', *Reuters*, 15 July 2015, <http://www.reuters.com/article/2015/07/15/sri-lanka-china-loans-idUSL4N0ZT3KD20150715>.

²⁵ Farzana Haniffa, Harini Amarasuriya & Vishakha Wijenayake, *Where Have All the Neighbours Gone? Aluthgama Riots and its Aftermath: A Fact Finding Mission to Aluthgama, Dharga Town, Valipanna and Beruwela*, Law & Society Trust (2015) at 1.

Bala Sena (BBS), an anti-Muslim group, made racist and inflammatory remarks against Muslims at a public rally held on 15 June.²⁶ His remarks prompted mobs to attack Muslim-owned businesses and homes in nearby areas. During the riots that followed, four persons including three Muslims were killed and over a hundred Muslim businesses and homes were destroyed. Meanwhile, law enforcement officials failed to contain the violence. There were also allegations that organised elements operated among the mobs that attacked the community. For instance, witnesses claimed that many of the attackers wore boots and helmets—thereby suggesting that some of the perpetrators had access to equipment not ordinarily used by civilians.²⁷ Such testimonies raised suspicions that the government was somehow involved in the riots.

The Aluthgama incident was in no way isolated. It was the culmination of a series of events that spanned over two years. Over 241 anti-Muslim attacks took place during 2013 alone.²⁸ In early 2014, The UN High Commissioner for Human Rights expressed that she was disturbed by ‘the significant surge in attacks against religious minorities and the incitement of violence by Sinhala Buddhist nationalist groups, led predominantly by certain extremist Buddhist monks’.²⁹ In September 2014, the OHCHR reported a further 88 incidents of violence against the Muslim community and

^{26.} *Ibid.*

^{27.} *Ibid.* at 31-32.

^{28.} Sri Lanka Muslim Congress, *Religious Violence in Sri Lanka: January 2013 – December 2013*.

^{29.} OHCHR Report 2014, at para.20.

55 attacks against Christians.³⁰ It also described the Aluthgama incident as ‘one of the worst incidents of sectarian violence in Sri Lanka’s recent history’.³¹

The government’s reaction to the spate of violence against religious minorities and specifically the Aluthgama incident was somewhat puzzling. Despite the fact that former President Mahinda Rajapaksa visited the areas that were attacked, and promised investigations, no progress was achieved in terms of bringing perpetrators to justice. Moreover, at the 26th Session of the UNHRC, Sri Lankan government officials sought to shift the blame to the Muslim community for inciting violence.³² The government’s inertia facilitated the ascendancy of groups such as the BBS, which by mid-2014 enjoyed total impunity, possibly due to the backing they received from powerful actors within government.³³ Religious minorities in the country now faced a serious existential threat.

³⁰ OHCHR Oral Update 2014, at paras.46 and 49. These figures reflect early assessments of attacks in 2014. It is noted that, by the end of the year, the Secretariat for Muslims had recorded over 200 attacks on Muslims during 2014. See Secretariat for Muslims, *Anti Muslim Sentiment in Sri Lanka 2014* (2015). Moreover, the National Christian Evangelical Alliance of Sri Lanka listed a total of 88 attacks against Christians in 2014.

³¹ *Ibid.* at para.46.

³² P.K. Balachandran, ‘Sri Lankan Government Accuses Muslims, President Orders Probe’, *New Indian Express*, 22 June 2014, <http://www.newindianexpress.com/world/Sri-Lankan-Government-Accuses-Muslims-President-Orders-Probe/2014/06/22/article2293193.ece>.

³³ In 2013, the BBS secured the endorsement of the then Defence Secretary, Gotabaya Rajapaksha and even met President Mahinda Rajapaksha at his official residence. On 9 March 2013, the Defence Secretary inaugurated ‘Meth Sevana’, the Cultural and Training Centre of the BBS in Galle. See ‘Sri Lankan Buddhist chauvinists provoke violence against Muslims’, *World Socialist Web Site*, 9 January 2013; ‘President Rajapaksa stresses need for respecting rights of all communities’, *The Island*, 28 January 2013; ‘Gota inaugurates BBS Meth Sevana’, *Ceylon Today*, 10 March 2013.

3.2. Constructing a culture of fear

The sudden rise in attacks on religious minorities must be understood within the context of the government's post-war agenda. Three incentives appear to have driven this agenda, which culminated in the creation and fostering of a culture of fear.

First, the failure of the government to deliver on the promises of economic prosperity after the end of the war required a suitable scapegoat. Ahilan Kadirgamar explains that the anti-Muslim campaign 'could not find reception among broader sections of the Sinhala population, until there was social disaffection with the post-war economy, which was meant to bring prosperity.' According to Kadirgamar, 'sections of the Muslim community in trading and business enterprises [became] the scapegoats.' The government was therefore able to deflect potential criticism of its policies by fostering a culture of paranoia about the Muslim community's perceived monopolisation of economic gains.

Second, the government hoped to galvanise its Sinhala Buddhist support base by constructing a narrative that demonised ethnic and religious minorities. It capitalised on the insecurities of Sinhala-Buddhist communities that had recently migrated from rural to urban areas. These communities faced the risk of fragmentation due to increased ethnic and religious diversity in these areas. Reconstructing this fragmented identity was one of the main political agendas behind suburban campaigns led by Buddhist monks such as Gangodawila Soma Thero. Such campaigns succeeded in revitalising the suburban Sinhala-Buddhist identity and began the process of galvanising these communities into a distinct voter base. This voter

base, which was essentially held together by an ethno-religious identity, needed constant rhetorical reinforcement. Without such constant reinforcement, other goals such as economic development and social mobility could perceivably shape voter choices. In this context, a state-backed militant form of Sinhala-Buddhism, which demonised competing ethno-religious groups such as Muslims, began to emerge. The arrival of BBS and the subsequent endorsement it received from government actors must be understood in this context.

Third, the government aimed to highlight its own relevance in safeguarding national security. Defeating the LTTE and securing and maintaining national security were fundamental to Mahinda Rajapaksa's success in the 2010 presidential and general elections. Yet in the post-war era, 'threats' to national security became less apparent, and expectations of rapid economic growth weighed heavily on the government. In August 2011, the President's himself announced his decision to end the state of emergency in the country, as the threat of terrorism had been defeated.³⁴ This rhetoric, however, presented the government with a dilemma. On the one hand, its development agenda was dependent on the continued involvement of the military. The defence and urban development portfolios were brought under one ministry, in which the President's brother Gotabaya Rajapaksa was Secretary. Infrastructure projects relied heavily on the involvement of the military, which by 2011 played a significant role in large-scale construction and urban 'beautification' projects. Moreover, the military acquired large

³⁴ Parliamentary Debates (Hansard) Volume 201 - No. 7, Thursday, 25 August, 2011.

extents of land in the North and East for various purposes including commercial projects.³⁵ The military had therefore become an integral part of the post-war engine of development. On the other hand, the government could not deploy the armed forces for reasons other than the maintenance of public security. For several years, the President deployed the armed forces throughout the country by relying on section 12 of the Public Security Ordinance of 1947 (PSO). The section authorises the President to deploy the armed forces if he was of the opinion that ‘circumstances endangering public security has arisen’ and that the ‘police are inadequate to deal with such situation’. Any military involvement in civilian administration essentially flowed from monthly presidential orders issued under this section. The regime’s economic agenda was therefore dependent on the understanding that there was a concurrent ‘public security’ agenda being fulfilled by the military. Thus the legal provisions that authorised the deployment of the armed forces remained somewhat incongruent with the actual purposes for which they were being deployed. This incongruence may have prompted the construction of an actual threat to public security. Hence the creation of a public security threat in the form of tensions between the Muslim community and radical Sinhala-Buddhist groups resolved this incongruence. It is plausible that the BBS was part of a strategy to construct a threat to stability, which only the government was capable of containing.

³⁵ See Gehan Gunatilleke & Vidya Nathaniel, ‘Illegal Land Dispossession’ in *Sri Lanka Governance Report – Transparency International Sri Lanka* (May, 2014).

These three incentives perhaps serve to explain the unusual rise in religious violence in Sri Lanka during the post-war era. This violence climaxed in 2014 with the Aluthgama riots and produced an unstable environment that necessitated continued dependence on the national security state. Yet, as discussed in the next section, the violence and instability in the country eventually reached a tipping point, which produced an unlikely political transformation.

4. Free Media and Regime Change

4.1. The freedom of mainstream and social media

The mainstream media offered a peculiar response to the events of Aluthgama as they unfolded on 15 June 2014. The day after the riots, the mainstream media failed to report on what had taken place, and instead presented a distorted and highly sanitised version of events. The state media, for example, made virtually no reference to the incidents the day after they took place. On 17 June 2014, the editorial of the *Daily News* was titled ‘They Try in Vain’ and claimed that the incident was ‘isolated’ and was being exaggerated by unnamed ‘saboteurs’ who wished to damage the reputation of the country.³⁶ The same newspapers carried a statement by then Mass Communication Information Minister Keheliya Rambukwella asking the media to ‘act with responsibility’, insinuating that the incident was being exaggerated.³⁷ Meanwhile, privately-owned media agencies including the *Island* and the *Daily Mirror*, presented very little

³⁶ See ‘They Try in Vain’, *The Daily News*, 17 June 2014, at <http://www.dailynews.lk/?q=editorial/they-try-vain>.

³⁷ See ‘Act with responsibility - Minister Keheliya’, *The Daily News*, 17 June 2014, at <http://www.dailynews.lk/?q=local/act-responsibility-minister-keheliya>.

information on the events. The *Island's* editorial on 16 June 2014 in fact implied that the rally organised by the BBS was peaceful and that the participants of the rally were attacked first, which led to their retaliation against Muslims in the area.³⁸ The version of events presented in the mainstream media closely resembled the government's official version.

However, an alternative channel of information was created through social media. Independent journalists operating on social media platforms such as Facebook and Twitter began to report on the events in Aluthgama in real time. It soon became apparent that the control that the government exercised over the mainstream media did not extend to social media. Journalists were freely sharing information and updates without editorial oversight. This free flow of information produced a raw and unadulterated version of events, and was instrumental in shocking the public consciousness at the time.

By 17 June 2015, the government realised that it no longer could control the flow of information. It thus attempted to discredit the journalists that were reporting on the incident. The editorial of the *Daily News* criticised social media as frenzied and fraught with 'petty political ends'. It was clear that the government was concerned about the uncontrollable nature of social media and the tangible threat it now posed to the establishment. It was also clear that the 'free media' only resided in the realm of social media, and that anonymity and fluidity made this realm nearly impossible to contain.

³⁸ See 'Police curfew clamped in Alutgama, Beruwala', *The Island*, 16 June 2014 http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=105187.

The government's link to hate groups such as BBS became increasingly evident, as independent journalists began to openly criticise the government's peculiar inaction. The space that was won through social media spilt over into the mainstream to a certain extent, with journalists such as Dharisha Bastians given space in mainstream newspapers such as the *Daily FT*. In her bold and provocative piece titled 'Striking the Match' published on 26 June 2014, she observed:

The Government that arrested journalist J.S. Tissainayagam, politician Azath Sally and human rights activists Ruki Fernando and Father Praveen Mahesan under sections of the Prevention of Terrorism Act dealing with an incitement of communal tension, has been criminally derelict in the case of Galagoda Aththe Gnanasara.³⁹

The public's perception of the government was now changing due to the connections that journalists such as Bastians were able to draw between the government and hate groups. By exposing these connections, social media and independent journalists posed the largest threat to the government's agenda of fostering insecurity on the one hand and necessitating a national security state on the other.

³⁹ See Dharisha Bastians, 'http://www.ft.lk/article/313452/Striking-the-match', *The Daily FT*, 26 June 2014, at <http://www.ft.lk/article/313452/Striking-the-match#sthash.kg9F0kFc.dpuf>.

4.2 The government's response to the new 'threat'

The defence establishment in Sri Lanka began to understand the extent of the new threat social media and independent journalism posed. During the latter part of 2014, it began a campaign to intimidate independent journalists, characterise social media as a threat to national security, and prevent the training of journalist in social media activism.

On 8 July 2014, independent journalist Dinouk Colombage was summoned for questioning by the Criminal Investigation Department of the Police. According to news reports, he was questioned for four hours over his reporting of the Aluthgama incident.⁴⁰ Incidentally, Colombage was an instrumental social media voice during the riots, as Twitter users closely followed his real time situational updates.

In August 2014, a previous statement by Defence Secretary, Gotabaya Rajapaksa was widely circulated both on the Ministry of Defence website and the state media.⁴¹ The Defence Secretary claimed:

The final threat to Sri Lanka's national security is the emergence of new technology-driven media, including social media sites such as Facebook, Twitter and other

⁴⁰ 'Journalist quizzed by CID over Aluthgama', *The DailyFT*, 8 July 2014, <http://www.ft.lk/article/318944/Journalist-quizzed-by-CID-over-Aluthgama>;

⁴¹ Gotabaya Rajapaksa, 'Sri Lanka's National Security', Ministry of Defence, *defence.lk*, 19 August 2014, at http://www.defence.lk/new.asp?fname=Sri_Lankas_National_Security_20140819_02; Gotabaya Rajapaksa, 'Reconciliation will enhance national security', *The Sunday Observer*, 31 August 2014, <http://www.sundayobserver.lk/2014/08/31/fea02.asp>

websites... Particularly due to increasing internet penetration and computer literacy in Sri Lanka, many youth are familiar with social media; they use them to gather information as well as to propagate ideas. Those with vested interests can exploit social media, causing problems in Sri Lanka or any other country, by circulating certain ideologies online and mobilizing and organizing people. This can be done with a minimal physical presence, and therefore constitutes a threat that is difficult to contain through the traditional tools of national defense.⁴²

It was no coincidence that these claims were repeatedly published on the back of the Aluthgama riots. Social media had been identified as the hitherto unforeseen factor that had disrupted the government's agenda. Instead of convincing the people that they needed the Rajapaksa regime to maintain security and stability within a highly volatile environment, the Aluthgama riots raised concerns that the government itself was creating instability. The connections between the Rajapaksas and the BBS were hugely detrimental to the post-war narrative of the government. Instead of being associated with peace and stability, the Rajapaksas were being associated with unrest and instability. Social media activism was instrumental in prompting this shift.

The government then introduced radical restrictions on the activities of civil society organisations. These restrictions were first introduced in a letter issued by the Ministry of

⁴² *Ibid.*

Defence in July 2014.⁴³ The letter instructed all civil society organisations to refrain from holding press conferences, workshops and training for journalists, and disseminating press releases. During this time, workshops for investigative journalists organised by Transparency International Sri Lanka were called off after being disrupted by organised mobs.⁴⁴ Despite the fact that the Ministry's letter lacked the force of law, it appeared to endorse such disruptions, and overtly intimidated organisations. The move proved to be a gross violation of the freedom of speech and expression, and of the freedom of association.

These new measures were not merely blanket restrictions on the work of civil society organisations. Despite its over-inclusive impact, the timing and precise terminology of the Ministry's letter suggests that the intended targets of the restrictions were independent journalists—the type of journalists who had exposed the government's possible collusion and patent inaction during the Aluthgama riots. Moreover, it is plausible that the defence establishment feared that journalists were being trained in investigative methods including the use of social media, which it saw as a genuine threat to its agenda. Hence the Ministry's letter aimed to instil fear and apprehension amongst civil society organisations that provided such training. The government had therefore embarked on a campaign to impede social

⁴³ K. Ratnayake, 'Sri Lankan government imposes political gag on NGOs', *The World Socialist Website*, 10 July 2014, at <https://www.wsws.org/en/articles/2014/07/10/sril-j10.html>.

⁴⁴ Dinouk Colombage, 'Sri Lanka accused of trying to gag NGOs', *Al-Jazeera*, 22 September 2014, at <http://www.aljazeera.com/indepth/features/2014/09/sri-lanka-accused-trying-gag-ngos-201492263518312357.html>.

media activism and investigative journalism to the greatest extent possible.

4.3 The presidential election

On 20 November 2014, then President Mahinda Rajapaksa issued a proclamation under Article 31(3A) of the Constitution appealing to the people for a mandate to hold office for a further term.⁴⁵ A day later, in a surprising and entirely unforeseen move, Maithripala Sirisena, the then Minister of Health in Rajapaksa's own government, announced his intention to contest the election as the Common Opposition candidate.⁴⁶ Sirisena's camp launched a single-issue campaign, which focused entirely on good governance in sharp contrast to the corruption and nepotism of the Rajapaksa regime. The campaign was engineered and supported by the United National Party, defectors from the Sri Lanka Freedom Party and a host of civil society activists.

It is worth noting that in mid 2014, few political commentators predicted a regime change. Yet in the space of six remarkable weeks beginning in mid November 2014, a seemingly undefeatable family dynasty was on the brink of collapse. Two important factors featured in the impending defeat of the Rajapaksa regime.

First, the regime's rhetoric of security and stability had become less convincing both to the majority and minority communities. The events of Aluthgama highlighted the nexus between the regime and the forces of instability such as the

⁴⁵ See Gazette Extraordinary No. 1889/31 dated 20 November 2014.

⁴⁶ 'Sri Lanka election: Health chief to challenge Rajapaksa', *The BBC*, 21 November, at <http://www.bbc.com/news/world-asia-30144182>.

BBS. It is plausible that moderate Sinhalese voters who were previously thankful to the regime for defeating the LTTE no longer perceived the Rajapaksas as genuinely committed to peace and stability. The regime had betrayed their trust. Moreover, the Muslim and Christian communities were very unlikely to back Mahinda Rajapaksa, given the government's gross failure to protect them from attacks. Rajapaksa had therefore succeeded in marginalising a large portion of his previous voter base.

Second, social media activism had become completely uncontrollable. In contrast to the highly controlled mainstream media, the social media space was rife with material that was openly critical of Rajapaksa and his supporters. New civil society movements such as *Purawasi Balaya* (Citizen's Power) and *Aluth Parapura* (New Generation) alongside older movements such as Platform for Freedom led effective anti-incumbency campaigns mainly via social media. The campaigns highlighted the promises made in Sirisena's manifesto⁴⁷ and encouraged voters to end impunity and corruption by ousting Rajapaksa.

5. Conclusion

The government's actions during 2014—in tolerating and possibly instigating religious violence, and suppressing civil society through arrests, intimidation and harassment—ultimately led to its undoing. Interestingly, the very targets of the government's repressive agenda were instrumental in setting up its unlikely defeat. Mahinda Rajapaksa's government is therefore likely to view 2014 as a year of

⁴⁷ See Manifesto of the New Democratic Front (December 2014).

tragic miscalculations. First, it miscalculated the value of shifting from a strategy of appeasing the international community to one of total intransigence. It also miscalculated the value of galvanising a radical Sinhala-Buddhist voter base at the expense of religious minorities, and moderate voters amongst the majority community. The religious minorities Rajapaksa helped marginalise were poised to vote against him. The civil society that his government viciously suppressed now vociferously campaigned for his opponent. And the tools that were used to highlight the hate and advance the campaign for good governance were the very tools that his regime desperately attempted to impede.

The instrumentality of religious violence, civil society activism and social media platforms in weakening Mahinda Rajapaksa to the point of defeat at the presidential elections cannot be understated. In this context, 2014 must be remembered as the year in which the tipping point was finally reached. The impunity, corruption and bigotry that characterised Sri Lanka's post-war era ultimately induced an awe-inspiring response from the public. 2014 thus produced an unlikely flourish to the post-war story of human rights in Sri Lanka. From a human rights perspective, it also witnessed a heartening transformation in the mood of the country. The fear and apprehension that exemplified 2010 and 2011, and the stark cynicism that marked 2012 and 2013, by the end of 2014, had well and truly been transformed into hope.

II JUDICIAL PROTECTION OF HUMAN RIGHTS

Dinesha Samararatne*

1. Introduction

The confidence in the Sri Lankan judiciary as an effective and independent arbiter of rights had sunk to dismal levels by the year 2014. The arbitrary manner in which Chief Justice Bandaranayake had been impeached in 2013 undermined the independence of the judiciary in deep and pervasive ways.¹ Parallel to this interference, the judicial attitude towards fundamental rights too seems to have taken a negative turn. This trend was demonstrated in the 2013 analysis of the judicial interpretation of human rights in the previous issue of this publication.² Remedies for alleged violations of human rights were sought in other *fora* presumably due to the lack of confidence in the independence of judiciary and due to the perception of a lack of commitment of the institution to the protection of human rights. It was argued in that chapter that the jurisprudence on fundamental rights in 2013, did not, in any meaningful way, reflect judicial engagement with any of the

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¹ Dinesha Samararatne, 'Judicial Protection of Human Rights' *Sri Lanka: State of Human Rights 2014* (Law & Society Trust 2014).

² *Ibid.*

serious concerns related to fundamental rights that Sri Lankan society was experiencing at the time.

The jurisprudence of 2014 amounts to a further intensification of the trends discernible in 2013. The analysis in this Chapter suggests that in the year 2014 the judicial remedy for claiming violations of fundamental rights was static, excessively narrow in scope, and preoccupied with findings on facts as opposed to findings on the relevant law. The jurisprudence seems to be disconnected from the issues and debates of ongoing human rights issues in Sri Lanka.

The analysis undertaken in this Chapter is presented in seven parts. The first part presents a general overview of the legal, political and social context as relevant to the Fundamental Rights (FR) jurisdiction. The second part provides a description of the types of cases that were dealt with by the Court in 2014. The third, fourth, fifth and sixth parts analyse the procedural and substantive issues that were dealt with in the jurisprudence of 2014. Based on this analysis, it is argued in the seventh part of this Chapter, that the FR jurisdiction is currently, a judicial remedy that is in crisis.

2. General Human Rights Context 2014

Reports on the state of human rights in Sri Lanka, by certain governments and INGOs, in the period under review, identify the weakening of the independence of the judiciary as a factor that contributed to the lack of respect for human rights.³ Some of these issues are analysed below, in terms of

³ See for instance, Amnesty International Annual Report 2014/15, 345; Foreign & Commonwealth Office Human Rights and Democracy Report 2014 (2015).

their impact on the judicial interpretation of human rights in 2014.

2.1. The continued impact of the impeachment of the Chief Justice

The arbitrary impeachment of CJ Bandaranayake cast its long shadow on the judiciary in 2014. The low points of this period include the appointments made to the Supreme Court and the setting aside of the decision of the Court of Appeal in 2013 regarding the constitutionality of the report of the Parliamentary Select Committee (PSC) which had concluded that the CJ was guilty of misconduct.⁴ Subsequent to the impeachment, the Attorney-General, who had been called to assist the Court of Appeal as *amicus curiae*, appealed against that decision. The Supreme Court, in 2014, issued judgment, setting aside the decision of the Court of Appeal.⁵ The main argument advanced by the Court was that the scope of judicial review under the Constitution could not be extended to review any actions of the Parliament. Subsequently, it has been argued that the reasoning of the

⁴ A motion to impeach the Chief Justice was passed in Parliament in 2013. Subsequently, under Art 107 of the Constitution, (which allowed for a procedure under standing orders of parliament or by legislation) a Parliamentary Select Committee inquired into the allegations against the Chief Justice and found her guilty of three acts of misconduct subsequent to which she was impeached in January 2014. During this time, several writ applications were filed before the Court of Appeal, seeking an order to quash the report of the PSC on the basis that it had no legal validity. The Court of Appeal upheld this argument on the basis that that such inquiry can be only by law. The parliament and the President disregarded the order by the Court of Appeal. Re appointments to the Supreme Court, see the resolution adopted by the Sri Lanka Bar Association on 17th October 2014.

⁵ *AG v Bandaranayake* SC Appeal No 67/2013 SC Minutes 21 February 2014.

Court does not adequately consider the principles that underlie the 1978 Constitution such as the sovereignty of the People.⁶ The decision of the SC was viewed by some as an attempt to align judicial opinion with the position taken by the Legislature and the Executive.⁷ It was also seen as an attempt to validate the impeachment after the fact. Suffice to say however, that the circumstances surrounding the appeal and its timing, does give rise to doubts as to the intentions underlying the appeal process and the determination. The decision of the Supreme Court further contributed to the deepening of the perception that the independence of the judiciary had been compromised due to the impeachment and also affirmed the view that the commitment of the judiciary to defend human rights had weakened.

2.2. Crisis in law and order

Three incidents which reflect grave violations of human rights are highlighted here to demonstrate the degree the crisis in law and order which prevailed in the country in 2014.

The *Bodhu Bala Sena* (BBS), formed and led by persons claiming to be Buddhist monks, has contributed to the rise of anti-Muslim sentiment in Sri Lanka over the last few

⁶ See further in this regard, N Selvakkumaran, 'Role of the Judiciary in the Public Law of Sri Lanka: Random Thoughts' (Justice Sriskandarajah Memorial Oration February 2015) available at <http://www.basl.lk/index.php/gallery/articles/168-justice-s-sriskandarajah-memorial-oration> accessed on 2 June 2014.

⁷ See for instance, *Supreme Court overrules Appeals Court writ against CJ impeachment* Daily FT, 22 February 2-14, available at, <http://www.ft.lk/2014/02/22/supreme-court-overrules-appeals-court-writ-against-cj-impeachment/> accessed on 2 June 2015.

years.⁸In June of 2014, three Muslims were killed and property and houses destroyed during unrest that followed a meeting held by BBS in Aluthgama.⁹ To date, no suspects have been charged or tried for the violence unleashed in *Aluthgama* or for the killings.

Human Rights defenders continued to experience severe hardships in 2014. The arrest and detention of prominent human rights defenders is a case in point. Balendran Jeyakumari, along with her 13 year old daughter, was arrested in March of 2014.¹⁰ The stated reason for arrest was a suspicion that they were harbouring a criminal.¹¹ The daughter was subsequently subjected to the care of the Probation and Child Care Department. Ruki Fernando, Rev Praveen Mahesan, and two other human rights activists, were taken into custody and detained without charges for two days soon thereafter, while attempting to inquire into the well-being of Jeyakumari and her daughter.¹² The reasons for the arrest of Ruki Fernando are assisting the LTTE to

⁸ See for instance, '*This is a Sinhala country, Sinhala Government*' Bodu Bala Sena Daily FT 18 February 2013, available at <http://www.ft.lk/2013/02/18/this-is-a-sinhala-country-sinhala-government-bodu-bala-sena/> accessed on 2 June 2015.

⁹ See for instance, '*Sri Lanka Muslims killed in Aluthgama clashes with Buddhists*' BBC News 16 June 2014, available at <http://www.bbc.com/news/world-asia-27864716>, accessed on 2 June 2015.

¹⁰ See *Tamil activist detained in Sri Lanka* BBC News 14 March 2014, available at <http://www.bbc.com/news/world-asia-26577956> accessed on 2 June 2015.

¹¹ 'Arrest of Ruki Fernando and Father Praveen', *Groundviews* 17 March 2014 available at <http://groundviews.org/2014/03/17/arrest-of-ruki-fernando-and-father-praveen/> last accessed on 8 October 2015.

¹² See *Sri Lankan activists freed after international outcry* The Guardian 19 March 2014, available at <http://www.theguardian.com/world/2014/mar/19/sri-lanka-activists-freed-ruki-fernando-father-praveen-mahesan> accessed on 2 June 2015.

reorganize; causing discomfort or embarrassment to the government; and obtaining money by proving information to foreign states (translated by author from Sinhala).¹³The reasons for arrest of Father Praveen are assisting the LTTE to reorganize; causing unrest among the public and obtaining money by proving information to foreign states (translated by author from Sinhala).¹⁴ All four human rights defenders were arrested and detained under the *Prevention of Terrorism Act* and information regarding the reasons for their arrest is not publicly available.¹⁵ B Jeyakumari and her daughter were released on bail on 10 March 2015, almost a year later.¹⁶

Death of suspects in police custody too continued to be reported in the country 2014.¹⁷ According to the above newspaper reports, some of these deaths are due to torture

¹³ Copy of arrest receipt (no 407112) dated 17 March 2014, issued by TID (Colombo) of the Ministry of Defence, Public Security, Law & Order available at <https://rukiiiiiii.wordpress.com/march-2014/court-and-police-documents/> last accessed on 8 October 2015.

¹⁴ Copy of arrest receipt (no 407111) dated 17 March 2014, issued by TID (Colombo) of the Ministry of Defence, Public Security, Law & Order available at <https://rukiiiiiii.wordpress.com/march-2014/court-and-police-documents/> last accessed on 8 October 2015.

¹⁵ *Prevention of Terrorism Act* No 48 of 1979.

¹⁶ See accessed on 2 June 2015.

¹⁷ See for instance, 'Sri Lanka: A young man tortured to death in Kandaketiya police custody', *Sri Lanka Brief* 23 May 2014, available at <http://srilankabrief.org/2014/05/sri-lanka-a-young-man-tortured-to-death-in-kandaketiya-police-custody/> accessed on 2 June 2015; *Suspects Die in Police Custody* Sunday Leader 2 June 2015 available at <http://www.thesundayleader.lk/2014/05/25/suspects-die-in-police-custody/> accessed on 2 June 2015; 'Friday Forum urges IGP to investigate police shooting deaths' *Newsfirst* 25 June 2014, available at <http://newsfirst.lk/english/2014/06/friday-forum-urges-igp-conduct-investigations/41511> accessed on 2 June 2015.

or neglect in police custody while some other deaths seem to be deliberately caused by the police.

2.3. Weak and inefficient non-judicial remedies

The non-judicial remedies for violations of human rights continued to be weak and ineffective in 2014. For instance, confidence in the Human Rights Commission (HRC), Bribery Commission, the Police Commission, and other similar institutions continued to be in short supply due to the appointments made directly by the President under the Eighteenth Amendment to the Constitution. The political independence of these bodies has been questioned as a result. The HRC has been accredited as 'B' according to the Paris Principles, meaning not in full compliance, due to the lack of independence in the appointment of its Commissioners.¹⁸

According to the annual report of the HRC, 5047 complaints were received by its headquarters in Colombo and 4082 by its regional centres in 2014.¹⁹ A breakdown of the nature of these complaints is provided in the report. However, the report does not provide a critical analysis of the responses of the HRC to these complaints. Nor does the report offer any critical assessment of the state of human rights in Sri Lanka during 2014. Moreover, the report does not offer an analysis of the judicial protection offered for human rights by the judiciary during the year under review: no analysis is offered regarding the number of fundamental rights petitions filed; the judgments or the remedies given. The independent

¹⁸ The last accreditation was in 2009. Accreditation as of 28 January 2014 by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC).

¹⁹ Annual Report 2014, Human Rights Commission (Colombo).

institution mandated to promote respect for human rights, does not demonstrate a critical engagement with the human rights concerns highlighted in 2014.

2.4. Monitoring and supervision by the UN mechanisms

The Concluding Observations of the Human Rights Committee on Sri Lanka's Fifth Periodic report was released in 2014.²⁰ The Committee identified several issues in relation to Sri Lanka's respect for civil and political rights. They included violence against women; abortion; counter-terrorism; prohibition of torture and ill-treatment; detention; trafficking; and freedom of expression.

The resolution adopted by the UN HRC on reconciliation and accountability in Sri Lanka in 2014, took note of several serious ongoing violations of human rights in the country.²¹ For instance, the Council expressed;

[S]erious concern at the continuing reports of violations of human rights in Sri Lanka, including sexual and gender-based violence, enforced disappearances, extrajudicial killings, torture and violations of the rights to freedom of expression, association and peaceful assembly, threats to judicial independence and the rule of law, as well as intimidation of and reprisals against human rights defenders, members of civil society, lawyers and journalists.²²

²⁰ Concluding Observations on the Fifth Periodic Report of Sri Lanka (CCPR/C/LKA/CO/5 November 2014).

²¹ Promoting reconciliation, accountability and human rights in Sri Lanka (A/HRC/25/L1/Rev 1, 26 March 2014).

²² *Ibid* 2.

Among other things, this resolution authorized the UN Office of the High Commissioner for Human Rights (OHCHR) to monitor the state of human rights in Sri Lanka and to carry out a ‘comprehensive investigation into alleged serious violations’ in Sri Lanka during the same period covered by the LLRC (Lessons Learnt and Reconciliation Commission)..²³This investigation process is currently underway and the OHCHR is due to report to the UN HRC in September 2015.²⁴

3. Fundamental Rights Jurisprudence 2014

In writing this Chapter, the fundamental rights jurisprudence for the year 2014 was identified through the website of the Sri Lankan Supreme Court.²⁵ This website provides access to all the judgments of the Court year-wise. Of the twenty-three judgments on Fundamental Rights petitions available on the website, in sixteen cases, petitioners alleged a violation of the right to equality. A violation of the right to freedom from torture was alleged only in one case. Claimed violations were upheld in four cases and preliminary objections against applications were overruled in two.

²³ *Ibid* 4.

²⁴ See in this regard, <http://www.ohchr.org/EN/HRBodies/HRC/Pages/OISL.aspx> accessed on 11 June 2015.

²⁵ www.supremecourt.lk

*Judgments on Fundamental Rights Cases 2014*²⁶

	Case	FRs	Determination	Compensation
1.	<i>Golden Key case</i> ²⁷	Not stated	Order	-
2.	<i>Thenuwera v. Speaker of Parliament</i> ²⁸	12(1) (2), 14(1) (a)	Preliminary objection upheld. Application dismissed without costs.	-
3.	<i>CPA v. Prime Minister</i> ²⁹	12(1)	Preliminary objection upheld. Application dismissed without costs.	-
4.	<i>Arambawala v. Principal, Sirimavo Bandaranaike Vidyalaya</i> ³⁰	12(1)	Application upheld. School ordered to admit child to school.	Rs 20 000 as costs, payable by the state.
5.	<i>Henagama v. Secy Min of Higher Education</i> ³¹	12(1)	Dismissed without costs.	-
6.	<i>Sampath v. Secy Min of Higher Education</i> ³²	12(1)	Dismissed without costs.	-
7.	<i>Manoranjan v. Governor, Northern Province</i> ³³	Not stated	Preliminary objection of application being time barred upheld.	-

²⁶ As reported in 2014 in www.supremecourt.lk.

²⁷ SC (FR) 191, 192, 197-206, 208 – 216, 225, 226, 244, 246-255, 315, 335, 372 of 2009, SC Minutes 10 March 2014.

²⁸ SC (FR) 665 – 672/2012, SC Minutes 24 March 2014.

²⁹ SC (FR) 23/2013, SC Minutes 24 March 2014.

³⁰ SC (FR) 37/2013, SC Minutes 20 January 2014.

³¹ SC (FR) 73/2012, SC Minutes 3 October 2014.

³² SC (FR) 74/2012, SC Minutes 3 October 2014.

³³ SC (FR) 261/2013, SC Minutes 11 September 2014.

8.	<i>Dhammarathana Thero v. OIC Police Station, Mibintale</i> ³⁴	12(1), 13(1), (2). Leave to proceed for 13(1)	Upheld.	Rs 25 000 by 1 st respondent to the two petitioners
9.	<i>Udawatta v. National Water Supply & Drainage Board</i> ³⁵	12	Dismissed without costs.	-
10.	<i>Fernando v. Police Sergeant, Welipenna</i> ³⁶	Not stated	Preliminary objection overruled.	-
11.	<i>Lake House Employees Union v. ANCL</i> ³⁷	1 2 (1) , 1 4 (1) (a) , 14(1)(c)	Preliminary objections upheld.	-
12.	<i>Issadeen v. Director General of Customs</i> ³⁸	12(1)	Application dismissed without costs.	-
13.	<i>Chaminda Wijewardhana v. Kurunegala Plantations Ltd</i> ³⁹	12(1)	Upheld. No costs ordered.	-
14.	<i>De Silva v. Chairman National Salaries and Cadres Commission</i> ⁴⁰	12(1)	Preliminary objection over-ruled. Matter to be argued on merits.	-
15.	<i>Ranjith de Silva v. Principal Dharmashoka College, Amabalangoda</i> ⁴¹	12 (1)	Upheld with no costs. Dismissed with no costs.	-

³⁴ SC (FR) 313/2009, SC Minutes 9 November 2011.

³⁵ SC (FR) 349/2011, SC Minutes 27 November 2014.

³⁶ SC (FR) 514/2010, SC Minutes 15 December 2014.

³⁷ SC (FR) 637/2009, SC Minutes 17 December 2014.

³⁸ SC (FR) 248/2011, SC Minutes 17 December 2014.

³⁹ SC (FR) 24/2013, SC Minutes 3 September 2014.

⁴⁰ SC (FR) 64/2009, SC Minutes 27 March 2014.

⁴¹ SC (FR) 79/2014, SC Minutes 1 September 2014.

16.	<i>Goonetilleke v. Chairman Police Commission</i> ⁴²	Not stated.	Intervention refused with no costs.	-
17.	<i>Karunaratne v. University of Peradeniya</i> ⁴³	Not stated.	Time-barred. Dismissed.	-
18.	<i>Samarasinghe v. Former Chairman, Public Service Commission</i> ⁴⁴	12(1)	Dismissed without costs.	-
19.	<i>Indika Herath v. Police Constable, Police Station, Dummalasuriya</i> ⁴⁵	11, 12(1), 13(1). Counsels agree to proceed on 11.	Dismissed without costs.	-
20.	<i>Gathidu Perera v. Principal, Royal College, Colombo</i> 07 ⁴⁶	12(1)	Preliminary objection upheld.	
21.	<i>Sujeewa Senasinghe v. Governor, Central Bank</i> ⁴⁷	Not stated	Leave to proceed refused. No costs.	
22.	<i>Wijialudchumi Ramesh v. Chief Minister, Northern Provincial Council</i> ⁴⁸	12(1), 14(1) (g)	Proceedings terminated.	
23.	<i>Kumarasiri v. Secy Min of Education</i> ⁴⁹	12(1)	Violations upheld in relation to 1 st and 3 rd petitioner.	1 st & 3 rd petitioners to be appointed to the administrative posts applied for

⁴² SC (FR) 308/2009, SC Minutes 30 January 2014.

⁴³ SC (FR) 308/2013, SC Minutes 9 May 2014.

⁴⁴ SC (FR) 524/2008, SC Minutes 26 March 2014.

⁴⁵ SC (FR) 555/2009, SC Minutes 18 February 2014.

⁴⁶ SC (FR) 27/2011, SC Minutes 18 September 2014.

⁴⁷ SC (FR) 457/2012, SC Minutes 18 September 2014.

⁴⁸ SC (FR) 82/2014, SC Minutes 4 August 2014.

⁴⁹ SC (FR) 277/2009, SC Minutes 28 March 2014.

12(1) Violations upheld in relation to 1st and 3rd petitioner. 1st & 3rd petitioners to be appointed to the administrative posts applied for

When these decisions are compared with the complaints made to the HRC in the same year, it is evident that relatively only a few complaints regarding violation of fundamental rights are determined by the Supreme Court. What is unknown however is as to how many cases are filed in a given year and also how many cases are dismissed from the bench. Bench orders are not made available on the Supreme Court website. Nevertheless it is apparent that the Fundamental Rights jurisdiction of the Supreme Court is not invoked as often as could be expected given the documented violations of human rights.

The next sections analyse the substantive and procedural issues that were dealt with by the Supreme Court in these judgments.

4. Preliminary Objections to Fundamental Rights Applications

The jurisprudence of 2014 concerned preliminary objections to FR applications in 5 cases. These objections related to procedural requirements of an FR application stipulated in Art. 126. It is submitted that the weightage to be given to compliance with procedure in FR applications cannot be similar to the weightage given to procedure in regular litigation. The Constitution recognises a ‘just and equitable’ jurisdiction of the Supreme Court in determining FR applications.⁵⁰ Accordingly, justice and equity must frame

⁵⁰ Art. 126(4) of the Constitution.

and inform the deliberations in the Court in all matters pertaining to FR applications, including preliminary objections on procedural requirements.

4.1. One-month time-bar

The constitutional restriction of the one-month time limit to file a fundamental rights application was considered by the Court in some FR applications in 2014. In *Lake House Employees Union v. Associated Newspapers of Ceylon Ltd (ANCL)*⁵¹ for instance, the application was dismissed on the basis that it was out of time.

The Employees Union of ANCL alleged that their right to freedom of expression and their right to engage in trade union activism have been violated by the decision of the management to require prior approval of public notices of the union at ANCL.⁵² ANCL successfully raised a preliminary objection to this petition claiming that the application was out of time. The Court held that even if the alleged violation was considered as involving a series of acts, the last such act took place on the 16 July 2009 and that the application was filed only on the 25 August 2009. According to the Court, the petition therefore was ‘clearly time-barred’.⁵³

The Court adopts a formal and strict approach to the time-limit given in Art. 126 in this case. Such an approach, it is submitted, is not in line with the ‘just and equitable’ jurisdiction of the Court, which requires that the Court interprets the procedural requirements of the FR application

⁵¹ SC (FR) 637/2009, SC Minutes 17 December 2014.

⁵² Art. 14(d) of the Constitution.

⁵³ *Lake House Employees Union v. ANCL*, (n 37) 7.

purposively. A progressive approach is further justified given the particular facts of the case: the petitioners allege prior restraint of the freedom of expression of an employees union of a state media institution. This is a grave allegation which has far reaching consequences, over and above the freedom of expression of the petitioners.⁵⁴ It is regrettable therefore that the Court adopted a strict and literal approach to the time-limit.

Past jurisprudence on the one-month time limit to file FR applications suggests that the Court is open to a consequentialist approach to the rule. The Court has considered factors such as the petitioner's access to legal representation in determining whether the rule should be applied or not.⁵⁵ In light of this jurisprudence, the approach of the judiciary in the case of *Lake House Employees Union v ANCL* is cause for concern.⁵⁶

In the case of *Goonetilleke v. Chairman Police Commission*⁵⁷ the Court refused to allow intervenient petitioners on the basis that they were out of time. The case involved promotions

⁵⁴ For instance, in the case of *ANCL v. Shantha* SC/CHC (App) 30/2003, SC Minutes 5 October 2012, Court notes that 'The extended lens of dedicated, fearless, responsible journalists has often been the tool in effecting social justice and they must be protected, nurtured and supported...', (9).

⁵⁵ See for instance, *Hewakuruppu v. Tea Commissioner* SC (FR) 118/1984, SC Minutes 30 November 1984 as discussed in Jayampathy Wickramaratne, *Fundamental Rights in Sri Lanka* (2nd ed Stamford Lake 2006) 842-844. Also see, *Gamaethige v. Sirivardena* [1998] 1 Sri LR 384; *Namasivayam v. Gunawardena* [1989] 1 Sri LR 394; *Saman v. Leeladasa* [1989] 1 Sri LR 1; *Nalika Kumudini v. OIC Hunugama Police* [1997] 3 Sri LR 331.

⁵⁶ *supra* (n 37).

⁵⁷ *Goonetilleke v. Chairman Police Commission* SC (FR) 308/2009, SC Minutes 30 January 2014.

in the police and the intervenient petitioners had filed their petition three years after the petitioners had filed the case, alleging that the promotion sought by the petitioner affected their rights. Court took the view that the intervening petition was manifestly out of time. It was argued on behalf of those seeking to intervene that if the claims of the petitioners were upheld by the Court, their rights would be affected. In this regard, the Court held that in any event, judicial actions, including a judgment regarding a fundamental rights petition, cannot be challenged under Art. 126.⁵⁸

It is submitted that the Court was justified in its consequentialist approach to the time limit in this case. The reason for seeking to intervene was ill-founded and the delay on the part of the petitioner unreasonable. In general however, it is desirable that the Court develops a clear set of guidelines that it would follow in determining whether FR applications are out of time. The cases analysed suggest that while the Court does seem to concern itself with relevant considerations that the matter is left entirely to the discretion of the Court.

4.2. Complaints to the Human Rights Commission

The impact of a making a complaint to the HRC, on the time-bar applicable to a FR application was considered in the case of *Manoranjan v. Governor, Northern Province*.⁵⁹ The petitioner alleged that he had been ‘wrongfully transferred’ from the post of Deputy Chief Secretary of Finance in the Provincial Treasury of the Northern Province. The Attorney-

⁵⁸ See for instance *Peter Leo Fernando v. AG* [1985] 2 Sri LR 341.

⁵⁹ *Manoranjan v. Governor, Northern Province* SC (FR) 261/2013, SC Minutes 11 September 2014.

General took the position that the application was out of time as per Article 126(2) while the petitioner argued that he sought to be exempt from that requirement since he had made a complaint to the Human Rights Commission. On an examination of the facts, the Court agreed with the AG. Court found that the complaint to the HRC was made at least three months after the alleged violation. Accordingly the preliminary objection was upheld. The Court recognised the statutory principle that the subsequent time taken to process the complaint before the HRC will not be counted in counting the time only where a complaint is made to the HRC within one month of the alleged violation.⁶⁰

The link between the HRC and the FR jurisdiction was also considered in the case of *Karunaratne v. University of Peradeniya*⁶¹. The petitioner relied among other things on a recommendation made by the HRC in seeking relief from the Court for an alleged violation of his right to equality due to alleged non-payment of retirement benefits. The Court rejected the petition on the basis that it was out of time. However, the Court also observed that the remedy available before the HRC was distinct from the judicial remedy available under Art. 126. Court noted that petitioners cannot seek to enforce recommendations made by the HRC through FR petitions to SC.⁶²

This observation is problematic. It does not leave room for a finding of a violation of fundamental rights by the Human Rights Commission to have even a persuasive value before

⁶⁰ S 13(1) *Human Rights Commission Act* No 21 of 1996.

⁶¹ *Karunaratne v. University of Peradeniya* SC (FR) 308/2013, SC Minutes 9 May 2014.

⁶² *Ibid* 6.

the Court. According to this view, the Human Rights Commission and the Supreme Court operate on exclusive spheres with no interaction between the two institutions. Such a separation would only serve to undermine the efficacy of the work of the HRC. It could also potentially result in the duplication of adjudicative processes before the HRC and the Supreme Court. A coherent approach that considers the mandate and scope of the judicial remedy under Art. 126 and the non-judicial remedies available through the HRC ought to be developed.

4.3. Jurat in affidavits

Defects in the *jurat* of the affidavit filed in a fundamental rights application was raised as a preliminary objection in the case of *Fernando v. Police Sergeant, Welipenna*.⁶³ The Court accepted the objection but held that the application cannot be dismissed on that ground alone. The Court gave two reasons for this decision. Firstly it held that the just and equitable jurisdiction of the Court is ‘not hamstrung by a rigid procedure and rules’.⁶⁴ Secondly, the Court noted that the fundamental rights jurisdiction can be invoked by any person ‘by way of writing’.⁶⁵ Therefore, where a *jurat* is defective, the Court may provide time for a fresh affidavit to be filed.

This judicial approach is commendable, particularly given that the Supreme Court has recognised for itself an epistolary jurisdiction under Art 126. While the Constitution requires

⁶³ *Fernando v. Police Sergeant, Welipenna* SC (FR) 514/2010, SC Minutes 15 December 2014.

⁶⁴ *Ibid* 7.

⁶⁵ *Ibid*.

Fundamental Rights applications to be filed by the victim or her attorney-at-law, the SC rules allow for FR applications to take the form of a letter to the Supreme Court.⁶⁶ Insisting on strict compliance with formats to be followed in filing a Fundamental Rights application would be inconsistent with the principles that informed these progressive developments.

4.4. Executive or administrative action

In the case of *Chaminda Wijewardhana v. Kurunegala Plantations Ltd*⁶⁷ a preliminary objection was made on the basis that the petition was not in relation to executive or administrative action. It was argued that the agreement between Kurunegala Plantations and the petitioner for a three year lease of a quarry site was purely a matter of contract law and not executive or administrative action. Relying on precedent, the Court rejected the preliminary objection.⁶⁸ The petitioner had been obstructed from enjoying his rights under the lease for a significant period of the duration of the lease. Court held that the respondents had acted arbitrarily when they refused to extend the lease even though the. Court observed that;

⁶⁶ Rules of the Supreme Court of Sri Lanka 1991, published in Gazette Extraordinary 665/32, 7 June 1991.

⁶⁷ *Chaminda Wijewardhana v. Kurunegala Plantations Ltd* SC (FR) 24/2013, SC Minutes 3 September 2014.

⁶⁸ Court cited the following cases: *Roberts v. Ratnayake* [1986] 2 Sri LR 36; *Wijenaike v. Air Lanka* [1990] 1 Sri LR 293; *Gunaratne v. Ceylon Petroleum Corporation* [1996] 1 Sri LR 315; *Wickrematunga v. Anuruddha Ratwatte* [1998] 1 Sri LR 201; *Wickremasinghe v. Ceylon Petroleum Corporation* [2001] 2 Sri LR 409.

Every instance of unfairness to an individual will not give rise to a justiciable grievance under the ideology of the rule of law and equality under the law, but the party which is seemingly more powerful in this instance case, after the conclusion of signing the contract, being a state entity should not have abused the power in its hands.⁶⁹

In these *dicta* the Court affirms the foundational principle of public law, which is that the exercise of public power must be subject to the rule of law and the right to equality of individuals. Even where the state acts as a party to a contract, it is required to act in conformity with those principles. One reason for this requirement is the unequal bargaining power between the state and non-state actors while the other is that it is artificial and impossible to separate the state as the state, from the state as a commercial entity.

5. Right to Equality

The majority of applications that were filed in 2014 before the Court were with regard to alleged violations of the right to equality. Some of these claims related to promotions and transfers. The impeachment of the Chief Justice was also challenged as a violation of the right to equality. Some other applications were in relation to admission to schools and to universities.

The judicial approach in these cases drew from past jurisprudence which expanded the scope of the right to equality. Since the mid 1990s the SC has abandoned the formula of equality between similarly placed persons to substantive equality. According to the notion of substantive

⁶⁹ *supra* (n 67) 9.

equality, equality includes the compliance with stipulated criteria and a prohibition on the arbitrary exercise of public power. It is no longer necessary to establish that a similarly situated person had been afforded preferential treatment. Even though Court follows this judicial trend, determinations are seemingly arrived at based on findings of fact and a general application of the law. The judicial reasoning is not elaborated on. It is submitted that this method of judicial decision making can undermine the deliberative nature of judicial decision making in the long run and bypasses the opportunity to contribute to the development of jurisprudence.

5.1. Access to education

The fundamental rights chapter does not recognise a right to education. However, in the past, the Court has interpreted the right to equality as including a right to education.⁷⁰ The right to education jurisprudence has evolved primarily in relation to equal access to education. The determinations in 2014 reflect this judicial approach.

Two applications in 2014 were with regard to Grade I admission to state schools. In *Arambawala v. Principal, Sirimavo Bandaranaike Vidyalaya*⁷¹, the interview board had set aside the application of the petitioner to the school on the basis that they were not permanently resident at the address that they had provided in the application. However, no reasons for such conclusion were apparent. Having examined the

⁷⁰ See for instance, *Kavirathne v. Commissioner General of Examinations* SC (FR) No 29/2012, SC Minutes of 25 June 2012.

⁷¹ *Arambawala v. Principal, Sirimavo Bandaranaike Vidyalaya* SC (FR) 37/2013, SC Minutes 20 January 2014.

record, the Court ordered that the child should be admitted to the school. The second application *Gathidu Perera v. Principal, Royal College, Colombo* 07⁷² was dismissed due to a preliminary objection. The Court held that since the petitioners had not proceeded against the interview board or the review panel, the application should be dismissed. The two other applications which challenged the non-admission to the medical or dental stream at university were dismissed.

5.2. Due process

The FR applications related to appointments, transfers etc which were dealt with by the Court on the basis of the right to equality as including the requirements of due process. In these cases, according to the interpretations given by the Court, due process essentially required that institutions exercising public power act according to stipulated procedures for instance in relation to appointments and promotions be carried out according to stipulated criteria. In the case of *Kumarasiri v. Secy Min of Education*⁷³ 16 individuals claimed that their right to equality had been violated in the interview for recruitment to the Sri Lanka Educational Administrative Service (SLEA). According to the petitioners, the criteria for selection had not been applied to them uniformly and led to discriminatory treatment. The issue is analysed by the Court in terms of the facts. Accordingly the Court upheld a violation of the right to equality only in relation to 2 individuals.

⁷² SC (FR) 27/2011, SC Minutes 18 September 2014.

⁷³ *Kumarasiri v. Secy Min of Education* SC (FR) 277/2009, SC Minutes 28 March 2014.

The Court justifies its non-recognition of violations in relation to the other petitioners through the traditional argument of judicial deference to the exercise of discretion of the administrators.

*In the absence of any ‘mala fides’ against a clear transgression of the accepted guiding principles and gross violation of constitutional norms, it is unsafe for the Court to interfere with the findings of the Public Service Commission (...) The Court would be reluctant to substitute its view unless it is proven that the decision of the Public Service Commission is grossly unreasonable, in the sense that no reasonable body can come to such a finding.*⁷⁴

It is not clear as to what the Court meant by ‘it is unsafe for the Court’. In making this argument the Court uses the language of the test of *Wednesbury* reasonableness which held as follows:

*It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere.*⁷⁵

Administrative law both in the United Kingdom and in Sri Lanka have evolved beyond the *Wednesbury* standard of reasonableness. Today the judiciary is much more receptive to a closer scrutiny of the exercise of administrative discretion. It has been held that where human rights are concerned, the highest possible standards of judicial review

⁷⁴ *Ibid* 14.

⁷⁵ *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223, 229.

will be exercised.⁷⁶ The Court's invocation of the older and higher threshold of *Wednesbury* reasonableness therefore, is anomalous and is also retrogressive.

It was evident from the case law that adherence to stipulated criteria and fairness continued to be included as an aspect of the right to equality. For instance, the case of *Udawatta v. National Water Supply & Drainage Board*⁷⁷ involved an alleged violation of the right to equality due to the decision to wrongfully retire the petitioner. In this case, in principle, the Court recognised the obligation of the National Water Board to act fairly but disagreed with the petitioner on the basis that he had been negligent.

In the past delegated legislation has been struck down if held to be in violation of the right to equality. In 2014, the authority of the *Establishments Code* when compared with a decision of the Cabinet of Ministers was considered in the case of *Issadeen v. Director General of Customs*.⁷⁸ The petitioner claimed that the authorities had not duly appointed him to the Department of Customs pursuant to a decision of the Cabinet. The Cabinet decision was based on a finding arrived at by the Political Victimization Committee of 1994. The Department argued that the date of appointment was determined according to the *Establishments Code* and not the decision of the Cabinet. Court held that where non-compliance with the *Establishments Code* had resulted in

⁷⁶ See for instance *R. v. Ministry of Defence Ex p. Smith* [1996] QB 517.

⁷⁷ *Udawatta v. National Water Supply & Drainage Board* SC (FR) 349/2011, SC Minutes 27 November 2014.

⁷⁸ *Issadeen v. Director General of Customs* SC (FR) 248/2011, SC Minutes 17 December 2014.

discrimination, such act can be subsequently ‘rectified by the Cabinet of Ministers’.⁷⁹In arriving at this conclusion, Court also emphasised on the basic principles of public law in light of which administrative processes ought to be understood.

Administrative processes such as recruitment and public examinations must be carried out with due regard to the rights and interests of the public, and errors should be corrected (...) An authority vested with discretion must act fairly and equitably.

The wide powers vested in those responsible for recruitment and promotions have to be exercised in the public interest and for the benefit of [sic] public. The powers granted to the appointing authority are public in nature, to be held in trust for the public, and to be exercised for the benefit of the public. Failure in the exercise of these powers according to the stipulated rules warrants the intervention courts. Further, the power to make appointments and promotions should be exercised without discrimination and any violations of the procedure.⁸⁰

The right to equality in the context of restructuring an administrative service was considered in the case of *De Silva v. Chairman National Salaries and Cadres Commission*.⁸¹The petitioners in this case claimed that the restructuring of staff in the Industrial Development Board resulted in a violation

⁷⁹ *Ibid* 6.

⁸⁰ *Ibid* 9.

⁸¹ *De Silva v. Chairman National Salaries and Cadres Commission* SC (FR) 64/ 2009, SC Minutes 27 March 2014.

of their right to equality. Formerly the petitioners had had executive status and they were deprived of this status through the restructuring. The restructuring also deprived them of a promotional step which they had had under the previous system.

In the case of *Wijjaludchumi Ramesh v. Chief Minister, Northern Provincial Council*⁸² the Supreme Court had to determine the legality of a circular issued by the Northern Provincial Council. This case was filed before the Court in a politically contentious context. The Chief Minister of the NPC claimed that he had the power to direct the Provincial Public Service while the Governor claimed that the *Provincial Councils Act* read together with the Constitution vested him with that power.⁸³ These contestations had serious implications on issues related to power sharing between the NPC and the Centre in the post-armed conflict context. The Chief Minister alleged in this FR application, that her right to equality had been violated by the Chief Minister through the circular. Court granted interim relief to the petitioner and suspended the impugned circular. Subsequently, Court terminated

⁸² *Wijjaludchumi Ramesh v. Chief Minister, Northern Provincial Council* SC (FR) 82/2014, SC Minutes 4 August 2014.

⁸³ *Provincial Councils Act* No 42 of 1987 and the 13th Amendment to the Constitution. See further, 'Chief Secretary Wijjaludchumi – The Bone of Contention', *Asian Tribune* 28 December 2013, available at <http://www.asiantribune.com/node/68696> accessed on 9 June 2015; 'Harsh winds gather momentum in the North' *Daily Mirror* 28 January 2014, available at <http://www.dailymirror.lk/42196/harsh-winds-gather-momentum-in-the-north> accessed on 9 June 2015; 'Supreme Court suspends NPC Chief Minister Administrative Standing Instructions' 25 March 2014, available at <http://www.tamilguardian.com/article.asp?articleid=10374> accessed on 9 June 2015.

proceedings in light of the withdrawal by the Chief Minister of the Northern Province of the challenged circular. As with other cases, the Court does not refer to past jurisprudence or justify its decision through reasons. The Court concludes its determination with the following observation:

The Court would finally remind all stakeholders in Provincial Council administration that they should rise from mutually misplaced suspicions in a spirit of comity and reconciliation when the people of this Nation are on an onward march towards national building, in an objective to ensure that every citizen of this Country lives in peace and dignity in one unitary state to enjoy all that is granted to him or her as decreed by the Constitution.⁸⁴

The presumptions which underlie these judicial observations are problematic, particularly given the specific context of this petition. The Court notes that ‘the people...are on an onward march towards national building’ for which it provides no justification or explanation. Court also suggests that all citizens aspire to live in ‘one unitary state’. These very concepts have been challenged and criticised in numerous discourses regarding state formation and the ethnic conflict in Sri Lanka. These are contentious issues for which acceptable political and legal solutions have yet not been developed in Sri Lankan society. The observations made by the Court therefore are problematic.

⁸⁴ *Supra* (n 82) 9.

5.3. Fundamental rights and fiscal management by the State

In *Sujeewa Senasinghe v. Governor, Central Bank*⁸⁵ Court held that economic decisions are not subject to judicial review even under Art. 126. In this case, a Minister of Parliament unsuccessfully sought to claim that the decision of the government to purchase, and subsequently sell, Sovereign Bonds issued by Greece was unlawful, irresponsible and arbitrary. The Court makes no reference to the fundamental right that the petitioner sought to rely on. The language employed in the judgment implies that the petitioner may have relied on the right to equality.

The Court advances two reasons in dismissing this application. On the one hand, Court holds that that the purchase and subsequent sale of the Greek Bonds was part of the fiscal strategy of the state and that the loss caused due to the transactions was negligible. On the other hand, the Court notes that the task of the Court is limited to ensuring that the Monetary Board did not act arbitrarily or for a collateral purpose. The Board must be afforded ‘a certain measure of freedom considering the complexity of the economic activities.’⁸⁶

A similar judicial trend is evident in the Special Determinations of the Supreme Court in the past few years. In reviewing the constitutionality of Appropriation Bills, the SC has rejected the argument that the fiscal policies of the state can be subject to judicial review. The Special

⁸⁵ *Sujeewa Senasinghe v. Governor, Central Bank* SC (FR) 457/2012, SC Minutes 18 September 2014.

⁸⁶ *Ibid* 4.

Determination of 2012 was an exception to that judicial approach.⁸⁷ In 2012, Court held that all power is held in trust and that the judiciary could review the constitutionality of draft Appropriation Bills. However, as was pointed out in the previous issue of this report, the government disregarded the observations made by the Court and adopted the Appropriation Bills without the required amendments.⁸⁸

5.4. Justiciability of the impeachment of the Chief Justice

In the case of *Thenuwera v. Speaker of Parliament*⁸⁹ the Court considered the claim made by several petitioners that their right to equality, freedom of expression and freedom of assembly were violated by the impeachment of the 43rd Chief Justice of Sri Lanka.⁹⁰ Four preliminary objections were raised by respondents to the petition and the Court upheld three of them and dismissed the petition accordingly.

In this case, the Court held that the appointment of a Parliamentary Select Committee (PSC) by the Speaker of Parliament comes within administrative and executive action. The Court held that the act of impeachment was not strictly administrative or executive. Rather, it ‘bore a unique complexion in that, while being more disciplinary in nature, it could not be exercised by Parliament alone and had to be performed in concurrence with the President of Sri Lanka (...)’⁹¹ Court argued that therefore, the power to impeach is

⁸⁷ *In Re Appropriation Bill* SC (SD) 15/2012.

⁸⁸ Dinesha Samararatne *supra* (n 1).

⁸⁹ *Thenuwera v. Speaker of Parliament* SC (FR) 665 – 672/2012, SC Minutes 24 March 2014.

⁹⁰ Art 12, 14(a) & (b) respectively of the Constitution.

⁹¹ *Supra* (89) 9.

not referred to in the description of legislative or judicial power of government in Article 4. According to the Court therefore, the appointment of a PSC by the Speaker is an action that can be challenged for any alleged violations of fundamental rights.

Court upheld the preliminary objection that the petitioners had not disclosed the violations of any of their fundamental rights. Court drew support for its finding, from the determination of the Supreme Court in *AG v. Shirani Bandaranayake*⁹² where Court overturned the finding of the Court of Appeal that the PSC proceedings were null and void. Court further held in the instant case that the impeachment of the 43rd Chief Justice was not justiciable under Article 126, given that the Supreme Court had already held that the procedure was according to the Constitution and was within the exercise of the sovereignty of Parliament.

In the past, there have been instances where the Court has recognised petitions made in the public interest even though direct or actual harm caused to the petitioners have not been evident.⁹³ In those cases, Court was willing to recognise that certain arbitrary decisions by the state do not necessarily lead to quantifiable ‘harm’ to an individual. Such arbitrary decisions undermine democratic processes and weaken institutional structures, which in turn leads to the weakening of respect for human rights across society. In interpreting Art. 12, the Supreme Court has held in several cases that

⁹² *AG v. Shirani Bandaranayake* SC Appeal 67/2013, SC Minutes 21 February 2014.

⁹³ See for instance, *Vasudeva Nanayakkara v. Choksy* SC (FR) 158/2007, SC Minutes 4 June 2009.

the weakening of the rule of law amounts to a violation of the right to equality.⁹⁴ The judicial reasoning in the case of *AG v. Shirani Bandaranayake*⁹⁵ goes against this approach.

6. Right to Liberty

The right to be free from arbitrary arrest and detention, the right to legal guarantees such as the presumption of innocence and legal representation, and the right to be free from torture, cruel and inhuman and degrading treatment or punishment, are components of the right to liberty. It has been argued in the first part of this Chapter that the right to liberty in Sri Lanka in 2014, according to reports by civil society and the UN, has been undermined. However, only two fundamental rights applications on the right to liberty were considered by the SC during this time. A rights violation was recognised in only one of them.

6.1. Right to freedom from arbitrary arrest and detention

In the case of *Dhammarathana Thero v. OIC Police Station, Mihintale*⁹⁶ two Buddhist monks alleged that their right to equality and their right to be free from arbitrary arrest and detention had been violated.⁹⁷ Leave to proceed was granted only in relation to the alleged violation of the right to be free from arbitrary arrests. In evaluating whether the arrest and detention of the petitioners was lawful, the Court considered established authorities in Criminal law and

⁹⁴ See for instance *Sugathapala Mendis v. Kumaratunge* SC (FR) 352/2007, SC Minutes 8 October 2008.

⁹⁵ *AG v Shirani Bandaranayake supra* (n 92).

⁹⁶ *Dhammarathana Thero v. OIC Police Station, Mihintale* SC (FR) 313/2009, SC Minutes 9 November 2011.

⁹⁷ Art 12 and 13 respectively of the Constitution.

observed that ‘there should be a reasonable complaint credible information or a reasonable suspicion’ where arrests are made without a warrant.⁹⁸ The Court held that the conduct of the police in the instant case fell short of this test. The Court also noted that police bail had been refused unreasonably and also that the arrest had been timed in bad faith to allow for detention over the weekend. Based on these findings of fact, the Court upheld the petitioner’s claim. The Court observed that the exercise of (or rather the failure to exercise) judicial discretion in the Magistrate Court frustrated the purpose of the *Bail Act*⁹⁹:

It is regrettable to mention that though the Bail Act was passed in 1997, the police as a rule continue to produce suspects in the Magistrate Court in bailable offences and move for the remand of the suspects and there are numerous instances where Magistrates without considering the facts and circumstances of the cases had remanded the suspects contrary to the guiding principles of the Bail Act.¹⁰⁰

This is a commendable approach. The Court evaluates the conduct of the police within the broader context of the underlying legislative policy and also in light of institutional practice. The assessment of past jurisprudence enables the Court to critically evaluate the facts. The determination is based on clearly identifiable reasons and arguments.

6.2. Right to freedom from torture

In the 2014 only one judgment under the Fundamental Rights jurisdiction dealt with an alleged violation of the right to be

⁹⁸ *Dhammarathana Thero v. OIC Police Station, Mibintale supra* (n 96) 5.

⁹⁹ *Bail Act* No 30 of 1997.

¹⁰⁰ *Dhammarathana Thero v. OIC Police Station, Mibintale supra* (n 96) 7.

free from torture. In the case of *Indika Herath v. Police Constable, Police Station, Dummalasuriya*¹⁰¹ the petitioner claimed that he was subjected to torture by the police who assaulted him in a public place, locked him up in a police jeep and subsequently detained him at a police station. The Court however, did not recognise a violation of the right to freedom from torture.¹⁰²

In considering the arguments of the petitioner, the Court drew from both Sri Lankan and foreign jurisprudence that define torture broadly. However, the Court did not consider the relevance of the terms cruel, inhuman and degrading treatment or punishment to the facts of the case before them. Moreover, the Court affirmed that “The standard of proof expected of a Petitioner seeking redress for breach of this right is high.”¹⁰³ Court further held that “The mechanism through which the Court expects the Petitioner to establish the breach is through medical reports and evidence from the medical officers who examined the victims.”¹⁰⁴ It is regrettable that the Court does not adopt a broader understanding of relevant evidence in establishing torture. The requirement of physical and medical evidence of torture, has been consistently upheld by the Sri Lankan Courts and has led to the narrowing of the range of treatment that have been held to come within the right to be free from torture. Furthermore, the Court does not consider the gradations of treatment and/or punishment that are captured within the right to be free

¹⁰¹ *Indika Herath v Police Constable, Police Station, Dummalasuriya* SC (FR) 555/2009, SC Minutes 18 February 2014.

¹⁰² Art 11 of the Constitution.

¹⁰³ *Indika Herath v. Police Constable, Police Station, Dummalasuriya, supra* (n 101) 6.

¹⁰⁴ *Ibid* 7.

from torture. It could be argued that even if the alleged violations did not qualify as torture, it could amount to cruel, inhuman or degrading treatment or punishment.

7. Compensation

The award of compensation for violation of fundamental rights in 2014 was abysmal. Compensation was awarded only in two cases and in the amounts were Rs 20 000 and Rs 25 000 respectively. The former was for a violation of the right to equality and the later for the violation of the right to be free from arbitrary arrest.¹⁰⁵

In keeping with past practice in the last decade, the Court does not provide clear reasons as to the basis on which it decided the amount of compensation to be awarded. Furthermore there is no assessment on the normative basis on which compensation is granted. As analysed elsewhere by this author, the grant of compensation through the fundamental rights jurisdiction seems to be *ad hoc* and lacking jurisprudential basis or consistency.¹⁰⁶ The judiciary seems to have continued this practice in 2014.

In the first two decades of litigation under the Fundamental Rights jurisdiction however, the Court made some attempts at identifying the jurisprudential basis for the grant of compensation and also the rules by which the quantum of compensation should be determined. The different judicial

¹⁰⁵ Art. 13 of the Constitution.

¹⁰⁶ See in this regard, M Jayaratne & D Samararatne, 'Judicial Response to the Right to Liberty in Terms of the Fundamental Rights Jurisdiction of the Supreme Court (2000-2007)' (March & April 2011) 21 (281 & 282) *LST Review*.

opinions expressed in *Saman v. Leeladasa* is a case in point.¹⁰⁷ For instance in the case of *Deshapriya v. MC, Nuweraeliya*, Fernando J observed as follows:

*(...) [C]ompensation must therefore be measured by the yardstick of liberty, and not weighed in the scales of commerce.*¹⁰⁸

This *dicta* indicates the critical and discursive manner in which the then Court approached the question of compensation. Recent judicial determinations, including judgments in 2014, do not reflect such an engagement. This is regrettable both for victims of FR violations but equally so from the standpoint of the development of the law.

8. Conclusion: A Judicial Remedy in Crisis?

The FR jurisprudence of 2014 suggests that the judicial remedy for fundamental rights violations is ineffective at the least. Applications alleging non compliance with due process seem to be the most common violation complained of even though other human rights violations have been documented and debated on both at the domestic and international levels. The FR petitions are determined by and large through an assessment of the facts with hardly any critical engagement on any aspects of the law that is being applied. In five applications, the fundamental right that has

¹⁰⁷ *Saman v. Leeladasa* [1989] 1 Sri LR 1. See further *Ratnapala v. Dharmasiri* [1993] 1 Sri LR 224; *Nalika Kumudini v. OIC Hunugama Police* [1997] 3 Sri LR 331.

¹⁰⁸ *Deshapriya v. MC, Nuweraeliya* [1995] 1 Sri LR 362, 371.

been alleged to have been violated has not even been stated in the judgment.¹⁰⁹

At its worst, the fundamental rights jurisdiction is in crisis. As was demonstrated in the first part of this Chapter, Sri Lankan society is faced with numerous challenges in respecting the human rights of its people. Those issues relate to civil and political rights as well as economic, social and cultural rights; they impact on individuals as well as the collective; there are continuous violations as well as incident specific violations. The jurisprudence of the Supreme Court however carries no resonance with any of those issues. It should be cause for alarm that only one judgment each has been issued on the right to be free from torture and the right to be free from arbitrary arrest in the year 2014 even though numerous violations of the right to liberty have been reported in 2014 and preceding years.

Developments in international human rights law and the treaty obligations of Sri Lanka under human rights treaties have not been considered in the Fundamental Rights jurisprudence of 2014. Sri Lanka's obligations under International Humanitarian Rights Law have been taken into account in the past in the interpretation of Fundamental Rights. But that trend did not find any resonance in the jurisprudence of 2014.

Furthermore, the jurisprudence of 2014 suggests that the judicial attitude towards fundamental rights is formal, strict

¹⁰⁹ *Sujeewa Senasinghe v. Governor, Central Bank supra* (n 47); *Goonetilleke v Chairman Police Commission supra* (n 42); *Karunaratne v. University of Peradeniya supra* (n 43); *Fernando v. Police Sergeant, Welipenna supra* (n 36); *Manoranjan v Governor, Northern Province supra* (n 33).

and automatic. The language employed in the judicial reasoning reflects a judicial attitude which is withdrawn and disconnected from the discourse of freedom and dignity that ought to animate the fundamental rights jurisprudence. Consequently, the development of the law relating to fundamental rights has suffered a severe setback in 2014. Only minimal, if any, contributions have been made to the strengthening of the scope of the fundamental rights jurisdiction. The majority of the decided cases in 2014 were dismissed on the basis of the preliminary objections raised by respondents.

It is submitted that this regrettable state of affairs is possibly an outcome of the invasion into the independence of the judiciary in the last few years and at large the lack of an enabling political environment for rights and freedom to nurture. Public confidence in the judiciary may have reduced significantly, which discourages petitioners from filing fundamental rights petitions. The Court, too, seems to have adopted a more withdrawn approach, in determining even the petitions that were made to Court.

The fundamental rights jurisdiction in 2014 therefore has not had any significant impact on the respect for human rights in Sri Lanka. The constitutional remedy itself seems to have weakened and rendered ineffective.

III

RELIGIOUS FREEDOM

*Kalana Senaratne**

1. Introduction

This chapter attempts to provide a brief account of the state of religious freedom in Sri Lanka in 2014.¹ Firstly, it refers to the broad constitutional and legal framework pertaining to the protection of religious freedom (Section 2). It will thereafter set out a few incidents that have had an adverse impact on the protection and promotion of religious freedom; especially incidents of attacks on religious places of worship (Section 3). Particular reference will be made to the attacks directed at the Muslim people in Aluthgama (Section 4). A brief discussion of the situation in the North and East (Section 5) and international attention paid to the aspect of religious freedom in Sri Lanka (Section 6), will follow. In conclusion (Section 7), this chapter will set out a few recommendations which may help, in some small measure,

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¹ This chapter follows the general structure of analysis adopted in Kalana Senaratne, 'Religious Freedom' in Law), *Sri Lanka: State of Human Rights 2014* (Colombo: LST, 2014), p. 167-192.

to address the worsening situation concerning the protection of religious freedom in the country.

2. Background: Legal and Judicial Framework & Recent Developments

Sri Lanka is a multi-religious country; i.e. a country composed of people belonging to (and/or following) four of the major religions in the world: Buddhism, Hinduism, Islam and Christianity. Census statistics show the following religious composition of the Sri Lankan population: Buddhists 70.2%; Hindus 12.6%; Muslims 9.7%; and Christians 7.4%.² Within this multi-religious set-up, Buddhism, followed by an overwhelming majority of the population, receives prominence, politically and constitutionally. As Article 9 of the Constitution states:

The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha *Sasana*, while assuring to all religions the rights granted by Articles 10 and 14(1)(e).

Article 9 reflects a dominant political aspiration of the majority Sinhala-Buddhist community in the country; one which initially received explicit and prominent expression in the previous constitution (i.e. the first Republican Constitution of 1972).³ It is a curious provision,

² ‘Population by religion according to districts, 2012’, available at: <http://www.statistics.gov.lk/PopHouSat/CPH2011/index.php?fileName=pop43&gp=Activities&tpl=3>

³ Section 6 of the 1972 Constitution introduced for the first time the idea of recognizing the prominence of Buddhism.

encapsulating a seeming contradiction of purposes: of giving prominence to one religion (i.e. Buddhism) while going on to assure to other religions their rights as well.

It is only within this broader context, wherein Buddhism is given prominence, that the rest of the Constitutional provisions concerning the protection and promotion of religious freedom (namely, Articles 10 and 14(1)(e)) can be appreciated.

Article 10 guarantees:

Every person is entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice.

Article 14(1)(e) provides that:

Every citizen is entitled to-

(e) the freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching.

Article 10 is absolute and applies to all persons; whereas Article 14 applies only to citizens, and is subject to certain restrictions that may be prescribed by law, *inter alia*, “in the interests of national security, public order and the protection of public health and morality” (as stated in Article 15(7) of the Constitution).

International law, especially international human rights law, has an impact on the legal framework governing aspects of religious freedom in the country. For instance, the

International Covenant on Civil and Political Rights (ICCPR), for instance, establishes the right to religious freedom in Article 18.⁴ Sri Lanka is a State-Party to the ICCPR, and is bound to guarantee and ensure the rights recognized by Article 18 of the ICCPR.

Furthermore, the ICCPR Act of 2007, which recognizes a few of the ICCPR-rights not recognized under the Sri Lankan Constitution, seeks to ensure that advocacy of religious hatred is prohibited. The prohibition of advocacy of “national, racial or religious hatred” is mandated by Article 20(2) of the ICCPR. Section 3 of the ICCPR Act of 2007 prohibits the advocacy of “national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”

Apart from the above, the broader legislative framework governing religious freedom in Sri Lanka includes, *inter alia*,

⁴ Article 18 of the ICCPR states: 1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching; 2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice; 3) Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others; 4) The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

numerous laws and legislative provisions pertaining to places of religious worship.⁵

There is also a body of jurisprudence that has developed due to the decisions of the Sri Lankan judiciary, on the topic of religious freedom.⁶ In more recent times, some of the Supreme Court Special Determinations (dealing with the Constitutionality of Bills, i.e. draft Laws) have dealt with the controversial issue of alleged ‘unethical conversions’ – an issue which continues to be an acute problem affecting the protection of religious freedoms of people. However, when discussing the topic of the judiciary and minority communities, it is necessary to bear in mind the broader judicial attitude that the Sri Lankan judiciary has tended to adopt; an attitude or ‘mindset’ which has not generally responded positively to the need to promote minority rights.⁷ The prevalence of this attitude, along with the unwillingness of the State and the Government to commit sincerely to the protection of ethno-religious minority groups in the country, explains the absence of serious legal/judicial proceedings concerning the many instances of alleged attacks carried out on them.

⁵ See, Centre for Policy Alternatives, ‘Constitutional and Legal Framework Governing Religious Freedom and Related Issues (July 2014)’, available at: <http://www.cpalanka.org/constitutional-and-legal-framework-governing-religious-freedom-and-relatd-issues/>

⁶ For a detailed analysis, see Jayampathi Wickramaratne, *Fundamental Rights in Sri Lanka* (Pannipitiya: Stamford Lake, 2006, Second Edition), especially p. 168-205.

⁷ For a useful study in this regard, see: Jayantha de Almeida Gunaratne, Kishali Pinto-Jayawardena and Gehan Gunatilleke, *The Judicial Mind in Sri Lanka: Responding to the Protection of Minority Rights* (Colombo: LST, 2013).

The year under review, 2014, did not bring about any significant addition to the legislative framework governing religious freedom in the country. Also, no significant judgment was delivered by the apex courts pertaining to the realm of religious freedom. There was also no development concerning the news report of 2013, that the Buddha Sasana and Religious Affairs Ministry had submitted a Bill enabling the prosecution of any publication (in print or online) that “defames the original teachings and traditions of the major religions”⁸; one which potentially challenged the religious freedoms of people in Sri Lanka.⁹

3. Attacks on Religious Freedom (2014)

Just as in 2013, the year 2014 also saw a number of violent attacks on religious places of worship and people taking place, including the spread of anti-Muslim and anti-Christian rhetoric. It appears that the targeting of minority religious groups has been more determined and well planned in 2014.

3.1 Attacks on Muslim places of worship

The Sri Lankan Muslim community has been one of the key targets of numerous attacks in recent times. The violent attacks on Muslim places of worship, which saw a meteoric rise in 2013, have continued unabated. While the most blatant attack took place in Aluthgama (discussed in Section 4 below), some of the other alleged/reported attacks on Muslims are the following:

⁸ See, ‘New law to prohibit publications defamatory of the major religions’, *Daily Mirror*, available at: <http://www.dailymirror.lk/news/33892-new-law-to-prohibit-publications-defamatory-of-the-major-religions.html>

⁹ Senaratne (note 1 above), p. 172-173.

- A grenade attack was carried out on a Mosque in Dambulla resulting in minor damages to the Mosque (25 March 2014);
- Members of the *Bodu Bala Sena* (BBS), along with monks, intruded the Masjidul Ilham Bebila Mosque in Gampola and engaged in filming/photographing creating tension among the Muslims (23 April 2014);
- A gang of unidentified persons stoned the Gampola Muslim Maha Vidyalaya, damaging the name-board and class rooms in the main hall (16 May 2014);
- A Muslim-owned hardware shop in Mawanella was set on fire (18 May 2014)
- National organizer of the Jathika Hela Urumaya (JHU), Mr. Nishantha Sri Warnasinghe, warned that Buddhists would lose their patience if the Grandpass Mosque was to be renovated (30 May 2014);
- Mosque and prayer room in Navanthurai (Jaffna) was attacked by unidentified persons (20 June 2014)
- A 90-year old mosque situated in Karumalai-ootta in Trincomalee town was destroyed by the Sri Lankan military (15 August 2014).¹⁰

3.2. Attacks on Christian places of worship:

Christian places of worship have also been attacked in 2014. Most of these alleged attacks have been on Evangelical Christians and their places of worship. The National Christian Evangelical Alliance of Sri Lanka (NCEASL) has

¹⁰ For a list of attacks, including the above, see: ‘Sri Lanka: Violations of the Right to Freedom of Religion and Attacks on Religious Minorities March-August 2014’, available at: <http://srilankabrief.org/wp-content/uploads/2014/09/SLB-Fact-Sheet-2-Sep-2014-re-attacks-on-religious-minorities.pdf>

listed 111 incidents for 2014¹¹, some of which are the following:

- A mob attacked Rathgama Christian Church pastor's premises in Rathgama (Galle), causing damages to the value of Rs. 50,000 (5 January 2014)
- The Assemblies of God Church in Hikkaduwa, Galle, was attacked by a violent mob during Sunday worship service (12 January 2014);
- Premises of the Church of the Foursquare Gospel in Pitipana, Homagama, was set on fire during the night (12 January 2014);
- A mob led by BBS assaulted pastor of Holy Family Church in Asgiriya, Kandy, demanding worship services to be stopped (16 February 2014);
- Pastors of the Foursquare Church, Assemblies of God and Lanka Faith Mission received threats of attacks from BBS (25 and 26 February 2014);
- A Hindu mob of around 30 people falsely accused pastor of Foursquare Church in Panchankerni, Trincomalee, of influencing Christians not to donate money to a Hindu temple fund, and forcibly enter premises (2 March 2014);
- A Christian student of Welapura Maha Vidyalaya in Kalutara, was forced to observe Buddhist rituals and the parent (a pastor) was asked to remove the child from school if the child was not willing to observe Buddhist rituals and follow Buddhism as a subject (31 March 2014);

¹¹ NCEASL, 'Incidents of Violence and Intimidation of Christians 2014'
[on file with author]

- Pastor of the New Blessing Church in Valaichchenai, Batticaloa, his family and another Christian were assaulted in a violent mob attack (24 August 2014);
- Stones were hurled at the premises of the Assemblies of God Church in Kadawatha, Gampaha, while worship service was in progress.¹²

3.3. Unwillingness/inability to investigate

Legal action against such widespread attacks has been minimal. As in 2013, the police have continued to protect certain groups (especially Buddhist groups), a situation which reflects the breakdown of law and order, as well as the complicity of the main arms of the state in the activities carried out in violation of religious freedoms, especially of the minority communities in the country. With such perceived inability of state agencies and their unwillingness to take legal and punitive action against those groups, it is difficult to see how the protection and promotion of religious freedom can be meaningfully improved. This inability and/or unwillingness was further evidenced in what happened in Aluthgama.

¹² *Ibid.* To be noted here is that a number of circulars have been issued that require approval of the Ministry of Buddha Sasana and Religious Affairs, for the setting up of places of religious worship – thus preventing Christians from continuing or starting places of religious worship. These have been used by complainants (mainly Buddhist monks) in an attempt to pressurize Christians to close prayer centres, with local authorities relying on them to deny planning permission. See, circulars issued by the Ministry of Religious Affairs and Moral Upliftment (dated 16-10-2008), and the Ministry of Buddha Sasana and Religious Affairs (dated 02-09-2011 and 04-01-2012) [copies on file with author].

4. Aluthgama: the ‘Virtual Holocaust’

One of the dangerous socio-political developments that the country witnessed in 2013 was the rise of Sinhala-Buddhist militant nationalist groups which were predominantly comprised and/or led by Buddhist monks, namely: the BBS; Sinhala Ravaya; and Ravana Balaya.¹³ 2014 saw the natural culmination of that project – a project which had continuously sought to project the Muslim people as a threat to the Sinhala people and the (Sinhala-Buddhist) State of Sri Lanka – in the violence that was unleashed on Muslim communities in Aluthgama (Southern Sri Lanka) and surrounding areas.

The violence in Aluthgama took place especially during the 15th and 16th of June, 2014. It was triggered by a meeting held under the auspices of the BBS in the Aluthgama town, wherein the BBS-Secretary, Galabodaaththe Gnanasara thera making a speech stated, *inter alia*, that not a single Muslim will be spared if the Sinhalese are touched.¹⁴ As the speech came to an end and the crowd left the meeting in a procession, stone throwing took place resulting in a commotion, and attacks being subsequently carried out by mobs in several areas, including Aluthgama, Adhikarigoda, Pathirajagoda, and in Dharga Town.¹⁵ These attacks resulted in the deaths

¹³ See Senaratne (note 1 above), p. 173-176.

¹⁴ See, ‘Full Speech – Aluthgama’, available at: <https://www.youtube.com/watch?v=YFfaR9acsvM>

¹⁵ For information on the Aluthgama-violence, see the fact-finding mission: *Where Have All the Neighbours Gone? Aluthgama Riots and Its Aftermath – A Fact Finding Mission to Aluthgama, Dharga Town, Valipana and Beruwela* (LST, 2014), available at: <http://lawandsocietytrust.org/images/PDF/Resources/aluthgama%20report%20final.pdf> [hereinafter: ‘Aluthgama Report’], especially chronology of events, p. 3-6.

of 4 persons, the displacement of approx. 10,000 persons (8000 Muslims and 2000 Sinhalese), and terrible damage to property.¹⁶

The fact finding mission refers to a number of findings, some of the key findings being the following:

- The attacks had been carried out simultaneously by groups already positioned in certain areas;
- In all areas there was the presence of STF(Special Task Force), who had refused to engage with affected persons;
- The STF had prevented Muslims from moving freely while curfew was in place, while the Sinhala people were moving about without any intervention;
- Looting had been a significant element in the attacks;
- Broadly, this was clearly an attack targeting the economic wellbeing of the Muslim community (which also had a class element, as the houses targeted had been owned by wealthy, upper-middle/middle class families);
- There has been a serious breakdown of relations and mistrust generated between the two communities.¹⁷

The manner in which the violence was unleashed, as well as findings of the above nature, makes it clear that ‘Aluthgama’ was not an isolated incident. It was part of the larger campaign which had the determined effect of antagonizing the Muslim community. The Minister of Justice (and leader

¹⁶ Waruni Karunaratne, ‘The Human Tragedy of Aluthgama’, available at: <http://www.thesundayleader.lk/2014/06/22/the-human-tragedy-of-aluthgama/>

¹⁷ Aluthgama Report (note 15 above), p. 44-46.

of the SLMC), Mr. Rauf Hakeem, condemned the Aluthgama violence and the attacks on the Muslims as being a “virtual holocaust”, while pointing to the idea that this was not an isolated incident but was rather a part of a “larger national project.”¹⁸

It is also necessary to note here that the mainstream media in the country initially underreported the violence unleashed in Aluthgama and the role played by Buddhist-groups such as the BBS. The reason for such underreporting may be attributed to the popular perception that groups such as the BBS were receiving active State patronage, coupled with the dominant influence the Government had over a number of prominent media institutions. In this context, it was largely due to social media outlets (such as Twitter and Facebook) that some journalists and individuals were able to disseminate information and photographic evidence of the chaos and destruction that was taking place in Aluthgama.¹⁹

The Aluthgama episode, in effect, brought out more forcefully the dark underside of Sinhala-Buddhist nationalism and the complicity of the State (and its dominant actors) in the

¹⁸ Meera Srinivasan, ‘Attacks on Sri Lankan Muslims not isolated incidents’ <http://www.thehindu.com/news/international/south-asia/attacks-on-sri-lankan-muslims-not-isolated-incidents/article6204765.ece>

¹⁹ See Aluthgama Report (note 15 above), especially Chapter VI (‘Media Coverage of Aluthgama Riots’), p. 62-65. However, the role and relevance of social media platforms is a complex one. While they have been extremely useful to report and expose perpetrator of violence, they were also the same tools which were used by numerous groups to spread rumours, spew hatred, and provoke people. Much of this means that in the final analysis, “in spite of social media acting as a valuable tool of information, it has also failed to create clarity”; *Ibid*, p. 65.

broader nationalist project promoted by groups such as the BBS.²⁰ As the Tamil Civil Society Forum (TCSF) stated, given the deep ideological reasons that prompt attacks of this nature on ethno-religious minorities, the Aluthgama-episode would not be the last of its kind.²¹

5. Religious Freedom in the North and East

Religious freedom in the North and East needs to be assessed by examining the attacks on religious places of worship, as well as the broader political policies affecting the political/cultural unity of the Tamil people. Problems pertaining to religious freedom in these areas are not simply problems of human rights protection, but also problems affecting Tamil claims of nationality and nationhood. Therefore, the many restrictions placed on people's ability to access religious places of worship in areas closed off by the military, along

²⁰ Kalana Senaratne, 'The Politics of Aluthgama', available at: <http://groundviews.org/2014/06/22/the-politics-of-aluthgama/>

²¹ For the TCSF statement, see 'Chief Culprits of Aluthgama Violence Enjoy Patronage From Senior Figures In MoD', available at: <https://www.colombotelegraph.com/index.php/chief-culprits-of-aluthgama-violence-enjoy-patronage-from-senior-figures-in-mod/>. The TCSF stated: "The attacks should not be seen in a vacuum or as being spontaneous... The attacks either by direct action or complicity, are part of the long established practice of the State, in its Sinhala Buddhist character, which seeks to instill fear among the other communities with the objective of negating and refusing space in Sri Lanka for their social, cultural, political and economic prosperity. While it is important that perpetrators need to be brought to justice, that will not be enough. The problem is not about a single organization or a political party. It is much more perverse and deep rooted. Unless this is acknowledged and reversed we regret to say that the Aluthgama incident will be unlikely to be the last of such similar incidents. We urge all concerned to reflect and act on this more complex understanding of those issues that Aluthgama reminds us of."

with the resurgence of Buddhist temples and other Buddhist-related symbols in the North and East, are meant to assert the (Sinhala) Buddhist identity in areas which the Tamil people consider to be their areas of historical habitation.

The adverse situation prevailing in the North and East in 2013 was not addressed in any meaningful manner by the Government in 2014. The leader of the TNA, Mr. R. Sampanthan, stressed certain aspects of the situation in a speech delivered in Parliament, in August 2014.²² Having referred to the problem of land grabs, including private land belonging to Tamil people, for the purpose of constructing High Security Zones (HSZs), Mr. Sampanthan went on to state:

“Private lands from which Tamils were displaced and which were occupied forcibly by the majority community are sought to be acquired by the State to be given to those who occupy the lands unlawfully. This is happening in Sivayogapuram in Trincomalee in close proximity to the Nadesar Temple at a place called Kanniya. Why is it being done? [...]

Sir, Hindu religious places have been destroyed; they have been desecrated. We have revealed information in regard to all this to Government; we have written to the Government; we have written to the President and we have raised this matter on the Floor of this House on a number of occasions. New majority Buddhist

²²See, R. Sampanthan, ‘On Illegal Possession of Land by the Military and Demographic Change in North & East’, available at: <https://www.colombotelegraph.com/index.php/on-illegal-possession-of-land-by-the-military-and-demographic-change-in-north-east/>

places of worship are coming up in the North and the East. I do not mind the statue of Lord Buddha being installed anywhere [...] But, they are coming up even in places where not one Sinhala Buddhist person lives. What is the purpose?

Mr. Sampanthan went on to refer to the manner in which Buddhist statues were being built in and around the hot wells in Kanniya (Trincomalee) and the desecration of the Pillaiyar Temple, an “absolutely diabolical and outrageous” denial “of an ancient Hindu religious and cultural right.” The underlying reasons, according to Mr. Sampanthan, were quite clear.

“Why is all this being done? All this is being done because you want to change the demographic composition of the North and the East and you want to change the cultural and linguistic identity of the districts in the North and the East [...] so as to make a political resolution, a political solution irrelevant and unnecessary [...]”

Such has been the alleged situation in the North and East of Sri Lanka, and no serious and genuine concern has been shown by the Government to address the many serious problems affecting the Tamil people, including those referred to by Mr. Sampanthan.

6. International Focus on Religious Freedom in Sri Lanka

International attention has continued to be directed at Sri Lanka’s situation concerning religious freedom. In 2013, the United Nations Human Rights Council (UNHRC) had adopted its second consecutive resolution on Sri Lanka (A/HCR/22/L.1/Rev.1) expressing concern, *inter alia*, at the

“continuing reports of violations of human rights” including, *inter alia*, “discrimination on the basis of religion or belief.”

In 2014, the UNHRC proceeded to adopt another resolution on Sri Lanka (A/HRC/25/L.1/Rev.1)²³ which, *inter alia*, called on the Office of the High Commissioner for Human Rights to “undertake a comprehensive investigation into alleged serious violations and abuses of human rights and related crimes” committed by both Sri Lanka and the LTTE (Operative para 10). More particularly, the 2014 resolution was: “Alarmed at the significant surge in attacks against members of religious minority groups in Sri Lanka, including Hindus, Muslims and Christians.” In Operative Paragraph 4, the UNHRC urged “the Government of Sri Lanka to investigate all alleged attacks, by individuals and groups, on journalists, human rights defenders, members of religious minority groups and other members of civil society, as well as on temples, mosques and churches, and also urges the Government to hold perpetrators of such attacks to account and to take steps to prevent such attacks in the future.”²⁴

Just as it happened in 2013, events that took place after the resolution was adopted proved that the Sri Lankan State was unable and unwilling to take effective measures, as expected and envisaged by the UNHRC resolution on religious freedom. International condemnation followed in the form of statements made by a number of States and

²³ Available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/25/L.1/Rev.1

²⁴ *Ibid.*

regional groups, including the US, the European Union²⁵ and the Organization of Islamic Cooperation (OIC).²⁶ A number of international non-governmental organizations (INGOs) and human rights groups, such as Amnesty International²⁷ and Minority Rights Group²⁸ condemned the violence and incitement against minority communities.

7. Conclusion

2014 was one of the worst years in terms of promoting religious freedom and harmony in post-war Sri Lanka. The State and the government clearly failed to ensure the greater protection of religious freedom of peoples. The militant nationalist project of some Buddhist groups continued without any hindrance; there was a virulent spread of hate speech, both in public discourse as well as online.²⁹ In light of the above examination, this chapter makes the following recommendations:

²⁵ 'EU and US concerned regarding Beruwala and Aluthgama incidents' available at: <http://www.hirunews.lk/85623/eu-us-concerned-regarding-beruwala-aluthgama-incidents>

²⁶ See 'Bring the Aluthgama Perpetrators to Justice: Organisation of Islamic Cooperation', available at: <https://www.colombotelegraph.com/index.php/bring-the-aluthgama-perpetrators-to-justice-organisation-of-islamic-cooperation/>

²⁷ 'Sri Lanka: Act now to prevent further bloodshed in anti-Muslim violence', available at: <https://www.amnesty.org/en/articles/news/2014/06/sri-lanka-act-now-prevent-further-bloodshed-anti-muslim-violence/>

²⁸ 'Sri Lanka must curb incitement against minorities, says MRG', available at: <http://www.minorityrights.org/12431/press-releases/sri-lanka-must-curb-incitement-against-minorities-says-mrg.html>

²⁹ See, Sanjana Hattotuwa and Shilpa Samaraturunge, 'Liking Violence: A Study of Hate Speech on Facebook in Sri Lanka', available at: <http://www.cpalanka.org/liking-violence-a-study-of-hate-speech-on-facebook-in-sri-lanka/>

- i) The government, as the key stakeholder in protecting and promoting religious freedom in the country, has the primary responsibility to protect and promote the religious freedom of citizens, as well as the responsibility to protect its citizens from religion-inspired violence. Pressure should therefore be exerted on the government to take urgent action to institute credible investigations and prosecutions.³⁰

- ii) The above call will only be of some success if there is a revamp of the current constitutional and legislative framework (e.g. the abolition of the 18th Amendment to the Constitution), which would pave the way for the establishment and functioning of independent institutions, such as an independent Human Rights Commission and also importantly an independent Police Commission, which is more effective in preventing violence (without getting involved in religious-related matters that do not involve breaches of the criminal law).

- iii) Political parties and civil society groups need to highlight the need to abolish Article 9 of the Constitution which gives prominence to Buddhism. While this is not the

³⁰ Note in this regard, the final report of the Lessons Learnt and Reconciliation Commission (LLRC) which stated that there were several incidents of attacks on places of religious worship and that: “Strong deterrent action should be taken to prevent such incidents... law enforcement agencies have hitherto failed to investigate and prosecute persons responsible for such unlawful action. The Government should make every endeavour to arrest the occurrence of such incidents”; ‘Report of the Commission of Inquiry on Lessons Learnt and Reconciliation (November, 2011)’, para 9.267, p. 384, available at: <http://www.defence.lk/news/pdf/FINAL-LLRC-REPORT.pdf>

sole reason for the escalation in violence perpetrated by Buddhist groups, Article 9 is often perceived to be sanctioning and giving constitutional legitimacy to any campaign carried out by Sinhala-Buddhist groups. Along with this, critical reflection on the ‘unitary’ concept of the State, as understood in Sri Lanka, is essential for re-imagining and constructing a more pluralist Sri Lanka.

- iv) Human rights and civil society institutions should carry out credible and detailed documentation of violations of religious freedom of people belonging to all religious denominations, including attacks on religions and religious places of worship. Annual reports should be prepared detailing all such alleged/reported incidents. This would be important, not simply for lobbying purposes but also to identify the trends as well as the systematic character of violence perpetrated by certain groups and organizations.
- v) Civil society groups should continue to lobby regional and international actors – to create greater awareness of the problems pertaining to the protection of religious freedom in the country, and in doing so, continue to try to affect some change on the ground by exerting pressure on the government and relevant stakeholders who are directly and/or indirectly promoting violence and discrimination.
- vi) Civil society groups would need to identify and engage with progressive representatives of the different religious groups and political parties; and in doing so, explore alternatives to militant ethno-religious mobilization. Emphasis should also be made on the need for these

discussions to be oriented towards an inward critical reflection of the politics and practices of religious entities/representatives. A necessary part of this process is also the facilitation of interaction, where possible, between those identified as the more progressive elements and those who are seen to be responsible for inciting religious hatred.

Given that some of the above suggestions were also made in concluding the report for the year 2013³¹, it will be necessary to study and assess in what ways, or even *whether*, any of the above kind of suggestions have been implemented. This would not only add perspective to the exercise of making policy prescriptions, but may also help re-think alternative strategies and ways of addressing human rights problems and challenges affecting the peoples of Sri Lanka.

³¹ See, Senaratne (note 1 above), p. 190-192

IV

FREEDOM OF ASSEMBLY AND ASSOCIATION WITH REGARD TO NGOs AND CIVIL SOCIETY

*Menaka I. Lecomwasam**

1. Introduction

The year 2014 dawned upon Sri Lanka at a point in time when the country was still grappling with issues of reconciliation, accountability, political impunity and a continuing breakdown in governance. The legacy of a culture of impunity perpetuated in post-war Sri Lanka had increased the need for an active civil society as well as organizations independent of the government in order to check the government's activities which would run counter to the interests of the polity. The approach of the state towards civil society and Non Governmental Organizations (NGOs) presented a dichotomy. In a landscape of political desolation, especially in the wake of international pressure on the government of Sri Lanka (GoSL) to take measures to investigate alleged serious Human Rights violations in Sri Lanka¹, one could see the government striving to engage in a dialogue with civil society and NGOs. Simultaneously

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¹ See Human Rights Council, "promoting reconciliation, accountability and human rights in Sri Lanka" A/HRC/25/L.1/Rev.1

however, serious incidents of attacks on peaceful civil society assemblies, a directive by the NGO secretariat to restrict the mandates of NGOs and inaction by law enforcement officials in the face of gross violations of fundamental rights characterize a state of intolerance towards civil society and NGOs by the state. Both press and electronic media reported these events from different perspectives. While the pro-government media either hailed the conduct of the government or maintained silence on certain issues, the alternative media was very critical of regressive actions of the regime.

This chapter seeks to explore the situation of the freedom of assembly and association with regard to NGOs and civil society in Sri Lanka during 2014. It will analyze the current constitutional and legal framework governing the right to peaceful assembly and the freedom of association in Sri Lanka in relation to Sri Lanka's international human rights obligations before going on to discuss a number of key events that occurred during 2014 which sought to undermine these fundamental rights. It will then attempt to provide a perspective of the political situation of the country which led to these events. In conclusion the chapter sets out certain recommendations which need to be taken serious account of, to ensure the protection of these rights.

2. Constitutional Framework

The Constitution of Sri Lanka provides a useful point of departure for a discussion on the freedom of assembly and association. Article 14(1)(b) of the Constitution guarantees to all citizens within Sri Lanka the freedom of peaceful assembly while Article 14(1)(c) guarantees the freedom of association. A concomitant right is enshrined in Article

14(1)(g) which guarantees the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise. Article 14(1)(d) ensures the freedom to form and join a trade union. However, these rights are subject to Article 15(3) & Article 15(4) of the Constitution which read “The exercise and operation of the fundamental right declared and recognized by Article 14(1)(b) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony” and “ The exercise and operation of the fundamental right declared and recognized by Article 14(1)(c) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or national economy” respectively. This limitation clause contained in the Constitution has an adverse impact on the full enjoyment of related rights. The notion of “interests of racial and religious harmony” could be invoked to suppress public dissent on arbitrary grounds. Additionally, Article 15 (7) of the Constitution legitimizes the restriction of Article 14 by means prescribed by law “in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society”. A further restriction on the freedoms enshrined in Article 14 is contained in Article 15 (8) with regards to its application to the armed forces and police. These articles therefore effectively restrict or limit the free application of the freedoms of assembly and association.

On another level, these rights are to be understood in the context of a polity in which the freedom of opinion and

expression too is guaranteed. Article 14(1)(a) provides to all citizens the freedom of speech and expression including publication. Freedom of expression is a prerequisite for the full enjoyment of the freedom of association and assembly.² The freedom is also buttressed by the requirement of an uncensored, unhindered and unrestrained media which is free to receive information and comment on public issues without fear of reprisals.³ In fact it is recognized as constituting a cornerstone of a democratic society.⁴ Limitative measures on media freedom hinder the public's right of access to information thereby defeating the very essence of democracy. Once again however, this freedom is placed under restriction by provisions of Article 15(2) which subjects the freedom to such restrictions as may be necessary "in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence" and Articles 15 (7) & (8) as discussed above.

The Public Security Ordinance (PSO) and the Prevention of Terrorism (Temporary Provisions) Act⁵ (PTA) further restrict the freedom of expression.⁶ In terms of section 2 (1) (h) of the PTA a person who "by words either spoken or intended to be read or by signs or by visible representations or

² See Human Rights Committee, General Comment No.34, Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, Paragraph 4

³ *Ibid*, Paragraph 13

⁴ See *Marques v. Angola*, communication No. 1128/2002, Views adopted on 29 March 2005

⁵ Act No.48 of 1979

⁶ See Lakshman Gunasekera, "Freedom of expression & the mass media: Weak support for democracy by news media", *Sri Lanka: State of Human Rights 2014* (Law & Society Trust 2014), p.196 for a complete concise narrative of the legal framework governing freedom of expression

otherwise causes or intends to cause commission of acts of violence or religious, racial or communal disharmony or feelings of ill-will or hostility between different communities or racial or religious groups” is guilty of an offence. In addition to a maximum of 20 years of imprisonment, the offence also carries the draconian penalty of forfeiture of property.⁷ Part IV of the Act prohibits the publication of material relating to conduct which is deemed to be an offence in terms of the PTA. Again, contravening these provisions attract the penalty of imprisonment.⁸ Cumulatively, these provisions restrict the freedom of expression and by extension, restrict the freedom of assembly and association as well.

Wickramaratne, in his seminal work discusses the freedom of assembly in the following terms;

“Freedom of assembly includes the freedom to take part in public meetings, processions, and demonstrations. As the above are held for the purpose of expressing ideas and opinions, the freedom of assembly is closely connected with that of speech and expression. Assemblies perform a function of vital significance in a democratic society. They contribute to the formation and dissemination of opinion and the education of the public. They are also one manner in which the Government is made to feel public opinion....The exercise of the freedom of assembly must not therefore offend the laws relating to nuisance, traffic, public order etc. But this freedom must not be abridged or denied in the guise of regulation.”⁹

⁷ See Note 5 above, Section 4

⁸ *Ibid*, Section 14 (3)

⁹ See J. Wickramaratne, *Fundamental Rights in Sri Lanka* (Stamford Lake, 2006) p.691

In this context it is understood that the freedom of assembly is not a stand-alone right, rather is part of a matrix of rights. It is also an important right in the exercise of the franchise of the people and has been used as a means of expressing political opinion. In recent times, this right has been exercised by people to demonstrate not only their partisan political beliefs but also to agitate against a series of social injustices including enforced disappearances, arbitrary arrests and detentions, and minority religious rights.¹⁰

The freedom of association connotes a conducive background for people to join others in pursuit of a common goal. Such a right is vital for purposes of policy advocacy. This right is cognate with the freedom of assembly and the right to freedom of expression. It is often used to exercise the freedom of assembly by providing an umbrella of common ground under which to congregate for advocacy or protest. It also provides a modicum of protection for the formation of NGOs and Civil Society Organizations in the

¹⁰ For example see Melani Manel Perera, “Sri Lanka, population protest authorities: You are responsible for enforced disappearances”, 07 May 2014 at <http://www.asianews.it/news-en/31542.html>; for an account of the peaceful protest organized by The Collective of the Families of the Disappeared (FOD) and the Christian Solidarity Movement (CSM) in honor of Madushka Haris de Silva who disappeared in 2013; “Sri Lanka’s Prevention of Terrorism Act should be repealed”, Meera Srinivasan, *The Hindu*, 30 September 2014 for an account of the protest launched by members of the civil society seeking the release of Balendran Jeyakumari, who was arrested by the Terrorism Investigation Division (TID) in March 2014, and “Protests against Buddhist attacks on Muslim communities” Peter Main, 20 June 2014 at <http://www.fifthinternational.org/content/protests-against-buddhist-attacks-muslim-communities> for an account of protests against attacks by extremist Sinhala-Buddhist groups aiming the Muslim minority

local context. However, one notable limitation of Article 14 is that the rights are only ensured to citizens. Therefore any non-citizen seeking to avail herself of this constitutional provision would be disappointed. This especially may pose an issue for NGOs employing foreign nationals.

3. International Legal Obligations

Sri Lanka has accepted international human rights standards which oblige the state to guarantee to its citizens the rights of peaceful assembly and freedom of association at the national level.. Articles 21 and 22 of the International Covenant on Civil and Political Rights (ICCPR) bind Sri Lanka, as a state party to the covenant, to ensure these rights are enjoyed by its people subject to derogation in times of “public emergency which threatens the life of the nation” in accordance with Article 4 of the Covenant. These articles guarantee the right of peaceful assembly and the freedom of association subject only to such lawful restrictions “which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others”. Article 19 of the covenant provides for the freedom of expression, subject to restrictions according to law and as are necessary *inter alia* “for the protection of national security or of public order (ordre public), or of public health or morals”.¹¹ Article 4 of the ICCPR however, reinforces that derogation is only possible to the extent which is strictly required by the exigencies of the situation.

¹¹ See International Covenant on Civil and Political Rights, Article 19(3)(B)

Accordingly, the constitutional grounds for limitation of the rights under discussion, i.e. in the interests of “racial and religious harmony” and “national economy” as per Article 15 (3) & (4), are not grounds recognized by the ICCPR on which rights could be restricted. “Racial and religious harmony” is a nebulous concept which lacks precise definition and could be utilized in a pluralistic society to curtail minority rights. Similarly, interests of national economy is too broad and vague a ground on which the freedom of association could be curtailed. The constitutional provisions are thus not in conformity with Sri Lanka’s international obligations accepted under the ICCPR.

Furthermore, the existence of emergency regulations promulgated under the Prevention of Terrorism Act (PTA) makes a mockery of Sri Lanka’s international obligations in respect of the rights under discussion. Section 7 of the PSO and Article 155 of the Constitution together provide that emergency regulations may override, amend or suspend any existing law except constitutional provisions. Therefore, the sole means by which Emergency Regulations could be challenged is by way of a Fundamental Rights application. However as noted previously, Article 15 of the Constitution legitimizes the restriction of fundamental rights through emergency regulations as a means prescribed by law. The Supreme Court opined in *Wicremabandu v. Herath and others*¹²

“If in respect of a fundamental right....., an emergency regulation imposes a restriction which is permitted by Article 15(7), such regulation does not over ride, suspend or

¹² [1990] 2 SLR 348

amend any provision of the Constitution ; it is a restriction permitted by the Constitution and is both *infra vires* and consonant with the Constitution, and therefore does not “override” the Constitution. Article 15(7) *permits inter alia*, restriction in the interests of national security and public order. The State may not have any burden of establishing the reasonableness of the restriction placed by law or Emergency Regulations but if this Court is satisfied that the restrictions are clearly unreasonable they cannot be regarded as being within the intended scope of the power under Article 15(7). But the test is not wholly objective for the court must not usurp the discretion of the authorities constitutionally entitled to impose restrictions.”¹³

In effect therefore, any regulation made under the emergency law becomes valid even if it severely restricts or even violates fundamental rights so long as it is in conformity with the Constitution. Judicial intervention is only possible if it could be proved that the regulations are in violation of the Constitution.

As a member of the United Nations and as a state which has undertaken binding obligations under international human rights treaties, Sri Lanka must also take cognizance of Resolution No. 25/38 adopted by the Human Rights Council titled “The promotion and protection of human

¹³ *Ibid*, at P. 358

rights in the context of peaceful protests”.¹⁴ The pertinent sections of the resolution read thus;

“Recalls that States have the responsibility, including in the context of peaceful protests, to promote and protect human rights and to prevent human rights violations, including extrajudicial, summary or arbitrary executions, arbitrary arrest and detention, enforced disappearances and torture and other cruel, inhuman or degrading treatment or punishment, and calls upon States to avoid the abuse of criminal and civil proceedings or threats of such acts at all times;

3. Calls upon States to promote a safe and enabling environment for individuals and groups to exercise their rights to freedom of peaceful assembly, of expression and of association, including by ensuring that their domestic legislation and procedures relating to the rights to freedom of peaceful assembly, of expression and of association are in conformity with their international human rights obligations and commitments, clearly and explicitly establish a presumption in favour of the exercise of these rights, and that they are effectively implemented;”

¹⁴ UNGA, Resolution adopted by the human Rights Council on the promotion and protection of human rights in the context of peaceful protests, A/HRC/RES/25/38

The resolution calls upon state parties to take appropriate measures to ensure the protection of these rights through a combination of positive and negative action. It is interesting to note that the conduct of the Government with regards to the freedoms of assembly and association during 2014 was diametrically opposed to such international obligations as will be discussed in a subsequent section of this chapter.

4. The Regressive Legislative Framework

The much dreaded PTA, a contentious piece of legislation both during the war and in the post-war dialogue, curtails the freedoms of association and peaceful assembly. Introduced in 1978 as a temporary provisions Act, it provides for the arrest and detention of persons without bail for up to 18 months.¹⁵ It also provides for the banning of certain organizations if those are found to be engaging in unlawful activities.¹⁶ The emergency laws promulgated under the Public Security Ordinance were lifted in 2011. But, the PTA remained in force and continued to be invoked to arrest individuals engaging in peaceful protests or discussions as well as to suppress anti-governmental opinions in the alternative media.

NGOs are formed in terms of the Voluntary Social Services Organizations (Registration & Supervision) Act (VSSO Act) of 1980. The Act, in addition to compelling social services organizations to register also enables the Registrar of Voluntary Social Services Organizations or any person authorized by him to enter and inspect the premises of an

¹⁵ See Prevention of Terrorism (Temporary Provisions) Act No.48 of 1979, Section 9

¹⁶ *Ibid*, Long title to the Act

organization, to notify the minister in charge of the subject of any fraud or misappropriation of funds, in event of discovering any fraud or misappropriation of funds to refer such matter to a board of inquiry, and to attend meetings of such organizations without prior notice. This Act is an invasive legislation which violates the freedom of association, as the substantive freedom is defined to include not only the choice to decide who to associate with but also to decide who not to associate with. The compulsive nature of the provisions infringed on the freedom of association and at the same time brought all registered voluntary social services organizations under government control. In 1990, a commission appointed by H.E. President R. Premadasa¹⁷ investigated into the activities of NGOs and made recommendation in a 300+ page report. Pursuant to such recommendations, emergency regulations were passed in terms of the Public Security Ordinance requiring NGOs which had a turnover of Rs.50,000 and above to register compulsorily. With the lapse of emergency regulations, this requirement has stopped operating.

Subsequently, the then incumbent government sought to amend the VSSO Act in 1995 by a bill which included more invasive provisions. However, due to the strong dissent of the opposition in Parliament, the process was stalled. In 1998, the bill was passed in Parliament on an occasion during which the opposition was absent from Parliament. The 1998 amendment stipulated that the minister may appoint an interim board of management if a board of inquiry constituted under the principal enactment found evidence of fraud or misappropriation of funds and if he is of the

¹⁷ Extraordinary Gazette No.641/2 dated 17 December 1990

opinion that such fraud or misappropriation would run counter to public interest. An attempt by civil society representatives to challenge the constitutionality of the bill was thwarted by the decision of the Supreme Court to dismiss the application for a special determination on the basis that the application was time barred.¹⁸

A National secretariat for NGOs was established in 1996 under the purview of the Ministry of Health, Highways & Social Services. Pursuant to a gazette notification issued by H.E. the President,¹⁹ the NGO secretariat was brought within the purview of the Ministry of Defence. This is yet another instance of the pervasive character of the government in wanting to exercise control over every aspect of civilian life including essentially non-governmental entities. The main objective of the secretariat ostensibly is to ensure the operation of NGOs within the legal and national policy framework of the country in order to contribute in relief and development activities. It is noteworthy that the Secretariat does not refer to NGOs working on human rights issues or research and advocacy NGOs expressly. It remains a question whether such organizations are captured.

Due to these less than desirable conditions, most NGOs now register as limited liability companies in terms of the Companies Act of 2007. According to the provisions of the Companies Act, authorities could only investigate internal matters of a company on a request of the shareholders of the company. This essentially reduces the government's

¹⁸ SC Applications No. SD 1/98, SD 2/98, 3/98, 4/98 and 5/98

¹⁹ Extraordinary Gazette No. 1651/20 dated 30 April 2010

potential for abuse of or interference in the legitimate activities of NGOs.

5. Lack of Judicial Precedent During 2014

In a judgment²⁰ endemic of the progressive nature of the Supreme Court of Sri Lanka in the 1990s' Justice A.R.B. Amerasinghe posited important dicta in relation to the freedom of association, specifically of members of the civil society. Salient excerpts of the judgment read as follows;

“Legitimate agitation cannot be assimilated with incitement to overthrow the Government by unlawful means.”²¹

“...effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. Freedom of expression includes not only the individual's right to speak, but also his right to advocate, and his right to join with his fellows in an effort to make that advocacy effective. Freedom of speech, freedom of assembly and freedom of association are cognate rights. However the right to freedom of association is a general, independent constitutional right recognized specifically by Article 14(1) (c), and not merely one that is keyed to the exercise of the right of free speech.”²²

²⁰ *Channa Pieris and Others v. Attorney General and Others* (Ratawesi Peramuna Case) [1994] 1 SLR 1

²¹ *Ibid.*, p. 35.

²² *Ibid.*, p. 144.

“ The right of association is not only guaranteed by the Constitution to protect the freedom of intimate association but also as an indispensable means of preserving other individual liberties concerned with a wide variety of political, social, economic, educational, religious and cultural ends”²³
“The fact that the respondents took no direct action to restrict the right of the petitioners and members of the Ratawesi Peramuna to associate freely in orderly group activity however, does not end the matter. Freedoms such as these are protected not only against obvious and heavy handed frontal attack, but also from being smothered or stifled or chilled by more subtle interference”²⁴.

This dictum is important to illustrate the expansive content of the freedom of association the Sri Lankan courts have accepted. The Human Rights situation in 2014 stands in stark contrast to the stance of the Supreme Court.

However, no significant jurisprudence with regards to the freedom of assembly and association emanated from the Superior Courts of Sri Lanka during 2014. Even in the face of many rights violations occurring during the year, the judiciary made no attempt to advance the Fundamental Rights jurisdiction of the country in line with international human rights standards.

6. Situation of Rights

The conduct of the government during 2014 rendered its public declarations and pledges of protecting and promoting human rights in the course of honouring its international

²³ *Ibid.*, p. 145.

²⁴ *Ibid.*, p. 146.

human rights obligations a mere travesty. This was made abundantly clear by the documentation of a startling Eighty Four (84) incidents of violations of the freedom of peaceful assembly and association reported during the year. Some incidents were inextricably linked to the rise of ethno-religious extremist groups in Sri Lanka during the period, while law enforcement agencies were repeatedly blamed either for inaction in the face of attacks against civil society or actively engaging in suppressing their freedom of assembly. Violations of freedom of peaceful assembly included incidents of attacks on civil society meetings, withholding authorization by police to hold meetings or peaceful protests, arbitrary arrests and detention of protesters or participants at meetings. The freedom of association was directly infringed through certain regressive policies and directives of the government. At the same time, the relentless suppression of dissenting and alternative media resulted in the lack of access to information and a violation of the freedom of expression.

It is useful to gain an understanding of actual incidents that took place during 2014 for an informed appraisal of the situation in the country. Following is a chronologically condensed account of the majority of such incidents reported in 2014 under each type of freedom.

6.1. Freedom of peaceful assembly

In January 2014 the former Convener of the Inter Student Federation was released on bail by the Magistrate, Colombo Fort on condition that he refrained from participating in protests or entering universities. He was charged with committing two offences, namely, that of public nuisance on the ground of organising a protest in November 2013 and of disrupting vehicle movement in Colombo during the same

event. During the same month, the police arrested 48 people, including women, children and devotees congregated in a nearby temple for taking part in a protest against the pollution of drinking water by a rubber factory in Thunthana, Hanwella in the Western Province of Sri Lanka. The residents demanded the factory be removed from the area. It was reported that many protesters were assaulted and threatened by the police while a senior police officer was reported as having intimidated the protesters the day prior to the arrests to abandon their “fast”.²⁵ The police issued a statement indicating that the incident was staged in order to discredit the government at the United Nations Human Rights Council sessions in Geneva.

In a positive move, in February 2014 the Magistrate of Chilaw denied the request of police for an order by court to prevent the commemoration of the assassination of a fisherman in a prior peaceful protest. However, in the same month the Magistrate of Anuradhapura issued an order declaring the student protests of the Rajarata University demanding the lifting of the suspension of 27 student activists were illegal.

The Janatha Vimukthi Peramuna (JVP), a political party in Sri Lanka in March 2014 alleged that government sponsored persons had assaulted a street drama group while they were staging a performance to educate the public on political issues at a public place in Panadura.²⁶ Further, a group of

²⁵ Aanya Wipulasena, “Hanwella protest a repeat of Rathupaswela?”, *The Sunday Times*, 23 March 2014

²⁶ INFORM Human Rights Documentation Centre, Sri Lanka, *Freedom of Assembly and Association in Sri Lanka*, 20 September 2014 (hereinafter INFORM Report)

Buddhist monks had interrupted a training programme for provincial journalists in Polonnaruwa in the North Central Province. In response to reasons being asked the group had claimed that no programmes funded by the United States were allowed in the area in view of the US's HRC Resolution against Sri Lanka.²⁷

An incident of a mob attack instigated by a local politician belonging to the ruling party against a group of opposition Members of Parliament (MPs) on an inspection tour of the newly constructed Magampura Port, Hambantota was reported in April 2014.²⁸ The attack was portrayed as a result of public anger over the continuous opposition to development projects of the government and not as a serious threat to the right of freedom of peaceful assembly as was evident by the nature of the attack. In another incident, a 'Bodu Bala Sena'²⁹ led mob disrupted the inaugural press conference organized by the 'Jathika Bala Sena'³⁰ led by Venerable Watareka Vijitha Thero, who is a defender of minority religious rights and an advocate of inter-religious

²⁷ *Ibid*

²⁸ *Ibid*

²⁹ A Sinhalese-Buddhist nationalist group comprising, among others, Buddhist monks which was formed in 2012 in order to enforce Sinhala-Buddhist nationalism within the country. Widely believed to have been supported by the Mahinda Rajapakse Government, the group sought to take action, including militant action, against religious minorities in the country. The group called for extreme measures such as the boycott of "Halal" products and for the increase of the Sinhala-Buddhist population of the country through procreation

³⁰ An interfaith group convened by a prominent Buddhist monk which stands for peaceful coexistence of all religious and ethnic groups within the country against Sinhalese-Buddhist nationalist groups such as the Bodu Bala Sena.

harmony.³¹ The Police yet again remained passive in the face of threats, intimidations and invasion of a peaceful assembly.

In May 2014, another serious instance of the right to freedom of peaceful assembly being denied was reported. The police have denied the Joint Trade Union Alliance their usual venue for the May Day rally going as far as to obtain a court order prohibiting the alliance from using the venue. Their May Day rally was obstructed and three trade unions leaders were charged with violating the court order.³² Furthermore, the Police obtained court orders against 17 activists of the Inter University Student Federation (IUSF) to prevent a protest march coinciding with the government-hosted World Conference on Youth in Colombo. Another Seventeen (17) university student activists were arrested by the Slave Island police subsequent to a protest staged in front of the University Grants Commission (UGC) in May itself. The students of the Allied Health Sciences (AHS) special degree programme at the University of Peradeniya engaged in a peaceful demonstration in protest of the reduction of the quality and course duration by higher education authorities. The arrests were carried out after the protest based on video footage of the demonstration. These students were later hospitalized amidst allegations of torture by the police.³³ This incident drew strong condemnation from university academics as well as civil society organizations. In the same month it was reported that the Kilinochchi organiser of the Tamil National People's Front (TNPF) was arrested by the Terrorist

³¹ See note 26 above

³² *Ibid*

³³ "AHS undergraduate activists assaulted in police custody and hospitalized", Chaturi Dissanayaka, *The Sunday Times*, 18 May 2014

Investigation Division (IID) on grounds of organising a protest demanding the government to accelerate the resettlement of displaced residents of Kilinochchi and to prevent the military from arbitrarily acquiring their lands.³⁴ Reports surfaced that he has been intimidated by the police into abandoning the protest which he had not heeded. Following the police rhetoric of the period, the Police Spokesperson stated that the arrest was in relation to suspected links with the LTTE.

In addition, many restrictions were placed on public remembrance ceremonies to be held during May in commemoration of the people who died during the war. 18th May is celebrated as the National Heroes Day in the aftermath of the military victory of the government in May 2009. Any public event, especially in the Northern parts of the country was deemed to be in contravention of the orders of the military and the police. Reports emerged of severe repression of such events, including in places of worship and public blood drives.³⁵

June brought a spate of attacks and intimidations against the education sector. Firstly, Parents of students of Ashoka College, Colombo engaged in a protest against the Principal of the school who was alleged to be a supporter of the Chief Minister of the Western Province, were attacked. Secondly, a female student activist of the University of Kelaniya was called for a disciplinary inquiry in June 2014 on the basis of instigating unrest among female students. This was in the

³⁴ “Kilinochchi organizer arrested to halt demonstration – TNPF”, *Tamil Guardian*, 24 May 2014

³⁵ See note 26 above

wake of a successful student protest to demand a new female hostel building. She was banned from entering the university premises until the conclusion of the inquiry. Next, a goon attack was carried out on the students of the Rajarata University in the North Central Province who were engaged in a continuous protest demanding the administration to withdraw the unjustified suspension of certain students. The temporary huts erected for the protest were burnt down on two occasions during the same month. Another attack on the university students of the Ruhuna University, Matara in the Southern Province by a mob led by a Deputy Minister was also reported. A serious allegation was leveled against the police for merely standing by without acting against the mob.³⁶ In a further separate incident in the same month, the police arrested a Northern Provincial councilor who was involved in organizing a protest demanding the hearing of habeas corpus applications filed by the families of persons reported missing during the final phases of the war.³⁷

Another series of violations of the rights under discussion with regards to journalists took place during the period from May-July. A training of trainers workshop for investigative journalists pursuant to the recommendations of the Lessons Learnt and Reconciliation Commission (LLRC) by Transparency International Sri Lanka (TISL) was abandoned in May due to military intimidation. Another workshop organized for Tamil journalists in Negombo was cancelled in June due to protests by an unidentified group. The police had refused a request for protection of participants.³⁸

³⁶ *Ibid*

³⁷ *Ibid*

³⁸ *Ibid*

Seven Tamil journalists were called for questioning by the Omanthai police in July 2014 on the basis of protesting against intimidation by the military while on their way to Colombo to attend a media workshop organized by the Sri Lanka Press Institute. The same workshop was disrupted by a mob who had warned against hosting similar events in the future.³⁹ In another incident, the Police had interrupted a banner-signing campaign held in Colombo by the Movement for Equal Rights (MER) as part of their public awareness campaign.⁴⁰ Attacks by violent mobs were prevalent during the month, with two incidents reported by the United National Party (UNP). A street campaign against racism was attacked and obstructed in Aluthgama at the same time as a group of Parliamentarians from the UNP were prevented from entering the Sapugaskanda Oil Refinery in the suburbs of Colombo where they were on a fact finding mission. The parliamentarians reported the presence of goons assisted by the Police.⁴¹

In August 2014 another crackdown on university student activists was reported. Students including females, of the University of Peradeniya who were engaged in a sit-in campaign demanding the establishment of a Faculty of Management were arrested and remanded on charges of illegal constructions and illegal entrance.

A meeting for the families of the disappeared held in Colombo by the Catholic Church was dispersed by a mob

³⁹ *Ibid*

⁴⁰ *Ibid*

⁴¹ *Ibid*

including Buddhist monks in August 2014. The mob had assaulted the participants and threatened the organizers against hosting future events. During the lead-in period to the event, several incidents were reported by the participating families of threatening phone calls by unidentified persons, sometimes claiming to be from the Criminal Investigation Division (CID) as well as visits by CID personnel inquiring after their whereabouts.⁴² Security forces thwarted another protest organized in commemoration of the disappeared in Vavuniya in the Northern Province to mark the International Day of the Victims of Enforced Disappearances. The organizers reportedly encouraged the protesters to disperse in view of their safety.⁴³

Several incidents of disruptions of assemblies conducted indoors were reported in August 2014.⁴⁴ Intelligence personnel were reported to have recorded an inter-religious dialogue conducted in Kandy while a police team had investigated the conduct of a programme which brought families from all communities together in Galle, Southern Province. Uniformed military personnel had questioned the organizers of a youth camp and a programme promoting cultural values in the Eastern Province. Members of a pro-government Trade Union had disrupted an awareness meeting organized by the Government Press Trade Union Collective to discuss allegations of political partisanship of the Government Printer. It was reported that several workers were assaulted in the ensuing melee.

⁴² *Ibid*

⁴³ *Ibid*

⁴⁴ *Ibid*

6.2. Freedom of association

The administration of Bandaranaike Memorial Conference Hall (BMICH) in Colombo cancelled a reservation of the premises by the Bar Association of Sri Lanka for a discussion on the potential implications of a gazette notification vesting police powers in the armed forces in March 2014.⁴⁵

In April 2014, the Secretary of Defense publicized Gazette Extraordinary No. 1854/41 dated 21 March 2014 listing 16 overseas Tamil organizations and the militarily defeated LTTE as either terrorist organizations or organizations facilitating terrorist acts. The gazette was issued pursuant to the United Nations Regulation No. 1 of 2012 derived from UN Security Council Resolution 1373 adopted in 2001 especially to give effect to Article 1 paragraphs (c) & (d) of the UNSC resolution, which provides for the immediate freezing of assets, financial resources and funds of persons and/or entities participating or facilitating terrorist acts. The previous regulation of Sri Lanka,⁴⁶ gazetted in the immediate aftermath of the adoption of the UNSC resolution provided for the freezing and forfeiting funds and assets of individuals assisting or promoting terrorism. The 2012 regulation extends the penalty of freezing of assets, to legal persons and entities as well. The overbroad regulation of 2012 and the order of 2014 sought to freeze the assets and financial resources of the listed organizations without providing any credible evidence of specific unlawful activities each organization was purported to have engaged in⁴⁷ Even though the 2012 regulation states that the designated list of

⁴⁵ *Ibid*

⁴⁶ Gazette Extraordinary No. 1206/14 dated 16 October 2001

⁴⁷ See Note 26 above

persons is decided based on credible information and will be reviewed periodically, it does not provide for disclosure of such evidence. This gives ample leeway for the authorities to be draconian in their approach, which the government has in fact done by not providing acceptable justifications for designating each organization as a proscribed organization.

In July 2014, the National Secretariat for NGOs issued a letter to all NGOs in the country ordering them to refrain from engaging in “unauthorised activities” including “press conferences, workshops, training for journalists, and dissemination of press releases which is beyond [the NGOs] mandate”. This order was severely criticized by civil society organizations and international monitors alike. A media statement issued by Karu Jayasuriya MP condemning the move of the government stated;

“The Ministry of Defense that has stamped out civil liberties in unprecedented ways in the post war era, is well on the way to creating a military state in Sri Lanka. It is in such an autocratic set up that the Defense Establishment dictates the limits of an individual or collective right to speech and assembly. It is the Rajapaksa Government’s greatest ruse, to keep telling the public and the world that Sri Lanka is a functioning democracy, while the Defense Ministry runs a parallel administration that is adamant to curb freedoms and build surveillance systems to oppress the citizenry and stamp out dissent against the regime.”

Echoing similar sentiments, the Lawyers' Collective issued a statement stating the following;

“The communication of the Director of National Secretariat for NGOs is an indication of the limited understanding of powerful Sri Lankan defense establishment on the civil liberties. The conduct of the MoD in issuing such communication further strengthens the allegation that Sri Lanka has now become an Authoritarian State.”

The restrictive nature of the order undermines the freedom of association and peaceful assembly while also hindering the essential nature of NGOs as entities independent of the government. It is accepted that a certain amount of control on the part of the government may be warranted in the interests of financial transparency and accountability of NGOs. However, to go to the length of proscribing specific activities is an unwarranted interference in the freedom of association.

The Finance and Planning Ministry informed all NGOs through a notice published in the national newspapers in August 2014 to obtain approval of the ministry prior to receiving foreign funds. The notice was addressed ostensibly to a variety of entities including government agencies, civil society organizations and the public. However, it is not untrue to state that this is yet another measure in a series of measures implemented to restrict NGOs and civil society organizations. This move could be perceived as an attempt of the government to undermine the advocacy work of NGOs, especially on pro-democratic and human rights protection related issues.⁴⁸

Furthermore in August 2014 the main Student Union and Faculty Unions of the Rajarata University were dissolved temporarily pursuant to the withdrawal of all academic staff from academic and administrative duties⁴⁹ while the Open University suspended several student leaders for leading a protest campaign demanding the right to unionize.⁵⁰

In September 2014, several media reports surfaced of a meeting convened by the Secretary of Defence for some NGOs who had worked with the Government and the Commonwealth Foundation on the People's Forum during the Commonwealth Heads of Governments meeting held in Colombo in 2013. The Defence Secretary had indicated the willingness of the government to engage in constructive dialogue with NGOs and civil society organizations which are critical of the government.⁵¹ While this change of stance of the government runs counter to its repressive measures against NGOs and the civil society, the *bona fides* of the regime remained a question.

6.3 Media freedom

According to the annual World Press Freedom Index 2014 compiled by Paris based Reporters Sans Frontiers (RSF) Sri Lanka was ranked 165th out of 180 countries and the lowest in South Asia in 2014.

⁴⁸ *Ibid*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ Paikiasothy Saravanamuththu, *Groundviews*, "Engaging with Civil Society", at <http://groundviews.org/2014/09/16/engaging-with-civil-society/>

Alternate media websites were periodically blocked by the government, while the Telecommunications Regulatory Commission withheld registration of several news websites which have applied for registration.⁵² Several incidents of threats and intimidations against media professionals were also reported.⁵³ The Free Media Movement lodged a complaint with the Sri Lanka Human Rights Commission against the periodic blocking of news websites.⁵⁴

The offices of ‘Uthayan’ and ‘Yal Thinakkural’ newspapers in Jaffna were surrounded and blocked entrance by the military in May 2014 on the day commemorating the end of the war.⁵⁵

The totality of these acts culminated in the general public being denied access to information on repressive government measures and activities, the opinions of parties critical of the government as well as the opinions of pro-democratic quarters. It seriously hindered the formation of an informed public opinion against the government thereby ensuring the continuance of an authoritarian regime.

⁵² Sri Lanka blocks two more websites critical of government: rights group”, Reuters, at <http://in.reuters.com/article/2014/05/21/uk-sri-lanka-censorship-media-idINKBN0E11TT20140521>

⁵³ “Sri Lanka: Petition to HRC on blocking websites”, *Sri Lanka Brief*, at <http://srilankabrief.org/2014/05/sri-lanka-petition-to-hrc-on-blocking-websites/>

⁵⁴ *Ibid.*

⁵⁵ See note 26 above

7. Report of the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association⁵⁶

The report of the UN Special Rapporteur on the freedom of peaceful assembly and of association has made reference to some of the incidents discussed above. In addition, it also reports an instance of reprisal by state run media against 24 civil society organizations undermining their credibility in retaliation for issuing a report to the Human Rights Council.⁵⁷

The report indicates grave concern over the fact that Sri Lanka has failed to respond to three out of five communications forwarded by the Special Rapporteur for the period of 2014. While reiterating the need for authorities to comply with reporting obligations and to cooperate fully with the special mandate holder, it states the existence of a positive presumption in favour of holding peaceful assemblies. At the same time the report urged the government of Sri Lanka to maintain an enabling environment for associations without subjecting those to acts of intimidation, violence or arbitrary arrest. The report also called upon the government to ensure the right to an effective remedy in the face of human rights violations and cautioned the government not to implement regulations and practices resulting in silence, intimidation and harassment of persons wishing to carry out activities in association with others.⁵⁸

In blatant disregard of its' pledges to promote and protect human rights at the domestic level, Sri Lanka has failed to

⁵⁶ See UNGA, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Observations on communications transmitted to Governments and replies received, A/HRC/29/25/Add.3

⁵⁷ *Ibid.*, Paragraph 346

⁵⁸ *Ibid.*, Paragraphs 347 & 348

extend an invitation to the Special Rapporteur for a country visit despite many requests by the Special Rapporteur. This failure is repeatedly emphasized in the Special Rapporteur's reports including the report commenting on the situation of the rights in 2014.

8. Rights Violations as Part of the Crisis of Governance

The Bar Association of Sri Lanka in a statement issued in July 2014 observes “that the post war Sri Lankan society is increasingly precipitating into a crypto military and authoritarian state”⁵⁹. The rights narrative of Sri Lanka in 2014 was peppered with increased attacks on civil society and NGOs, military involvement in law enforcement duties, threats and intimidation against civil society and NGOs as well legal restrictions placed on the legitimate exercise of the activities of these entities. This intolerance towards non-state actors was a manifestation of the political will of a government well on the path to authoritarianism. This was exacerbated by the complete disregard the government displayed towards sustained local and international callings to abstain from gross violations of human rights and democratic ideals which were in diametric opposition to Sri Lanka's international human rights obligations. A closer scrutiny of the incidents of violations with regards to the rights under discussion during 2014 reveals certain patterns of behaviour. The common strands could be condensed as follows;

⁵⁹ ‘Sri Lanka Transforming into a Crypto Military and Authoritarian State’ says BASL”, Bar Association of Sri Lanka, at <http://www.basl.lk/index.php/39-editor-s-choice-blocks/139-sri-lanka-transforming-into-a-crypto-military-and-authoritarian-state-says-basl>

8.1. Militarization of law enforcement

The regular involvement of the military in activities normally within the purview of the police was a recurrent practice. The continued “calling of personnel” for the maintenance of public order by the Minister of Defence despite the non-existence of a situation of emergency allowed the armed forces to be tasked with dispersing public gatherings, monitor civil society activities and in extreme cases to intimidate civilians from assembling for peaceful legitimate purposes. It is pertinent to mention that every aspect of civilian life, including the economic sphere was invaded by the military during the post-war period. The armed forces encroached into the leisure sector, health sector, construction industry, aviation industry among many other commercial enterprises.⁶⁰ Militarization was also visible in the sports arena with the installation of military personnel to key positions in sports unions⁶¹, private security companies with the advent of Rakna Arakshaka Lanka⁶² which was perceived as the beginnings of a private army⁶³, and general public

⁶⁰ Upl Kumarapperuma, “Sri Lanka: Are We Heading Towards a Militarized Society”, *Colombo Telegraph*, at <https://www.colombotelegraph.com/index.php/sri-lanka-are-we-heading-towards-a-militarized-society/>

⁶¹ Emil van der Pooten, “Recent Militarization of Sri Lankan Life: The Elephant in the Room”, *Colombo Telegraph*, at <https://www.colombotelegraph.com/index.php/recent-militarization-of-sri-lankan-life-the-elephant-in-the-room/>

⁶² A state-owned security company established by the former Defence Secretary, Gotabhaya Rajapakse to carry out functions of a military nature, ordinarily performed by regular armed forces. See Emil van der Pooten, *Colombo Telegraph*, “Blackwater in the USA and Rakna Arakshaka Lanka In Sri Lanka?”, at <https://www.colombotelegraph.com/index.php/blackwater-in-the-usa-and-rakna-arakshaka-lanka-in-sri-lanka/>

⁶³ *Ibid.*

administration and the diplomatic corps by appointing ex-military personnel to positions of authority.⁶⁴

8.2. Suppression of student activists agitating to counter arbitrary decisions of the authorities

Students in higher education institutions are mantled with the task of grooming themselves into future leaders. The Sri Lankan university system has always had robust student activism. Sustained student activism has in the past yielded many victories for the student body. Therefore it is only natural that they pose a threat and in fact are perceived as a hindrance to ambitious political aspirations of an authoritarian regime. Incidents of suspension of students from classes, obstructing funding, banning student unions, arrests and assaults by police as well as unidentified thugs and threats against student leaders were reported during the period from 2010-2014.⁶⁵ The rhetorical response to all such measures that student agitations disrupted public order and posed a threat to security and the attendant impunity were illustrative of a facet of the crisis of governance the country was mired in.

8.3 Increase in attacks against peaceful assemblies by unidentified mobs

Not only did the government use the military and police to suppress dissent, it also was silent in the face of attacks by non-state actors against peaceful protests staged by the civil society. The incidents where mobs or unidentified thugs

⁶⁴ See Note 60 above

⁶⁵ Lanka University News, “University Students Suppression Worst in Sri Lanka”, at <http://www.lankauniversity-news.com/2014/07/1420-suspensions-of-students-from-sri.html>

attacked or intimidated peaceful protesters were numerous. No arrests of such attackers were reported during the year under review, begging the legitimate question of whether law enforcement agencies are competent to protect civilians. The situation is particularly problematic as the state bears the primary responsibility to ensure respect for human rights and to protect individuals against violations of human rights. Even if the state does not bear direct responsibility for the actions of private individuals or groups, it certainly has an obligation to take all necessary steps to ensure the protection of fundamental rights by providing and facilitating an effective remedy for victims. The State is also responsible for its failure to control the activities of private individuals or to punish wrongdoers. The apathy of the government of Sri Lanka in the face of such mob violence is a clear indication that the government is in violation of its obligations towards the people.

8.4. Extremist Sinhala-Buddhist militant groups engaging in attacks against religious minorities

The wave of Sinhala-Buddhist nationalism that arose in the post-war period continued to sustain during the period under review.⁶⁶ Militantly inclined hard line groups, such as Bodu Bala Sena (BBS), congregating under the Sinhala-Buddhist banner, carried out attacks against religious minorities. The attack on Muslims in Aluthgama in Southern Sri Lanka⁶⁷ was the culmination of the heightened tensions between the two

⁶⁶ See Kalana Senaratne, “Religious Freedom”, *Sri Lanka: State of Human Rights 2014* (Law & Society Trust 2014) for a full account of the rise of Sinhala-Buddhist nationalism including its militant aspects

⁶⁷ Sri Lanka Muslims killed in Aluthgama clashes with Buddhists”, BBC News, at <http://www.bbc.com/news/world-asia-27864716>

religious factions. These Buddhist militant groups, in blatant disregard of the law, engaged in numerous attacks, intimidations and obstructions against minority religious groups as well as civil society organizations engaged in community advocacy. The complete impunity enjoyed by these extremist factions points to a political culture of minority religious intolerance which adversely impact the freedom of assembly and association of minority religions and communities.

8.5. Apathy of the judicial and law enforcement agencies in the face of violations

Perhaps the most alarming aspect of the overarching governance crisis is the inertia displayed by the judiciary and the police. Numerous accounts of passive or quiescent conduct of the police in the face of blatant human rights violations were reported. Furthermore, instances of active participation of the police in cracking down on peaceful protesters, closely monitoring and sometimes cancelling advocacy campaigns organized by NGOs, arbitrary arrests and detention of people exercising their freedom of assembly and association were ubiquitous. The judiciary seemed to have divested itself of the mantle of the guardian of the constitution and remained passive despite the violations of rights while at times vigorously supporting retrogressive measures such as issuing court orders to prevent peaceful agitations at the behest of the police. Such seeming apathy could predominantly have been due to the fear of reprisal by political superiors. The lack of significant jurisprudence in regard to the rights under discussion for the period under review is indicative of the diminishing public confidence in the judiciary.

8.6. Crackdowns on the political opposition

Unsurprisingly, and perhaps routinely for the prevalent regime, regular reports of breach of rights of the political opposition surfaced. Repressive acts were aimed at the main opposition as well as other political parties engaged in popular politics including political parties representing minority interests. Political parties play a vital role in modern democracies and inform the vote of the polity. Regular meetings and similar activities in common with other people are characteristic of means employed to disseminate political knowledge among the masses at the same time as joining a political party is an exercise of the freedom of association. Crackdowns on dissenting political parties are violations of these constitutionally guaranteed rights. Again, the astounding acts are reflective of the extremity of measures the ruling party could resort to in order to perpetuate authoritarianism.

8.7. Suppression of dissent

The government prevented pro-democratic ideals of the masses dissenting with the authoritarian regime coming to the fore, chiefly through severe restrictions placed on mass media. Censorship was a ubiquitous occurrence with the alternative media bearing the brunt of the onslaught against dissent. The regime succeeded in clamping down on dissent by engendering a fear psychosis in the public and preying on the political ignorance of the majority polity. The government used the rhetoric of a resurgence of terrorism, western interference in domestic sovereignty through NGOs, and Islamic militancy surging in various parts in the world to provoke violence among the public. This resulted in willingness on the part of the public to engage in and retaliate

against violence including many instances of violating the freedom of assembly and association.

9. Conclusion

The year 2014 exposed a continuing governance crisis within which protection of universal human rights yet alone constitutionally guaranteed fundamental rights were at a minimum. The conduct of the state and other state sponsored entities indicated the treatment of the freedom of assembly and the freedom of association as exceptions to the rule rather than entertaining a positive presumption in favour of the existence of these rights. The state was in repeated violation of its international obligations with regards to human rights standards. The political climate created a restrictive environment for civil society organizations, NGOs and media entities to function effectively. There exists an immediate need therefore to ensure an environment within which the freedom of assembly and association are protected and in fact promoted.

The chapter concludes with the following recommendations which are identified as necessary for the full realization of the rights under discussion;

- As the foremost protector of human rights, the state ought to enable a conducive environment within which the freedom of assembly and association could be exercised without fear of oppression. Ending the culture of impunity cloaking violators of rights and providing effective redress mechanisms for violations are crucial in this regard. Additionally, it is indispensable to identify and actively pursue channels through which constructive dialogue and engagement

with NGOs and civil society organizations is possible. Allowing the free expression of a multiplicity of political ideas, religious beliefs, and ethnic values without suppression is fundamental to the freedom of assembly and association. This entails guaranteeing media freedom and entertaining dissent.

- It is an absolute necessity to demilitarize the society, to ensure military presence is removed from essentially public spheres, and the society returned to a state of normalcy.
- Law enforcement agencies should be de-politicized and strengthened to respond effectively and positively to violations of human rights. An active law enforcement agency would engender in the minds of the public a sense of security in the event of any violations of rights.
- A robust judiciary with a progressive approach towards the promotion and protection of human rights is an integral part of a thriving democracy. The judiciary ought to ascribe to itself the role of the guardian of constitutional rights and expand the frontiers of human rights for meaningful enjoyment of such rights.
- The regressive legislative framework, including the PTA and the mandatory registration of NGOs and Civil Society Organizations, needs to be substituted with legislation aimed at prioritizing human rights, promoting democratic values, and encouraging participation of non-state actors in the development narrative of the country.

- An important aspect of a democratic society is the existence of a proactive civil society constantly engaging with the state and the international community to ensure that rights are protected and promoted within the country. A proactive civil society will ensure that the state adheres to its international human rights obligations and will act as a whistleblower in the face of violations.

VI

WOMEN'S RIGHTS

*Thiagi Piyadasa**

1. Introduction

The State of Human Rights Report (SHR) 2005 carried a chapter on the Prevention of Domestic Violence Bill and the Women's Rights Bill, and since then has not included a dedicated chapter on women's rights till this report for 2014. Within this period women's rights faced many obstacles, mainly a shift to a more protectionist mindset by the government, religious and community leaders. Women's roles in society were increasingly defined and limited to their roles as mothers and wives. This was evident for example in the new regulations by the Foreign Employment Bureau prohibiting women with children under 5 years from migrating, the backlash against contraception and family planning by the *Bodu Bala Sena* (BBS), the refusal of the mandatory quota for women in local government when the Local Authorities Election Amendment was passed in 2012

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and the restrictive Supreme Court decision in 2010 which limited the scope and application of Article 12 (4)¹.

Furthermore within the public sphere extremely sexist comments were made by Cabinet Ministers and Members of Parliament with serious implications for women's rights. More recently Minister S. B. Dissanayaka, amidst campaigning for the Presidential Election 2015, was on record having stated that he would parade former President Chandrika Bandaranaike Kumaranatunga naked on the street². Commenting on women in positions of leadership in his Ministry, Tissa Karaliyadda the Minister of Child Development and Women's Affairs at the time stated that women should not be appointed to positions of leadership as they attempt to suppress other women out of jealousy, and women should therefore always support leadership but never be appointed to lead. Such statements by lawmakers reflect the deterioration of women's rights in Sri Lanka and contribute to and perpetuate discriminatory stereotypes and attitudes that limit women from exercising their rights as equal citizens of this country.

The end of war in 2009, brought fresh challenges for the protection and promotion of women's rights in the North and East. Increased militarization in particular contributed to undermining women's security.

This Chapter will briefly introduce national policy frameworks and international instruments relating to the

¹ SC Special Determination No.2-11 of 2010

² "Friday Forum calls for action against Minister S.B.Dissanayake, *Daily FT*, 20 December 2014.

rights of women in Sri Lanka and provide an overview of key women's rights issues in 2014 along five main thematic areas as follows:

- Women's economic rights which will include a brief overview of the situation of women migrant workers, women in the Free Trade Zones (FTZs), women tea plantation workers, commercial sex workers, women domestic workers, and women's domestic work.
- Women's health rights including sexual and reproductive health
- Women's political rights looking at women's political representation
- Post-war rights violations of women in Northern Sri Lanka
- Gender based violence (GBV) recognizing the nature of violence and discrimination experienced by women in Sri Lanka

2. International Instruments and Mechanisms Relating to Women's Rights

Several international instruments and mechanisms have contributed to the progressive conceptualization of women's rights. Article 1 of the Universal Declaration of Human Rights (UDHR) recognizes and affirms that 'all human beings are born free and equal in dignity and rights', while Article 2 goes onto state that everyone is entitled to all the rights and freedoms set forth in the Declaration.

Sri Lanka also ratified the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR) in 1980 and ratified the ICCPR Optional Protocol in 1997. Article 2

of the respective Covenants call for non-discrimination based on sex while Article 3 specifically stipulates that ‘State Parties to the present Covenant undertake to ensure the equal right of men and women’ to the enjoyment of all rights set forth therein. Unfortunately Sri Lanka’s legal system requires domestic legislation to make these provisions enforceable by law. Furthermore, while certain provisions contained in the ICCPR have been incorporated into Chapter III of the 1978 Constitution as Fundamental Rights, provisions contained in the ICESCR are only incorporated into Chapter VI as Directive Principles of State Policy and Fundamental Duties which are not enforceable by law.

The most important international instrument contributing to the realization of women’s rights is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Sri Lanka ratified CEDAW in 1981 and the Optional Protocol in 2002. In 1993 the Declaration on the Elimination of Violence against Women adopted by the United Nations General Assembly filled a critical gap by specifically highlighting violence against women and resulted in the appointment of a Special Rapporteur on Violence against Women in 1994.

CEDAW calls on State Parties to promote substantive equality³ by eliminating all forms of discrimination and promoting equal opportunities for women. The obligations to guarantee equality and non-discrimination apply to State and non-State actors.

³ General Recommendation 25

CEDAW also provides for a monitoring mechanism by way of the CEDAW Committee to which State Parties report every four years on progress made. The Government of Sri Lanka (GoSL) presented the 8th periodic report in April 2015. Similarly, the Commission on the Status of Women (CSW) is the principal policymaking body dedicated exclusively to gender equality and the advancement of women, and was established in 1946 two years before the UDHR. Another important mechanism towards the realization of equality for women is the Beijing Declaration and Platform for Action, a result of the Fourth World Conference on Women in 1995. While highlighting twelve areas for action, it also emphasized the importance of working in partnership with men to address common concerns. In preparation to commemorate 20 years since the Beijing Declaration, UN Women launched a global campaign 'Empowering Women, Empowering Humanity: Picture It' in 2014. Globally speaking 2014 was a year for reflection and review with the United Nations preparing country reports on the achievements of the Millennium Development Goals.

In addition to these key international instruments and mechanisms, Sri Lanka has ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1994); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1996); Convention on the Rights of the Child (1991); Abolition of Forced Labour Convention (1993); Maternity Protection Convention (1993) and the Equal Remuneration Convention (1993).

3. National Laws and Policy Frameworks

Chapter III of the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka provides for fundamental rights which are enforceable by law against infringements by State actors. Articles 12 (1) and 12 (2) guarantees the right to equality before the law and non-discrimination on the grounds of sex, and Article 12 (4) provides for special provisions by way of law, subordinate legislature or executive action for the advancement of women. This makes provisions for substantive equality. However, while Article 12 attempts to give life to the CEDAW provisions, the Fundamental Rights contained in Chapter III is limited to actions by State actors and does not provide for action against private or non-State actors. Another drawback is that existing laws cannot be challenged even if it violates fundamental rights, it can only be challenged before it becomes law. Recognizing this gap and the need for corrective measures, the State took action in 1995 to make amendments to the penal code which increased the age of marriage to 18 years and strengthened the law on sexual offences. In 1998 the anti-ragging law⁴ enabled prosecution of violence against women and sexual harassment of female staff and students in higher education institutes. Anti-trafficking laws⁵ were also strengthened through amendments in 2006. A key piece of legislation that caused much debate was the Prevention of Domestic Violence Act No.34 of 2005. This law seeks to provide immediate relief by way of protection orders to any individual who suffers violence by a family member.

⁴ Prohibition of Ragging and other Forms of Violence in Educational Institutions Act No. 20 of 1998

⁵ Section 360C of the Penal Code (Amendment) Act No. 16 of 2006

Several national mechanisms have also been established to promote and monitor progress in achieving equality for women. The first of such institutes was the Women's Bureau established in 1979, with the aim of providing necessary skills and training to promote income generating activities for rural women. Thereafter in 1983 the Ministry of Women's Affairs was established to ensure gender is mainstreamed in national policy and laws as well as ensure sufficient resource allocation to meet the State's commitments towards achieving gender equality. While this Ministry does not receive as much prominence⁶ compared to health, justice and education, it has taken several measures to promote women's interests island-wide by way of the Women Development Officers and the Children and Women's Development Units located in each Division⁷. The Ministry requires further support and attention by the Government to strengthen these efforts for greater effectiveness.

In 1993 the Women's Charter was formulated as the government's principal policy document related to women's empowerment, and provided for the establishment of the National Committee on Women (NCW). At present the NCW and Women's Bureau are the main implementing bodies functioning under the Ministry of Women's Affairs⁸. In 1996 a National Action Plan on Women was formulated to give effect to the Beijing Platform for Action and set out specific

⁶ *CEDAW Commitments: A Progress Review, Sri Lanka*, Centre for Women's Research, 2011, p.12

⁷ Administrative sub-unit of a District

⁸ Prior to 8 January 2015, it was the Ministry of Child Development and Women's Affairs. At the time of writing it remains the Ministry of Women's Affairs.

activities and measures that should be taken to address the problem of discrimination and violence experienced by women in Sri Lanka. In 2004, a draft Bill on Women's Rights was drafted to establish a National Commission on Women which would have the power to carry out investigations; call for reports on violations of women's rights; conduct public inquiries; and intervene in any proceedings relating to infringement of rights pending before any court. A decade later, the GoSL in its 8th periodic report to the CEDAW Committee in April 2015 stated that a Bill to establish the National Commission on Women was presented to Cabinet and awaiting approval⁹.

The Government of Sri Lanka launched the National Action Plan for the Protection and Promotion of Human Rights 2011-2016 with a dedicated chapter on the Rights of Women, and identifies specific action points relating to gender discriminatory laws and policy gaps across various spheres. Unfortunately, little progress has been achieved against the timelines mentioned. The Ministry also drafted a National Action Plan on Women 2014-2018. However, this has not been given much publicity.

At the time of writing, the Ministry of Women's Affairs had appointed a national committee to formulate an action plan for women headed households recognizing that 23% of households in Sri Lanka are women headed. The Ministry has also taken steps to formulate a multi sectoral National Framework and National Action Plan on Gender Based Violence.

⁹ *8th Periodic Report by the Government of Sri Lanka to CEDAW*, 30 April 2015, p.9.

4. Women's Economic Rights

Women's economic rights are directly affected by socio-cultural norms and expectations of gender roles. While laws relating to labour rights are generally gender neutral and apply equally to men and women, this often applies to the formal sector. Women in the informal sectors continue to experience discrimination. For example, women engaged in the informal agriculture sector continue to be paid less than men for similar work.

A case study on employment creation in Sri Lanka reports a drop in unemployment from 14.5% in 1992 to 4% in 2012, with a reduction in female unemployment from 20% in 1992 to 6.2% in 2012¹⁰. However, unemployment among men remains significantly lower at 2.8% revealing a significant gender disparity. The case study goes on to describe how despite the increased employment opportunities, vulnerable employment has also increased for women from 34.7% in 1992 to 43% in 2012. In other words, the employment opportunities that were created are 'poor quality employment'¹¹.

4.1. Migrant workers

Sri Lanka has over 1.8 million¹² migrant workers with nearly half being women, the majority whom migrate as domestic workers to the Middle East. While the GoSL has attempted

¹⁰ Bruce Byiers et al, *Manufacturing Progress? Employment Creation in Sri Lanka*, Overseas Development Institute, 2005, p.13.

¹¹ *Ibid.*, p.20

¹² "UN expert calls for better protection of SL migrating abroad for work", *The Island*, 28 May 2014

to train and promote semi-skilled labour, most of the women who migrate are unskilled and not protected by Sri Lankan labour laws nor provided any protection by receiving countries. There are several shortcomings in the regulation of agents and sub-agents which has paved the way for exploitation and precarious working conditions, especially for women. The United Nations Special Rapporteur on Human Rights of Migrants, Francois Crépeau raised this issue during his official visit to Sri Lanka in May 2014 and called for better monitoring of the recruitment industry through comprehensive policy and holding recruitment agencies accountable to reduce costs for migrants¹³.

It was also noted that migrant workers are often required to sign a contract in Sri Lanka but find that upon arriving in the host country are compelled to sign another contract in Arabic with different terms and conditions with no translation being provided. The most common complaints include long hours of work that sometimes exceed 12 hours, not being entitled to medical leave or rest, and lower salaries than previously agreed. Most often the contracts that are signed even in Sri Lanka fail to provide a clear job description for ‘domestic work’¹⁴. In addition to these issues, women migrant workers face harassment from employers and informal reports reveal that up to 200 women migrant workers return to the country pregnant. Several incidents were reported in the newspapers in 2014 of rape and alleged forced

¹³ *Ibid.*

¹⁴ Discussions with Andrew Samuel and Januka Tillekeratne from Community Development Services

abortions¹⁵. Recognizing the possibility of such a situation, the Sri Lanka Foreign Employment Bureau (SLFEB) has made provisions for women who are pregnant to report to 'Sahana Piyasa' at the airport upon arrival where some assistance is provided to find suitable shelter. Unfortunately no steps are taken to find justice for these women. Newspaper reports in 2014 reveal many stories of women migrant workers committing suicide unable to tolerate the harassment from employers any longer¹⁶.

The SLFEB introduced regulations that prohibit women with children less than 5 years from migrating for employment, and made it compulsory for all women to obtain a family background report prior to migrating for work with effect from 15.07.2013¹⁷. This is not a requirement for men who wish to migrate and the ostensible primary motivation was protection of children who were left behind in the country. The Migrant Development Officers are responsible for visiting the households and preparing a family background report, and will only approve migration if adequate steps have been taken to provide for the care of the children in the absence of the mother. Often this requires securing the assistance of another female member of the family. The Bureau also took a decision in 2013 to increase the minimum age limit of women leaving for foreign employment. In the

¹⁵ "The story of a domestic worker claiming to have had an abortion in Oman", T. Jayawardena and D. Adikari, *Mawbima*, 5 October 2014, p.12; "The grievance of a Sri Lankan domestic worker pregnant after being raped by the employer", *Lakbima*, 3 August 2014, p.15; same incident reported on 10 August 2014, *Lankadeepa*, p.3

¹⁶ "Tanuja's body returns to Sri Lanka", *Lankadeepa*, 19 September 2014.

¹⁷ *8th Periodic Report by the Government of Sri Lanka to CEDAW*, 30 April 2015, p.31.

case of Saudi Arabia the minimum age limit was increased from 21 years to 25 years and for other Middle East countries to 23 years reflecting a protectionist approach rather than an empowering approach. These terms and conditions are discriminatory to women and violate a woman's right to engage in a profession or trade of her choice. It also places an undue burden of childcare on mothers and women, and fails to recognize any care giving role that fathers may play in the lives of their children thus perpetuating gender stereotypes.

In terms of addressing some of the issues relating to contracts and working conditions, the Kingdom of Saudi Arabia and the Foreign Employment Bureau signed a Memorandum of Understanding (MoU) in 2014 that covers 12 categories of domestic workers including housemaids, drivers, cleaners and waiters employed by individuals¹⁸. The agreement will provide for contracts to be in a language understood by the worker, and include provisions to protect the worker including facilitating an opening of a bank account and issuing of exit visas at the termination of the contract or in the case of emergencies¹⁹. The article states that a Saudi sponsor spends up to 20,000 Saudi Riyals to recruit a maid. This is the new trend where women domestic workers are paid an advance (between Rs.50,000 – 100,000) before they migrate, but in reality this money is given to the family and serves as an incentive for migration, despite the obvious risks involved. It is evident that for many women in poverty there is very little choice but to migrate.

¹⁸ "Saudi to offer expertise to train domestic aides", M. Rasooldeen, *Daily News*, 1 August 2014, p.4.

¹⁹ "Ensuring rights of domestic workers, Saudi's Shoura Council approves agreement with SL", C. Christopher, *Ceylon Today*, 5 June 2014.

4.2. Women in the free trade zones (FTZs)

Free Trade Zones or Export Processing Zones (EPZs) are reported to employ nearly 126,300 individuals²⁰ and the majority of these workers are women from rural areas between the ages of 18-30. Many human rights and labour activists have highlighted the deplorable working and living conditions that FTZ workers face. During the year in review, these remained the main concerns.

A campaign by the Free Trade Zones and General Services Employees Union²¹ raised the following issues in a resolution on International Women's Day in 2014. The Union called on officials to remedy the anomaly in wages between women and men for equal work, reflecting Constitutional guarantees to non-discrimination. It also called on the State to make maternity benefits available to all private, public, semi government and co-operative sector workers. Highlighting the need for childcare facilities, the Union raised demands for the establishment of modern childcare facilities that include pre-schools, medical and child recreational facilities all managed and served by well trained and efficient personnel. And finally the issue of the absence of complaint mechanisms on sexual harassment in the workplace was raised, and the Union called for the formation of a complaints committee in every factory and workplace, headed by recognised and educated women, with adequate legal powers to decide on disciplinary punishments and further legal investigations where necessary. Perhaps in

²⁰ B. Padmasiri and S. Arulingam, "Trapped in the Katunayake Free Trade Zone", *The Sunday Times*, 30 November 2014

²¹ "Sri Lanka: FTZ working women calls for proper complaint mechanism in their work places", *Sri Lanka Brief*, 11 March 2014.

response to some of these demands an article in *Lakbima*²² reported intentions by the GoSL to establish day care centres near factories. However, this was introduced to improve child malnutrition and was not viewed as a right of women that would promote equity in employment.

An article by the Collective for Economic Democratisation highlighted²³ the issue of poor working conditions that include long and strenuous hours of work where workers have little time to consider comfort or health, receive inadequate time for rest or lunch and manage with inadequate sanitation facilities. Living conditions are equally dismal with frequent reports of overcrowding. The remuneration is barely sufficient to manage for the month with a percentage being deducted by the factory for breakfast and lunch. Many workers fall into debt to nearby retail shops to manage their day to day needs.

4.3. Women tea plantation workers

Historically workers in the tea plantation, particularly women workers have experienced discrimination. Women constitute nearly 60% of the estate labour force and are mostly employed as unskilled labour. The issues of adequate wages, better living conditions, welfare facilities and stronger representation have been raised over the years. In recent years the issue of poor maintenance of the estates has been highlighted as putting women workers at risk. Sanitation facilities are in need of repair and maintenance, and the health and safety of women workers, for example exposure

²² *Lakbima*, 20 July 2014, p.2

²³ “Trapped in the Katunayake Free Trade Zone”, 30 November 2014.

to pesticides in the absence of protective gear, have been raised as critical areas that need attention. Women's rights groups and certain trade unions like the Red Flag Women's Movement have called for women to be employed at higher levels in the estate, including representation in trade union leadership. Certain estate companies appear to have taken steps to train and appoint women field officers who would supervise estate workers²⁴.

Reports also indicate that women's wages and maternity benefits still continue to be paid to the husband instead of the woman, which completely undermines her status as a worker and her right to receive and control her income. Similarly women are not paid equal wage for equal value of work as women work longer hours than men²⁵. In terms of maternity leave and benefits while day care facilities are available, women estate workers are entitled only to 84 consecutive days of maternity leave (Maternity Benefits Ordinance No.32 of 1939) less than their counterparts governed by the Shops and Office Act. Therefore despite the considerable contribution to GDP for over a century, women tea plantation workers continue to be deprived of basic benefits.

4.4. Women commercial sex workers

Old colonial laws contained in the Vagrants Ordinance²⁶ are applied to arrest and prosecute commercial sex workers. Article 7 (1) (a) is used to arrest 'any person in or about any

²⁴ "Female field officers making strides in plantation industry", *Daily Mirror*, 7 November 2014.

²⁵ On average men work 6 hours but women work from 7.30a.m. to 5.30p.m.

²⁶ Vagrants Ordinance No. 4 of 1841

public place soliciting any person for the purpose of the commission of any act of illicit sexual intercourse or indecency'. Sri Lanka's 8th periodic report to the CEDAW committee reported the presence of 40,000 commercial sex workers in the country. In 2014, the police prosecuted 472 women commercial sex workers under the Vagrants Ordinance and 90% were women. In 2013, 610 arrests were made which is significantly less compared to arrests during the period 2008-2012 which exceeded 1200 in each year with 1914 arrests made in 2009²⁷.

Human rights and women's rights activists continue to highlight the impunity with which some police officers blackmail sex workers for money or sexual favours in exchange for 'protection'. One such incident took place in October 2014 in Rathnapura where a policeman publicly attacked a sex worker²⁸. The attack was videoed and uploaded to youtube. Interestingly following this incident two protests were held in Rathnapura against sex workers operating around the main bus stand by three wheel drivers among others. Sex workers report that often three wheel drivers benefit from the trade, as they engage in finding clients and also receive a share from the sex worker's earnings²⁹. Many commercial sex workers are forced into sex work due to poverty, and trafficked into the trade by job brokers who cheat rural women by promising work in the cities. Women who are trafficked in this way are often subjected to rape before being forced into the trade.

²⁷ Lecture by SSP Ajith Rohana, Sri Lanka Law College, July 2015.

²⁸ C. Kirinde, "Bared: Sex worker's vulnerability", *The Sunday Times*, 12 October 2014.

²⁹ *Ibid.*

It is unclear what steps are being taken to prevent unsuspecting women from being trafficked into sex work. When a draft law to replace the Vagrants Ordinance was discussed in 2014, the focus was on punishing commercial sex workers soliciting in public places. Therefore the priority appears to be preventing soliciting in public and not preventing the trade entirely as more up market sex work establishments are rarely raided. With a growing tourist industry clear strategies need to be put in place to ensure that either the trade is regulated by law to provide adequate protection to those who may engage in the trade or safety plans are put in place to raise public awareness and prevent trafficking, including effective prosecution of perpetrators.

4.5. Women domestic workers

An emerging issue globally and in Sri Lanka is the movement calling for greater recognition of domestic workers. Much like the Vagrants Ordinance, the law governing domestic work in Sri Lanka is contained in an old law, the Domestic Servants Ordinance No.28 of 1871 which defines a domestic worker as a 'servant' and provides for registration books by a government-appointed servant. This definition highlights the principal issue for domestic workers, that of not being recognized as 'workers' and therefore being denied protection through labour rights that workers are normally entitled to under Sri Lanka's labour laws. Menaha Kandasamy refers to the movement of women from the plantation sector into domestic work in urban and other areas and refers to this as a horizontal move and not one of upward mobility³⁰. This is

³⁰ Menaha Kandasamy, "*From Plantations to Domestic Labour: The New Form of Exploitation and Political Marginalisation of Women*", Social Scientists' Association (SSA), 2014, p.4.

due to the lack of recognition and protection for domestic workers, with tea plantation workers winning certain ‘economic and political rights after nearly a century of struggle’³¹.

At present Sri Lanka has a domestic workers union that lobbies the government for comprehensive employment protection. The formal recognition and unionization of domestic workers gives visibility to an otherwise invisible worker, with domestic work rooted in a history of discrimination and exploitation based on race, caste and class³². Domestic workers are denied social protection benefits such as Employees Provident Fund (EPF) and Employees Trust Fund (ETF), maternity leave, minimum wages and decent working conditions. The lack of legal protection and regulation leaves room for exploitation. The plight of domestic workers is illustrative not only of the discrimination that women working in the informal sector face, but of the poor status and recognition given to such work which is still seen as primarily a woman’s role.

4.6. Women’s domestic work

In Sri Lanka the labour force participation of women is 35.6%. This does not recognize or capture women’s overwhelming contribution to families by way of care work and food production. The GoSL in its 8th periodic report to the CEDAW committee highlights this issue as a major drawback. Overlooking the obvious economic and social contribution that women make as caregivers in households

³¹ *Ibid.*

³² Y.Gunaratnam, “Plight of Sri Lanka’s ‘ghost’ workers raises spectre of inequality and abuse”, *The Guardian*, 8 November 2013.

devalues the role of women in society and contributes to discriminatory and unequal treatment, including in allocation of resources. However, it also highlights the need for greater sharing of household work among men and women to ensure that women are given the choice to engage in waged labour without having to bear the bulk of household responsibilities. In reality, many women engaging in household work also take up small cottage industries or other means of ad hoc income generating activities which adds to their workload and may have consequences for their health and quality of life. Unfortunately, very little research is conducted in this regard.

5. Women's Health Rights

Women's health rights and particularly sexual and reproductive rights continue to be governed by strict cultural and religious views on the role of a woman and her virtue. In 2013 the fundamentalist *Bodu Bala Sena* (BBS) launched a campaign against organisations providing family planning services with the accusation of attempting to destroy the Buddhist race by introducing western values. The Family Planning Association (FPA) for example was forced to close down all out reach centres as a result of these threats and attacks.

The Millennium Development Goals Country Report 2014 for Sri Lanka (MDG Report) states that women in younger age groups seem to have more unmet contraceptive needs than other women, with estate and urban women having more unmet contraceptive needs than women in rural areas³³. The National Youth Survey conducted in 2013 indicated

³³ *Millennium Development Goals Country Report – Sri Lanka 2014*, United Nations, 2015, p.113.

that 35.4% of youth do not seek sexual and reproductive health services due to shame, and youth assume they cannot access these services if they are unmarried. While the MDG Report indicates a drop in adolescent pregnancies³⁴ reports in media appear to indicate a higher number of teenage pregnancies across the country that lead to girls dropping out of school. More attention needs to be paid to the phenomenon of teenage pregnancies to identify socio-economic and cultural factors that put adolescent girls at risk. For example, half of all young women in the estates drop out of school after primary level, and teenage pregnancy in the estate sector is 10% which is higher than the national average of 6.4%. This is often a vicious cycle of poverty for women in the estate sector³⁵.

Sexual and reproductive health professionals caution against the dangers of not promoting comprehensive sex education and services. Strong patriarchal beliefs prevent women from being able to negotiate safe sex with their partners. This is also reflected in Sri Lankan law where marital rape is not recognized, sending a negative message that men are entitled to sex from their wives. This is a violation of women's right to safe sexual and reproductive health which the State is obligated to promote. The National STD/HIV Control program has stated that all pregnant mothers will be tested for HIV by the end of 2015 with the objective of preventing transmission of HIV from mother to child³⁶. The doctors

³⁴ The MDG Report states that the limited data is due to data being available only for women under 20 registered with public health midwives, p.110.

³⁵ K. D'Almeida, "On Sri Lanka's tea estates, maternal health leaves a lot to be desired", *Daily Mirror*, 27 September 2014

³⁶ R.L. Jayakody, "All pregnant women to be tested for HIV by 2015", *Ceylon Today*, 24 June 2014.

acknowledge that pregnant women had contracted the virus through their husbands. It is disheartening to note that the welfare of the woman, and her health and safety is not a priority and little effort is made to improve women's sexual and reproductive health, despite evidence as to the risk involved.

The situation of women's health in the estate sector is comparatively worse compared to the rest of the country. The malnutrition rate for women of reproductive age is 33% for women estate workers, much higher than the national average of 16%³⁷. This is often due to the tiring and long hours of work where women do not prioritise their own health needs, and in case of pregnancies almost all women will work till the seventh or eighth month. As indicated above, estate workers also appear to have less knowledge and access to sexual and reproductive health services.

Abortion continues to be criminalized even in cases of rape and incest in violation of CEDAW. The Family Health Bureau reports that septic abortion is the third highest cause for maternal death at 13%. This is because women are reluctant to seek medical assistance due to fear of being prosecuted for abortion³⁸. Laws based on strong religious and cultural views not only deprive women from making decisions about their reproductive health, it also deters them from seeking lifesaving assistance. While the National Action Plan for the Protection and Promotion of Human Rights 2011-2016

³⁷K. D'Almeida, "On Sri Lanka's tea estates, maternal health leaves a lot to be desired", *Daily Mirror*, 27 September 2014

³⁸ *Country Profile on Universal Access to Sexual and Reproductive Health: Sri Lanka*, Women and Media Collective, 2015 p.6

identified actions to reform the law to allow for abortion in select circumstances such as rape, incest and foetal abnormalities, religious groups disapproved and no further action has been taken to attempt to reform this law.

6. Women's Political Rights

Not only is women's political representation in Sri Lanka the lowest in South Asia, it is the only South Asian country that does not provide for affirmative action to increase women's political representation, despite producing the world's first woman head of state. Women's rights activists have lobbied for many years to increase women's representation in local government, provincial councils and parliament but with little success. At national and provincial level women's representation is 6% and lowest at local government at 1.8%. Chulani Kodikara elaborates on the reasons for this and identifies two contributory factors³⁹. She argues that the principal factor is a lack of commitment to substantive equality in favour of formal equality that is gender neutral. The second is the absence of certain factors that put pressure on the State and includes the lack of the 'State's desire to project modernity through higher levels of women's political representation, a domestic women's movement with sufficient political traction to influence the state and political society., and susceptibility to international pressure during a transition from war to peace that can precipitate a change in the political architecture which expands women's political representation'⁴⁰

³⁹ Chulani Kodikara, "A Quota for Women in Local Government in Sri Lanka: Questions of Equality, Modernity and Political leverage", *ICES WORKING PAPER NO.05*, July 2014, p.1

⁴⁰ *Ibid.*

Across party lines, women form the backbone of political parties and many parties have a women's wing. However, women are not represented in higher leadership positions and lack the extensive patronage network that is required to win an election. Kodikara points out Maithreepala Sirisena stating it very clearly 'today most people who apply for nominations, they have not built their profile within their communities as politicians. If you think of this as a social problem, yes then we all have the responsibility to address that problem. We are not against a quota, but a quota will not resolve the problem'⁴¹. This is true to a large extent with political parties being the main stumbling block to women's political representation. Political parties lack the will to mentor and profile more women within the party and this is precisely why a formal equality approach will not help women. Furthermore, the state is committed to take affirmative action to promote women's leadership in political bodies.

7. Post-War Rights Violations of Women in Northern Sri Lanka

7.1. Challenges facing women heads of households

Women heads of household constitute 23% of all households in Sri Lanka. Unfortunately there is no policy framework in place at present to identify and support their needs in a systematic manner. Women heads of households in the North and East face additional challenges compared to rest of the country due to post-war recovery efforts being slow to address economic and social issues. Militarization has replaced and taken over livelihood opportunities

⁴¹ *Ibid.*, p.10

available to women in the North, for example the use of military machinery replacing women's labour during harvest season. Similarly, the military control and run large scale vegetable cultivation farms where women in the North are hired as cheap labour and military are able to market their produce at a much lower price than local women who cultivate vegetables in their home gardens or small farms. Similarly due to the loss of breadwinners and additional burden women heads of households in the North face the problem of acute debt to manage day to day needs.

Article 27 (2)(c) of the Constitution states that the State is pledged to establish in Sri Lanka a democratic socialist society, the objectives of which include the 'realization by all citizens of adequate standard of living for themselves and their families, including adequate food, clothing and housing, the continuous improvement of living conditions and the full enjoyment of leisure and social and cultural opportunities'. Read with Article 12 (4) 'nothing in this Article shall prevent special provision being made, by law, subordinate legislation or executive action, for the advancement of women, children or disabled' it appears to be an imperative of the state to provide for the immediate and long term needs of women heads of households, especially those recovering from war.

Beside the issues of lack of viable livelihoods, safe and adequate housing and protection, women heads of households in the North and East face barriers in the transfer and ownership of land title. This is due to the death or disappearance of male family members. Ninety percent of land in the North belong to the state and land use is governed

by permits and grants. The Land Development Ordinance and the Land Grants Law⁴², the main body of law governing state land, is essentially discriminatory towards women through its preference to male heirs⁴³. State practice has also discriminated against women, where government officials prefer to grant land in the name of the man. In the case of a husband and wife, if the wife is not nominated by her husband to succeed to the property, despite being able to continue in possession she will not have any power to dispose of the land or nominate her own successor and will lose the land if she remarries⁴⁴. This has effectively barred women from being able to transfer permits and grants in their own name. In the event of death and disappearance the GoSL made provisions for registering of death through a temporary provision⁴⁵ where the reason for death is 'missing for more than a year and believed to be dead'. For many women whose husbands have been disappeared this is not an acceptable solution as they believe their husbands to be alive or fear that investigations will stop if they obtain a death certificate and they will never know what actually happened⁴⁶.

7.2. Increased prevalence of sexual violence

The issue of security for women and children in the North has been highlighted as a major concern by many human

⁴² Section 10, Land Grants (Special Provisions) Act No. 43 of 1979

⁴³ Third Schedule, Land Development Ordinance No. 19 of 1935

⁴⁴ Section 16 (1)(h), Land Development Ordinance No. 19 of 1935

⁴⁵ The Registration of Deaths (Temporary Provision) Act No. 19 of 2010.

⁴⁶ M.H.Mohammed Hassan Rushdy et al, "Land issues affecting female-headed households of victims of enforced disappearances, in the districts of Kilinochchi and Mullaitivu", *LST Review*, Volume 25, Issue 325 & 326 (November & December 2014), p.69.

rights groups. Several reports⁴⁷ have documented and revealed a high prevalence of sexual violence affecting women in the North. These incidents have been attributed to the high number of military stationed in the North estimated at 160,000, and increased militarization of socio-economic life which forces women to engage with the military for basic services and needs for transactional sex. The report on sexual violence and torture by Yasmin Sooka alleges incidents of sexual violence in rehabilitation camps of former LTTE cadres, and incidents of abductions, torture and rape of women suspected to have some connection to the LTTE⁴⁸. The Report goes on to state that the evidence 'is consistent with a practice of rape and sexual violence that has become institutionalized and entrenched in the Sri Lankan Security forces'⁴⁹.

Many families that have been resettled in isolated areas face continuous sexual harassment from security forces. The establishment of villages of women heads of households has been heavily criticized by civil society and development practitioners as contributing to further marginalization and discrimination⁵⁰. These villages are isolated and do not have basic infrastructure such as roads and transport facilities. This social isolation also leads to lack of awareness and

⁴⁷ UN Panel of Experts Report, 2011; Human Rights Watch Report on Sexual Violence, 2013

⁴⁸ Yasmin Sooka, *An Unfinished War: Torture and Sexual Violence in Sri Lanka 2009-2014*, The Bar Human Rights Committee of England and Wales (BHRC), March 2014

⁴⁹ *Ibid.*, p.37

⁵⁰ For example the villages of Konavil, Anaivillinthan, Veddikaadu, Shanthipuram in the Kilinochchi District (information from 2013)

access to information that may help them. Women heads of households are sometimes also deprived access to contraception which increases their risk to disease and unplanned pregnancies, adding to their existing burden. Accessing government information and services in Tamil language is also a challenge and may prevent women from seeking out assistance.

7.3. Challenges to women human rights defenders in the North

A key incident in 2014 affecting the rights of women in the North was the arrest and detention of Jeyakumari Balendran. Jeyakumari was actively engaged in the movement against enforced disappearances. Her son was disappeared after surrendering to the Sri Lanka Army in 2009. She was suspected for harbouring a suspect and arrested in March 2014. She was held under the Prevention of Terrorism Act for nearly a year. This highlighted the issue of women human rights defenders, particularly those living in the North and East. Jeyakumari was subsequently released in March 2015 after much public agitation and a special appeal to President Maithreepala Sirisena from her 13 - year - old daughter Vibooshika.

8. Gender Based Violence (GBV)

Over the years, a disturbing increase of incidents of gender based violence has been observed. This includes the Kahawatte murders, increasing incidents of sexual abuse and rape of women and girls. Despite provisions in the Penal Code that criminalize sexual abuse and rape, the rate of prosecution is extremely slow and discourages many women from reporting the violation. The Report of the Opposition

Commission on Violence Against Women released in 2014⁵¹ states that 96.5% of rapists receive no legal reprisal. Therefore while very few cases of rape are reported, only a fraction of survivors that report receive any justice. Many reports indicate that perpetrators are able to escape police custody through connections, and perpetrators include male family members, security force personnel and men in positions of power such as school teachers, principals and employers.

8.1. Domestic violence

Even after 10 years, the Prevention of Domestic Violence Act (PDVA) is still perceived as a dangerous and powerful law that has the power to remove the breadwinner⁵² from the house despite it being a neutral law that provides for relief for any member of the family experiencing violence. This perception is fed by the belief that the wife is subordinate to the husband, and therefore should tolerate any situation in the best interest of the family and children. In many instances the police are reluctant to file action against husbands under the PDVA. Lawyers report that the situation has improved to some extent but have noted that when husbands fail to appear in court, Magistrates are reluctant to proceed even though the law provides for an ex parte inquiry. This leads to delays when the man in question continues to evade court. Furthermore, after a protection order has been issued, there is no mechanism to monitor

⁵¹ *Report of the Leader of the Opposition on the Prevention of Violence Against Women and the Girl Child*, December 2014, p.19

⁵² Statement by Women Police officer at a meeting of Anuradhapura Government officials, May 2015

implementation. For example in situations where the husband fails to comply with the protection order, little or no action is taken by the police. There is also no system in place to gather data on domestic violence cases filed under the PDVA, however a study conducted by the International Centre for Ethnic Studies (ICES) revealed up to 94,000 cases of domestic violence reported to the Police Children and Women's Desk island-wide in 2009 with only 55 cases filed by the police under the PDVA⁵³.

8.2. Rape

It has been reported that rape is the most prevalent form of violence against women in South Asia⁵⁴ and in Sri Lanka 38.9% of men who reported having raped a woman had committed the crime for the first time before the age of 19. During the first eight months of 2014 police recorded 1046 cases of rape and sexual abuse, and 788 of those cases involved girls below the age of 16 years, and these were attributed to 'love affairs'⁵⁵. This highlights a long standing issue of statutory rape and also highlights the gap in effective sexual and reproductive health information and services for adolescents. From a rights perspective this is a situation of statutory rape and more awareness is needed among the general public to prevent this violation. It also highlights the contradiction in society where women who engage in premarital sex are always stigmatized and young men or men

⁵³ Chulani Kodikara with Thiagi Piyadasa, *Domestic Violence Intervention Services in Sri Lanka*, ICES, 2012

⁵⁴ Jennifer L. Solotaroff and Rohini Prabha Pande, *Violence against Women and Girls : Lessons from South Asia*. World Bank Group, Washington, DC, 2014.

⁵⁵ Premalal Wijeratne, *Mambima*, 5 October 2014, p.2

who engage in what is argued to be consensual sex with a minor, are protected by way of suspended sentences. This nature of rationalizing the consequence of adolescent relationships is of little value when no measures are being taken to prevent the situation through appropriate and comprehensive sexual and reproductive health education, information and services.

The Report of the Opposition Commission highlights the critical issue of sexual violence by politicians and the impunity of perpetrators who are aligned with politicians. In 2014 Member of Parliament, Rosie Senanayake⁵⁶ highlighted that 15 politicians stand accused of rape and challenged the government as to why no action had been taken. In March 2014 the Chairman of the Weligama Pradeshiya Sabha was accused of attempting to rape a Swedish woman at Palana, Welligama⁵⁷ and meanwhile in July 2014 former Tangalle Pradeshiya Sabha Chairman Sampath Chandrapushpa Vidana Pathirana and three others were found guilty of the murder of British tourist and the rape of his Russian girlfriend in December 2011.

A major obstacle for justice to survivors of rape is the long delays in prosecution and conclusion of the trial. One such example is the case of 22 - year - old Chamila Dissanayake, a garment worker from Moneragala who was raped and murdered in the Negombo General Hospital by a doctor, Indika Sudarshana Balage in November 2007. The accused was found guilty at a Trial-at-Bar that concluded in

⁵⁶ S. Indrajith, “Women’s Affairs Minister says preventing rape not his business”, *The Island*, 11 April 2014

⁵⁷ *Lankadeepa*, 24 March 2014

September 2014, seven years after the incident. In addition to the inordinate delays, the survivor has to undergo several traumatic experiences due to discrepancies in procedural aspects of the law. This includes insensitive criminal procedure practices that require some survivors of rape to physically point out and touch the accused in an identification parade to aggressive cross examination by the defense where a woman's past sexual history is probed. There is also much room for improvement in the gathering and processing of evidence and the government has taken steps to improve this situation through trainings and preparation of standard operating procedures for police.

8.3. Sexual harassment

Sexual harassment in public places and workplaces continued to be reported during the year in review. Sexual harassment is often difficult to prove due to the situations in which it takes place, often in isolated places between people with unequal power relationships. For example in 2011 while police received 2600 complaints of sexual harassment, only 226 persons were convicted. A survey conducted in 2011 by the Legal Aid Commission found that 70% of women experienced sexual harassment while using public transport. An incident that received wide publicity in 2014 is the incident of sexual harassment in Wariyapola. Thilini Amalka provoked by a man, responded by hitting him. This went viral via a youtube video and received mixed reactions from the public. Many were quick to find fault with Thilini for taking the law into her own hands and assaulting the perpetrator with no comment being made on the behavior of the perpetrator that provoked her. However, it highlighted the problem of sexual harassment and challenges women face when they react or report harassment even to the police,

and since that incident many youth have initiated campaigns to raise the issue of sexual harassment, calling on men to prevent such incidents. At the time of writing the perpetrator in question was found guilty and sentenced to prison for six months under section 345 of the Penal Code and ordered to pay Rs.25,000 to each of the women⁵⁸ (a friend was also with her at the time of the incident).

A new phenomenon is sexual harassment through electronic and social media, mainly facebook, emails and mobile phones. It is fairly common to find facebook pages containing pictures of school girls and women, which appear to be taken without their knowledge. There were also incidents of three school girls committing suicide⁵⁹ due to their pictures being circulated through mobile phones or facebook by their boyfriends. In rural areas, missed calls have been reported to be one reason for increased suspicion among couples. While it is possible to use existing penal code provisions to prosecute these crimes, it will require the willingness and support of the judiciary to identify and understand the demands of emerging technology related crimes.

8.4. Discriminatory provisions in Law

At the time of writing in a decided case the Supreme Court⁶⁰ declared the third schedule of the Land Development

⁵⁸ C. Wijeyesinghe, "I suffered mental trauma: Wariyapola girl", *Daily Mirror*, 8 September 2015.

⁵⁹ Dr. Prathiba Mahanamaheva, "School girl ends life over Facebook photo", *Daily News*, 2 February 2014; "Dilemma in disciplining students in Sri Lankan schools", *Daily Mirror*, 1 March 2014.

⁶⁰ SCAppeal No. 125/2010, p.8 and 9.

Ordinance to be in violation of Article 12 of the Constitution of the Democratic Socialist Republic of Sri Lanka. The court also stated that it would be desirable to consider joint permit-holders in situations where the family of the permit holder also helps develop the land, and recognized that this would help maintain cordiality in the family after the death of the permit holder. Unfortunately the Supreme Court does not have authority for judicial review of legislation and the Parliament would need to introduce legislation to amend this discriminatory provision.

Several women's rights groups and the CEDAW Committee have urged the GoSL to amend certain provisions governing Muslim Personal Law. The Muslim Women's Research and Action Front (MWRAF) has made several key recommendations to the amendment of the Muslim Marriage and Divorce Act of 1951 (MMDA)⁶¹. Recommendations include making it mandatory to include details of *Kaikull*⁶² in the marriage register; the wife to be paid compensation where a wife makes an application for divorce on the ground of the husband's fault; women to be appointed as registrars of Muslim marriages and the appointment of women as Quazi and as members of the Board of Quazi that administer justice under the MMDA.

⁶¹ Faizun Zackariya and Chulani Kodikara, *Women Claiming Rights and Spaces, Activism to Reform Muslim Personal Law in Sri Lanka*, MWRAF 2014.

⁶² A custom in Muslim marriages where gifts are given to the groom by the bride's parents for the benefit of the bride.

8.5. Media

The ethical reporting of incidents of violence against women and children in media is a problem. A recent study by CARE International⁶³ has found that media tends to cover more incidents of sexual and physical violence compared to cultural and socio-economic or emotional violence. It also found that more information is provided about the victim than the perpetrator and the source of information is usually the police or criminal justice personnel, and very rarely involves experts in the field or advocates of the victim. Therefore reporting is limited to facts instead of pursuing a more investigative piece.

9. Conclusion

An overview of the status of women's rights in 2014 indicates little improvement in the critical issues that have been barriers to women's equality and empowerment for several decades. As discussed, the State appears to favour formal equality which falls short of the substantive equality envisaged through CEDAW. This is unfortunate as the notion of formal equality does not acknowledge structural inequalities between women and men.

For example, the understanding of economic rights should begin with addressing gender norms and discriminatory practices that discourage women's active engagement in economic life and devalue women's social and reproductive work. Political parties need to be cognizant that in reality politics is very much a male dominated field and has been for centuries. Substantive equality is also necessary to address

⁶³Inoka Priyadarshani & Jayandra Seneviratne, *The tip of a dark iceberg*, CARE International, August 2015

the issue of horizontal inequalities. For example rural women and estate women appear to be more disadvantaged than urban women. Similarly women in the informal sector lack the social protection that women engaged within the formal sector enjoy. A clear policy framework and action plan is essential to address the immediate and long term needs of women heads of households. This would ideally include national, provincial and local government coming together to address critical issues that have been raised for decades, such as the amendment to the third schedule of the Land Development Ordinance for example.

Cultural and religious beliefs and norms continue to dominate and frame violence against women and sexual and reproductive health rights. Emerging technologies have made it easier to violate rights and this is a growing threat to the rights of women and girls. Any improvements to strengthen the rights framework will need to take into consideration ways to influence attitudes and behavior, and in doing so build up a strong public voice that calls for positive substantive equality.

HUMAN RIGHTS AND DEVELOPMENT

*Shashika Bandara and Vishakha Wijenayake**

1. Introduction

The year 2014 marked the five-year anniversary since the end of the armed-conflict in Sri Lanka. The debate on post-war reconciliation, continued to occupy center stage of Sri Lanka's human rights discourse. While such dialogue is not only pertinent but also necessary, the State has seized the 'post-conflict' era as an opportunity to focus on economic development, at times to the detriment of the protection of human rights. This chapter considers the idea of development that is being promoted by the State and analyses it from a human rights optic. The objective of this analysis is to argue for the use human rights as a vehicle to achieving a more holistic form of development.

In this context, firstly the chapter presents an overview of the development agenda carried out by the government and

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highlights certain issues that have arisen in relation to such ventures. Secondly, a conceptual overview lends modest grounding to the vast literature on development while drawing inter-connections between the discourses of development and human rights. Thirdly, the chapter analyzes the manner in which such normative concepts have been enshrined and implemented in the constitutional and legislative structures in Sri Lanka with a special focus on how violations can be legally redressed in a domestic setting. Finally, the chapter provides recommendations on integrating a human rights centric approach to development in Sri Lanka.

2. An Overview of the Development Agenda of Sri Lanka 2014

Sri Lanka's development trajectory in 2014 cannot be divorced from its post-independence economic and welfare structure. At the time of independence Sri Lanka had adopted an approach of a welfare state, which provided services such as health and education and basic necessities such as food for those who needed such support.¹ However, the country's economy was not adequate to accommodate the increasing workforce and therefore engendering unemployment.² The post-1977 liberalization of the Sri Lankan economy saw a shift from an emphasis on a welfare policy based on subsidies, to one which is essentially market driven.³ By mid-1980's malnutrition and income inequality had increased, despite the improvements in macroeconomic

¹ Arjun Sengupta, Archana Negi, Moushumi Basu, *Reflections on the Right to Development*, Center for Development and Human Rights, p. 160.

² *Ibid*, p. 164.

³ *Ibid*, p. 172.

growth.⁴ The *Samurdhi* program was introduced, combining programs such as *Janasaviya* and food stamps program to remedy this crisis by attempting to reduce poverty through the increase of the income earning capacity of its beneficiaries.⁵

Furthermore, the post-independence Sri Lankan economy has faced internal strife, two of them taking place in 1971 and 1987-1989 led by youth who were unsatisfied due to frustrations caused by unemployment and economic hardships. The armed conflict that lasted from 1983 till 2009, had a longer lasting effect on the Sri Lankan economy as a whole, and adversely affected the development of the Northern and Eastern provinces for almost three decades.⁶ Economists surmised that an end to the armed conflict in Sri Lanka would result in a surge in economic activity and development. Five years from the end of the war, it is relevant to consider whether the development plans that were put into action have delivered its fruits to all stakeholders concerned; especially whether it has done so in a manner that ensures and safeguards their human rights.

In post-war Sri Lanka, development has been championed as a channel towards gaining reconciliation. It has been argued that this ‘development highway’⁷ or the fast track to peace via development, has neglected ethnic minorities while visible and macro scale development may have been

⁴ *Ibid*, p. 176.

⁵ *Ibid*.

⁶ *Ibid*, 179.

⁷ Sumith Chaaminda, ‘*Fishing in turbulent waters*’, ICES Working Paper Series, p. 4.

successfully achieved.⁸ This, as the chapter will explore more in depth, is a reflection of the adoption of a narrow understanding of development, which does not give prominence to the significance of participation of all communities and stakeholders in the development process. During the final stages of the war efforts, the government introduced two development projects, namely, *uthuru wasanthaya* (Northern Summer) and *nagenahira navodaya* (Dawn of the East) which aimed at achieving social reconciliation through economic development.⁹ The agenda of the government seemed to be based on the assumption that uplifting the economic standards of ethnic minorities would curb the re-emergence of conflict. However, it is debatable whether the benefits of economic development thus envisioned has trickled down to those who were directly affected by the conflict.¹⁰

In 2010, the government under Mahinda Rajapakse unveiled the ‘five hubs + tourism’ plan in which Sri Lanka planned to utilize the hub concept as revenue streams and to increase visibility for Foreign Direct Investments (FDI). The five hubs consist of Maritime, Commercial, Knowledge, Aviation and Energy, in addition to tourism essentially making it six hubs. Ajit Nivaad Cabraal the head of Central Bank in 2014 (at this time) described the six strategies at a discussion on the effectiveness of the hub concept:¹¹ These strategies included investment; resettlement; heavy government investment,

⁸ *Ibid.*, p. 4.

⁹ *Ibid.*, p. 6.

¹⁰ *Ibid.*

¹¹ Cheranka Mendis, “Five Hubs: Fiction or Reality”, *Daily FT*, 28 February 2014.

resettlement, rehabilitation; and countering political forces that critique the government's agenda. The strategy focused on bolstering the infrastructure framework; beautification of cities, and creating a paradise like environment through mega development and tourism projects. The development of human capital was largely ignored in this approach in addition to the lack of inclusive approaches to development.

Sri Lanka boasts of a high quality of life on modest per capita income.¹² The UNDP Human Development Report 2014 on Sri Lanka indicates long-term progress in three basic dimensions of human development: a long and healthy life; access to knowledge; and a decent standard of living.¹³ This is based on Sri Lanka's impressive investments in the social sectors, on free health care, universal free education and subsidized food.¹⁴ However, the Human Development Index (HDI) masks inequality in the distribution of human development across the population at the country level. For example, as per the 2014 UNDP Report, "Sri Lanka's HDI for 2013 is 0.750. However, when the value is discounted for inequality, the HDI falls to 0.643, a loss of 14.3 percent due to inequality in the distribution of the dimension indices."¹⁵ Furthermore, the household survey data of the conflict-affected region has an inherent weakness because

¹²Lal Jayawardena, "Understanding Reforms: 1960 -2000", in *Economic Policy in Sri Lanka: Issues and Debates*, Saman Kelegama, Sage Publications (2004).

¹³ 'Sri Lanka: HDI values and rank changes in the 2014 Human Development Report', United Nations Development Program, 2014. http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/LKA.pdf

¹⁴ Understanding Reforms, p. 98.

¹⁵ Sri Lanka: HDI values and rank changes in the 2014 Human Development Report.

it covers only households and not families who continue to live in displacement, that are arguably the most deprived with regard to access to resources and essential services.¹⁶

According to the 2014 budget speech, Sri Lanka's poverty level is 6.4 per cent — meaning, that 6.4 per cent of the total population of about 20 million live below the official poverty line (OPL), showing a reduction in poverty rates.¹⁷ Yet, the highly unequal distribution of the Gross Domestic Product (GDP) among the provinces points towards regional poverty and inequality, with the Western Province taking almost half of the national GDP. The primary reason for the low GDP is the type of employment. The earnings in terms of wages, according to the government labour force survey (2012), are the lowest in the agriculture sector.¹⁸ It is also noted that as a result of the drought conditions that prevailed in both 2013/14 *Maha* and 2014 *Yala* seasons, paddy production in 2014 is expected to decline by 23 per cent to 3.54 million metric tons, which would be the lowest paddy output in the last seven years.¹⁹ However, the Central Bank Report of Sri Lanka notes that the Agriculture sector recorded a growth of 3.1 per cent during the first half of 2014. Yet, what the report does not note is that in villages in the North Central Province (NCP) approximately 400,000,

¹⁶ Sarvananthan, Muttukrishna. *The Economy of the Conflict Region: From Economic Embargo to Economic Repression*, Point Pedro: Point Pedro Institute of Development, (2008), at P. 45.

¹⁷ 'Poverty Free Sri Lanka by 2015 – Is it a dream or reality?', *The Sunday Times*, September 14, 2014.

¹⁸ *Ibid*; 'District poverty lines' Department of Census and Statistics, accessed at http://www.statistics.gov.lk/poverty/monthly_poverty/index.htm.

¹⁹ Annual Report, Central Bank of Sri Lanka (2014).

mostly adults involved in farming, have been affected by and around 22,000 people have died due to a chronic kidney disease of unknown etiology. This situation suggests an unequal distribution of healthcare services which affects other aspects such as education and food security.²⁰

In addition to the above, there have been certain other alarming trends that have manifested themselves in relation to the development practice in Sri Lanka in the post war era. One is the heavy military involvement in all development related activities. The functions that were ordinarily carried out by the Urban Development Authority (UDA) were transferred to the Ministry of Defense such as in the case of alienation of property. In 2014, the military had a constant presence not only in the previously war affected areas but also in Colombo and was seen undertaking many of the tasks more commonly associated with a municipality.²¹ The nexus between big businesses, government and the military made it difficult for ordinary citizens to challenge the lack of due process, especially in the war-affected regions due to intimidation tactics that followed such challenges.²²

Furthermore, the use of public and private property for development projects without complying with a stipulated procedure is evident and has been well documented.²³ The

²⁰ 'Silent Killer', *LST Blog – Chapter III, 9 June 2014*.

²¹ Iromi Perera, Luvie Ganeshathasan, Thyagi Ruwanpathirana, *Forced Evictions in Colombo: the ugly side of beautification*, Center for Policy Alternatives, 2014, p. 11.

²² *Ibid.*

²³ *Ibid.*, 'Land in the Northern Province: Post-War Politics, Policy and Practices', Bhavani Fonseka and Mirak Raheem, Center for Policy Alternatives, December 2011.

benefactors of these transactions often tend to be big businesses or foreign investors whether public or private. Submissions to Human Rights Council notes that the government of Sri Lanka's push for "development" is playing out in the form of forcible acquisition of land by State and private actors, including foreign corporations, displacing thousands of vulnerable people across the island. These actions undermine efforts towards reconciliation and recovery as they alienate, marginalize and disenfranchise communities of farmers and fisher-folk.²⁴

3. Incorporating Human Rights into Development Practice

The Office of the United Nations High Commissioner for Human Rights acknowledges that poverty is the gravest human rights challenge facing the world today.²⁵ A human rights-sensitive understanding of development not only facilitates a more effective and equitable response to the multiple dimensions of poverty but it also complements the traditional outlook to development and poverty reduction by looking not just at resources, but also at the capabilities, choices, security and power needed for the enjoyment of an adequate standard of living and of other fundamental civil, cultural, economic, political and social rights.²⁶

²⁴ 'Written statement submitted by the Asian Forum for Human Rights and Development, a non-governmental organization in special consultative status' A/HRC/28/NGO/120, 25 February 2015.

²⁵ 'Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies', Office of United Nations Commissioner for Human Rights, HR/PUB/06/12, page 1.

²⁶ *Ibid.*

This segment evaluates the conceptual linkages between such development policies as practiced and the newly developing discourse on development while outlining the confluences of such practices and the field of human rights. Firstly, the authors delve into the notion of human development as an integral component of development practice. Secondly, the contours of the right to development are traced. Thirdly, in light of the Sri Lankan context, the authors analyze the extent to which transitional justice is achieved a human rights centric approach to development.

3.1 Human development

According to the UNDP, human development pertains not merely to economic growth, but to the expansion of people's freedoms to live their lives as they choose.²⁷ One of the underlying motivations for introducing the concept of human development was to overcome the tendency to regard development in purely economic or utilitarian terms, and to appreciate the general purpose of economics in terms of increasing human well-being.²⁸

Amartya Sen, a Nobel Laureate in Economic Science, notes that development can be seen as a process of expanding the actual freedoms that people enjoy. He contrasts the view of development as human freedoms with narrower views of development, such as identifying development with the growth of gross national product, or with the rise in personal

²⁷ *Human Development Report: Overcoming Barriers – Human Mobility and Development*, United Nations Development Programme, 2009, at p.14.

²⁸ De Greiff, "Articulating the Links Between Transitional Justice and Development: Justice and Social Integration", In *Transitional Justice and Development: Making Connections* (Greiff & Duthie, ITCJ publication 2009) at p.48.

incomes.²⁹ Likewise, the Sarkozy Commission, chaired by Joseph Stiglitz, Amartya Sen and Jean Paul Fitoussi states that there is a need to shift emphasis to measuring people's wellbeing, taking into account (a) Material living standards (income, consumption and wealth); (b) health; (c) education; (d) political voice and governance; (e) social connections and relationships; (f) environment (present and future conditions); and (g) insecurity, of an economic as well as physical nature.³⁰

The importance of maintaining such an approach is that if human rights ideals are not explicit, they tend to be forgotten or compromised in macro-economic calculi that are used in measuring economic development. Such disregard for human rights is exacerbated by the gulf that exists between development practitioners and human rights advocates and scholars. Moreover, human rights standards tend to be more long term and progressive and can bring more demanding requirements in the business of development.

3.2. Right to development

The Declaration on the Right to Development is framed with the understanding of a holistic approach to 'development' that considers it a comprehensive economic, social, cultural and political process.³¹ The focus is on the continuous

²⁹ Amartya Sen, *Development as Freedom* (1999) at p.3.

³⁰ Joseph E. Stiglitz, Amartya Sen & Jean Paul Fitoussi, 'Report by the Commission on the Measurement of Economic Performance and Social Progress' (2009), at p.14.

³¹ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, preamble.

improvement of the well being of all, commensurate to their free and meaningful participation in development. It also enshrines a Rawlsian notion that the benefits of development should be subject to fair distribution.³² Under this inalienable human right to development, individuals are given the entitlements to firstly participate, contribute and enjoy the fruits of development.³³ Secondly, such entitlement extends to all aspects of social, economic, political and cultural development. Thirdly, the methodology that aims to achieve this is through the existing human rights framework, which places the individual at the center, both as a participant and as a beneficiary of development.³⁴

The Declaration also highlights that such entitlements carry a corollary responsibility to individually and collectively respect human rights and freedoms, as well as a resultant duty to the community to ensure the free and complete fulfillment of the human being.³⁵ Therefore, each individual has a duty to promote and protect an appropriate political, social and economic order for development. The States have an obligation to formulate national development policies based on the idea of development that is to be achieved under this Declaration.³⁶ Likewise, while both individuals and the state jointly hold responsibilities, the framework assigns primary responsibility to the states; Responsibilities are assigned to states both when operating in their domestic spheres and when interacting with other states in the international community.³⁷

³² *Ibid.*

³³ *Ibid.*, Article 1.

³⁴ *Ibid.*, Article 2.

³⁵ *Ibid.*, Article 2 (2).

³⁶ *Ibid.*, Article 2(3).

³⁷ *Ibid.*, Article 3.

An interdependent approach to social, cultural and economic rights as well as civil and political rights is important in the achievement of development and a failure to observe any or both these types of rights may act as an obstacle to achieving development.³⁸ Furthermore, the Declaration adopts a vision of development that is participatory, not only in terms of providing equal opportunity to access all rights but also opportunity to be involved in all spheres in defining the scope of such rights within development policy.³⁹ It adds a missing element to present activities by enhancing the enabling environment for equitable development, and by empowering people to take their own decisions. The Declaration on the Right to Development highlights participation; non-discrimination; transparency; and accountability⁴⁰ as being integral to a process through which individuals can seek empowerment.

3.3 Development in a post-war society

In 2014, the international community increased pressure on Sri Lanka through the Human Rights Council to ensure accountability with regard to incidents that took place in the final stages of the war. Given that Sri Lanka is a transitional society, it is important to take into account the special concerns of a post-war society, in addition to the general elements taken into consideration in appraising the right to development. It is not only the case that discrimination results in development deficits that cause

³⁸ *Ibid.*, Article 6.

³⁹ *Ibid.*, Article 8.

⁴⁰ Dan Seymour, “Integrating human rights and equality: a development agenda for the future”, In *The Millennium Development Goals and Human Rights: Past Present and Future* (Langford, Summer & Yamin, 2015) at p. 412.

human rights violations and violence but at the same time, massive human rights violations frequently lead to development deficits. Such violations may cause poverty; deepen inequality; weaken institutions; destroy infrastructure; impoverish governance; increase insecurity; and deplete social capital.⁴¹ In addition to the direct impact of the war, such as loss of life, injuries, destruction of property and the breakdown of social order, the loss of cultivation has had a direct impact on poverty. For instance, destitution, loss of food and economic problems are indirect forms of mental distress that have directly affected both the Tamil and Sinhala populations.⁴²

Furthermore, there is a risk of a dependency syndrome emerging out of humanitarian efforts. In the Sri Lankan experience, years of giving and receiving have diminished the capacity of communities to take initiative and be industrious in re-building their lives, thereby producing an ethos of learned helplessness. To compound these effects, an unequal distribution of wealth and power in a society often leads to the creation of ‘poverty traps’ or rather institutions that systematically favor the interests of those with more influence and perpetuate inequalities.⁴³ A human rights approach would reverse this cycle by entrenching the perception that they are individuals who can proactively take action to empower themselves rather than play the role of victims awaiting external help.⁴⁴

⁴¹ De Greiff, “Justice and Social Integration”, p.30.

⁴² Poverty and Social Conflict in Sri Lanka, CEPA (2014), p. 126.

⁴³ Indraratna, S. & Hirimuthugodage, Dilani, *Inequity, Poverty and Development*, Colombo: Sri Lanka Economic Association, (2007) at p. 34.

⁴⁴ ‘Poverty and social conflict’, p. 8.

The failure to alleviate underdevelopment and promote distributive justice in the aftermath of a political transition or armed conflict is tantamount to allowing the injustice of previous exploitation and violation to persist. In a post-war society, such as that of Sri Lanka therefore, it is pertinent to approach development as a means to a greater end of achieving transitional justice, rather than viewing development as an independent goal. In this light, certain key concepts such as restorative justice and minority protections must be evaluated.

Restorative justice draws attention to the fact that the war has put certain communities at a substantial disadvantage and suggests that in fashioning development policies, effort must be taken to restore these communities to a situation in which they would be, had they not suffered losses. Reparations may have an impact on development by facilitating social integration. Once a group of people is left outside the system or treated as marginal over a period of time, other forces develop that reinforce its marginalization. The group learns not to participate in society and others learn to exclude members of this group.⁴⁵ In such situations human rights obligations include a duty to provide remedies.⁴⁶

⁴⁵ Naomi Rogt-Arriaza, “Reparations and Development”, In *Law in Transition: Human Rights, Development and Transitional Justice* (Buchanan & Zumbansen, 2014) at 194.

⁴⁶ UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law : resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147.*

Moving beyond corrective justice, ensuring the non-recurrence of past injustices is critical. To this end, development practices must ensure that minority rights safeguards are integrated into the process. Article 5 of the Declaration of the Right to Development demands states to take resolute steps to eliminate violations of international law that are considered *jus cogens* or peremptory norms, which include all forms of racism and racial discrimination. Furthermore, the Convention on the Elimination of all Forms of Racial Discrimination sets obligations on the State to take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.⁴⁷ States are further required to ensure the adequate development and protection of racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.⁴⁸

The equality provision enshrined in Article 12 of the Constitution can be used to ensure that when the government is providing benefits and welfare to the community, it does not discriminate on the basis of race, religion, language, caste, sex etc. This is an apt provision in the context of a post-war situation where the divides between ethnic and religious background are still deep and relationships are fractured. The Constitution goes beyond formal equality in Article 12(4) in recognizing that affirmative action may be necessary in

⁴⁷ UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, Article 2(1)(c).

⁴⁸ *Ibid.* Article 2(2).

the advancement of women, children and disabled persons. It may be argued that the provision for substantive equality is restricted in its application, as it does not leave room for an expansive interpretation, which may include other groups of persons who have been historically denied access to certain rights and therefore may qualify for special treatment. It is noteworthy that the South African Constitution, which was a transitional document, specifically catered to the communities that were disadvantaged as a result of the Apartheid regime.

4. Obligations and Guarantees

Much of the international principles on development and human rights discourse do not enforce binding obligations on Sri Lanka. It is noteworthy that in the Supreme Court judgment in the *Eppawala Phosphate Mining case*,⁴⁹ the concept of sustainable development was judicially incorporated into Sri Lankan jurisprudence. Court stated that while international legal principles are not legally binding in Sri Lanka's dualist legal regime and are regarded merely as 'soft law', as a Member of the United Nations, they could hardly be ignored by Sri Lanka. However, this case is more an outlier than the norm when it comes to the application of non-binding international norms in domestic jurisdiction.

4.1. International obligations

Sri Lanka is party to treaty obligations under various human rights treaties, which impose binding international obligations on the State. Sri Lanka has ratified the

⁴⁹ *Bulankulama v. Secretary, Ministry of Industrial Development* [2000] 3 Sri. L.R. 243

International Covenant on Civil and Political Rights (ICCPR) and passed enabling legislation, namely the ICCPR Act No. 56 of 2007. Sri Lanka is also party to the International Covenant on Socio Cultural and Economic Rights. In addition to this, human rights norms that have been elevated to the standard of customary international law would be binding on the domestic legal system whether or not they has been incorporated through legislation by Parliament.

Civil and Political Rights, as set out in the ICCPR in Article 2 imposes immediate obligations on states to respect, ensure and promote human rights as set out in the Covenant. On the one hand, civil and political rights such as the freedom of expression, access to information, can empower citizens to participate fully in the development process and also understand the associated challenges. On the other hand, in the course of development activities of the State these rights may be negatively affected, such as the right to life, freedom from cruel and inhumane and degrading treatment. The state has an obligation to ensure that its development policies do not negatively affect such rights. Where Social and Economic rights are concerned, the state has a duty to achieve rights progressively.⁵⁰ Although the Covenant provides for progressive realization, it also imposes obligations with immediate effect, firstly in the undertaking to guarantee that relevant rights will be exercised without discrimination, and secondly, to take steps which in itself are not qualified or limited by other considerations. It is important in this regard

⁵⁰ International Covenant on Economic, Social and Cultural Rights, Article 2.

that a certain minimum core standard must be ensured at all times with respect to all rights.⁵¹

4.2. Governments and corporate responsibility

In all the above cases, international human rights law requires governments to ensure that individuals are protected from the harmful actions of private actors. This is vital in development processes in order to ensure that powerful companies do not violate human rights in the process of carrying out projects. International law has formulated non-binding guidelines concerning direct human rights obligations on corporations. Accordingly, as per the UN Guiding Principles on Business and Human Rights, corporate entities have obligations within their respective spheres, to use due diligence in ensuring their activities do not contribute directly or indirectly to human rights violations. Corporate Responsibility to respect human rights exists wherever companies operate and independently of states' abilities and willingness to fulfill their own human rights obligations. Therefore, they have an obligation to inform themselves of the human rights impact of their activities. Due diligence requirements include an obligation on the part of the corporation to conduct a process of internal impact risk assessment of their own activities or their business relationships. Such risk assessment should draw on internal or external human rights expertise and involve meaningful consultation with potentially affected groups and stakeholders.

⁵¹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23.

In terms of limiting corporate actions that have an adverse impact on rights, in addition to the multiple regulatory mechanisms established as the Sri Lankan courts have indicated that corporate rights are also curtailed whenever they interfere with the health of the general public. Where the Ceylon Tobacco Company challenged a regulation requiring pictorial warnings on cigarette packets, the Court of Appeal denied the tobacco company's request to delay implementation of the regulation claiming that the intellectual property rights of the company cannot override the right to health of the general public that is recognized by international obligations of Sri Lanka.⁵² This judgment is important as it accepts that rights of corporate entities are subordinate to the fundamental interests of the public.

4.3. Constitutional guarantees

Whether specifically incorporating social and economic rights or not, a constitution can act either as a mechanism which strengthens rights or one which acts as an obstacle to the realization of rights.⁵³ The Preamble of a constitution often sets the tone for the nature of the sovereignty and the mode of governance it exercises. The 1978 Constitution makes express provision for the protection of fundamental rights, which are assured to all peoples among other principles such as freedom, equality and justice.⁵⁴

⁵² *Ceylon Tobacco Co v. Minister of Health*, C.A. 336/2012, Court of Appeal (2014).

⁵³ Yash Ghai & Jill Cottrell, *The Millennium Declaration, Rights and Constitutions*, Oxford University Press, 2011 at p.69.

⁵⁴ These principles while akin to those of the Indian constitution are not so elaborated. The Indian Constitution specifies that 'justice' encompasses social, economic and political justice. However, this can be read into the notion of justice expressed in the preamble as it is invoked under a republican state which is both democratic and socialist.

Chapter VI: Directive Principles of State Policy and Fundamental Duties

These broad claims must be interpreted in light of the substantive elements of the Constitution. While not of a binding nature, the directive principles of state policy can be viewed as the most development related content of the Constitution. These principles set the tenor as to how the Parliament, the President and other branches of the government should act when enacting laws and in governance, with a view of establishing a just and free society. Therefore, this segment of the Constitution can be seen as an elaboration or a specification of the general principles flagged in the Preamble.

The objectives that the state organs must be guided by, in the process of governance, include the promotion of the welfare of the people by securing and protecting a social order in which justice (social, economic and political) guides all institutions of the national life.⁵⁵ Much of how this notion of justice has been contextualized is illustrated in the distributive and participatory approach to justice adopted by the UN bodies. It is outlined in the directive principles which specify that while private economic activity is to be enhanced, they should always be subject to larger social objectives, and to equitable distribution, which will serve the common good. Therefore, it stresses that equitable distribution entails the non-concentration of means of production or social goods in the hands of a few, whether it be state or private groups.

The participatory nature of development is embedded in fundamental duties of the individuals of a state, which are inseparable from the performance of the duties and

⁵⁵ 27(2)(b)

obligations, by the State. Such duties on the part of the citizenry include the preservation and protection of public property and combating the misuse and waste of public property. The Constitution also describes individuals as guardians who must ensure the protection of nature and the conservation of its riches. Therefore, the individual is duty-bound to act as an effective check on the actions of the government in the manner in which they utilize public property and the environment. This duty has been used to justify awarding *locus standi* to individuals in public interest litigation.⁵⁶

The Sri Lankan Constitution does not ensure the protection of socio-economic rights as justiciable and enforceable. However, these are given expression to in the Chapter VI, which calls for the realization by all citizens of an adequate standard of living for themselves and their families, including adequate food, clothing and housing, the continuous improvement of living conditions and the full enjoyment of leisure and social and cultural opportunities.⁵⁷ Furthermore, it advocates for the complete eradication of illiteracy and the assurance to all persons of the right to universal and equal access to education at all levels as well as the protection, preservation and improvement of the environment for the benefit of the community.

Chapter III: Fundamental Rights

While some may consider the fundamental rights chapter in the Sri Lankan Constitution as not being adequate for regulating development related activities, as it does not give expression to socio-economic rights, this would be only

⁵⁶ 'Judges and Environmental Law: A Handbook for the Sri Lankan Judiciary', Environmental Foundation Limited, (2009), p. 100.

⁵⁷ Article 27(2)(c), 1978 Constitution.

partially true. The fundamental rights chapter is still of significant importance in two important aspects. Firstly, socio-economic rights can be given effect through a creative interpretation of existing rights. Secondly, a human rights centered approach to development depends on a strong civil and political rights framework to ensure public participation and accountability in the development process. Many of these rights are further discussed in the following section dealing with implementation and violation of rights in the Sri Lankan context.

It is evident from the foregoing analysis that the Constitution portrays a vision of development that is in many ways comparable to those proposed by international law treaties and the soft-law instruments. Such international law analogies are further strengthened by the fact that the directive principles require states to endeavor to foster respect for international law and treaty obligations in dealings among nations.

5. Implementation and Violation of Rights: Special Focus Areas in Sri Lanka

5.1. Right to housing

Evictions: Highlighted Facts

- *Wanatammulla*: an area in Borella, which contains underserved housing, was brought to national attention in January 2014, due to eviction of the families living in the area.⁵⁸

⁵⁸ Forced evictions in Colombo: The ugly price of beautification, centre for policy Alternatives, 2014.

- Bar Association of Sri Lanka issued a statement describing the eviction as illegal. It was also asserted in the statement that the army has been used to intimidate residents.⁵⁹
- Issues raised by the residents included inadequate alternative accommodation and lack of compensation.⁶⁰
- The apparent reasons for the evictions include the high value of land (in terms of market prices) in the hands of the economically marginalized, and the need for such land to be released for the promotion of commerce and the development of ‘middle-income’ housing (with private sector involvement).⁶¹
- Brigadier Samarasinghe, who is the Project Director of the UDA’s Urban Regeneration Program, accompanied by several other UDA officials, police and demolition equipment turned up at *34 Watta* and informed the residents of imminent evictions and the destruction of their homes.⁶²
- Following the UDA attempt to demolish homes, the Court of Appeal decided to take up the case of residents from *34 Watta* in *Wanathamulla* as an urgent matter.⁶³

⁵⁹ Dave Rush, ‘Bar Association Condemns Colombo Evictions’, *The Republic Square*, 30 January 2014.

⁶⁰ CA (Writ) Application No: 283/14, 20th August 2014. (Petition by CPA on the Wanathamulla incident).

⁶¹ *Ibid*; Rasika Mendis, ‘Are the poor “lesser” stakeholders of development’, *ESCR Newsletter*, Issue 9 (May 2014) p. 1.

⁶² Dave Rush, ‘HRC inquiry into Colombo slum demolitions’, *The Republic Square*, 21 January 2014.

⁶³ ‘Court of Appeal to take up Wanathamulla eviction case as urgent matter’, *Daily FT*, 20 September 2014, p.1.

- The Center for Policy Alternatives, which has supported the application by the Wanathamulla residents, notes that these residents, and most of those who have already left due to threats of demolition, possess legal title to their houses, some even dating back to 1979.⁶⁴
- In January 2015 the Supreme Court issued an eviction notice to 577 families living in the *Apple Watta* area in *Maligawatta*, ordering their eviction before March 28. However, the court order directed the UDA to bear the cost of rent for those who live in rented houses until their permanent residencies are built.⁶⁵

Development-based evictions occur across the globe, often planned or conducted under the pretext of serving the “public good”, such as those linked to development and infrastructure projects; land-acquisition measures associated with urban renewal, slum upgrades, housing renovation, city beautification, mega development or other land-use programs.⁶⁶ The obligation of States to refrain from, and protect against, forced evictions arises from several international legal instruments that protect the human right to adequate housing and other related

⁶⁴ *Ibid.*

⁶⁵ ‘SC issues eviction notice on 577 families in Apple Watta’, *Ada Derana.lk*, 23 January 2014.

⁶⁶ ‘Basic Principles and Guidelines on Development Based Evictions and Displacement’ Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, A/HRC/4/18, p. 4.

human rights.⁶⁷ According to the Mahinda Chinthana, the election manifesto of Mahinda Rajapakse who won two presidential elections in 2005 and 2010, the government aimed to make Sri Lanka slum-free by 2020. In order to facilitate this goal the Urban Regeneration Project oversaw a number of forced evictions that have not been completely resolved to this date.

The human right to adequate housing, which is derived from the right to an adequate standard of living,⁶⁸ is of central importance for the enjoyment of all economic, social and cultural rights.⁶⁹ Adequate shelter encompasses adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost.⁷⁰ The Commission on Human Rights has also indicated that forced evictions are a gross violation of human rights.⁷¹ As per the “Urban Regeneration Project -

⁶⁷ These include the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights (art. 11, para. 1), the Convention on the Rights of the Child (art. 27, para. 3), the non-discrimination provisions found in article 14, paragraph 2 (h), of the Convention on the Elimination of All Forms of Discrimination against Women, and article 5 (e) of the International Convention on the Elimination of All Forms of Racial Discrimination.

⁶⁸ Article 11(1), IESCR.

⁶⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991.

⁷⁰ UN General Assembly, *Global Strategy for Shelter to the Year 2000: resolution / adopted by the General Assembly*, 4 February 1998, A/RES/52/191

⁷¹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions*, 20 May 1997

City of Colombo”, “Underserved Settlements” are described as “low income areas which represent different characteristics of development constrained by inadequacy or total lack of urban basic services and mostly improvised buildings with no secure land ownership”.⁷² However, as has been demonstrated in the case of the Wanatamulla evictions, those who were relocated were packed off to apartment complexes, which firstly, failed to provide adequate space as the policy disregarded the number of persons in a family, applying a blanket policy for all families concerned.⁷³ Secondly, it violated their right to work, uprooting them from the places where they conducted small and medium scale businesses.⁷⁴ Thirdly, as will be shown below, the cost was not reasonable.

In consideration of urban underserved settlements, the National Housing Policy highlights that the land these settlements are built on are of prime market value. This in itself leaves the door open to development projects taking place with the sole objective of profiteering.⁷⁵ The policy highlights the necessity of implementing an urban development planning policy framework along with an efficient land development strategy that offers incentives to private investors to obtain maximum economic benefits from urban lands for fulfilling the housing needs of the urban dwellers. More attention should also be focused on the systems for maintenance and management of the

⁷² CA (Writ) Application No: 283/14, 20th August 2014. (Petition by CPA on the Wanatamulla incident)

⁷³ *Ibid.*

⁷⁴ ‘The Ugly price of Beautification’, CPA, 2014.

⁷⁵ National Housing Policy, p. 6.

condominiums to be constructed during this process with the participation of the beneficiary communities. In the process of regenerating underserved encumbrance areas, it is mandatory to adopt a housing development approach that would ensure benefits to the slum and shanty communities living in these areas.⁷⁶ However, given the fact that private investors are unlikely to invest in housing for the low-income earners, it is the State that has taken upon the duty of providing alternative housing to those being relocated. It is doubtful whether the State has been successful in ensuring that the process benefits the poor communities in the localities.

In order to ensure that the benefits are catered towards affected communities, the State is under an obligation to ensure that the entire resettlement process is carried out with full participation by and with affected persons, groups and communities.⁷⁷ It should, in particular, take into account all alternative plans proposed by the affected persons, groups and communities.⁷⁸ In the *Galle Face Green case (Environmental Foundation Limited v. Urban Development Authority*, SC(FR) No. 47/2004, Supreme Court Minutes 23rd November 2005.) it was held that the freedom of speech and expression guaranteed in Article 14(a) of the Constitution to be meaningful and effective, must carry within its domain an implicit right of a person to secure relevant information from a public authority in respect of a matter that should be in the public domain. This is a valuable tool which would enhance the citizens' ability to meaningfully participate in

⁷⁶ *Ibid.*, p. 18.

⁷⁷ General Comment 7 on Evictions.

⁷⁸ *Ibid.*

the development process. However, with regard to Colombo evictions, the government had not served a Section 2 notice under the Land Acquisition Act in order to acquire the land in adherence to the present legal framework,⁷⁹ nor have the communities at any point been consulted in fashioning resettlement policies.

In order for genuine consent with regard to resettlement to be obtained, local government officials and neutral observers, properly identified, are required to be present during the resettlement so as to ensure that no force, violence or intimidation is involved.⁸⁰ The increased militarization of the eviction processes has generated a fear psychosis in the affected communities that prevents them from clamouring for their rights.⁸¹ It is further reported that community leaders in Wanatamulla who protested against the evictions received anonymous threatening phone calls and was abducted by unidentified men before being thrown out of a vehicle in the outskirts of Colombo.⁸²

The actor proposing and/or carrying out the resettlement must be required by law to pay for any associated costs, including all resettlement costs. Furthermore, no affected persons, groups or communities must suffer detriment as far as their human rights are concerned, nor must their right to the continuous improvement of living conditions be subject to infringement.⁸³ The Land Acquisition Act (LAA) No.9 of

⁷⁹ ‘Court of Appeal to take up Wanathamulla eviction case as urgent matter’. (N 63)

⁸⁰ General Comment No. 7.

⁸¹ ‘The Ugly price of Beautification’, CPA, 2015

⁸² *Ibid.*

1950 also requires compensation prior to displacement. In addition, a National Involuntary Resettlement Policy (NIRP) introduced in 2001, highlights principles of compensation at replacement cost, a negotiated compensation and resettlement process, assistance to recover livelihoods, and a process to voice their grievances.⁸⁴ Firstly, those who were evicted were denied compensation for lost land, structures, assets or businesses. Secondly, they were also asked to pay a significant sum of money before they are granted full ownership of their new houses.⁸⁵ Thirdly, the new houses in some cases were less spacious than the houses they were required to give up.⁸⁶

5.2. Right to Land

Land Acquisition, Displacement: Highlighted Facts

Kalpitiya: over 100 hectares of land and 14 islands in the region have been marked out as part of one of the most extensive tourism projects which strives to generate environmentally friendly sustainable tourism.⁸⁷ Many

⁸³ General Comment No. 7.

⁸⁴ Bhavani Fonseka and Dharsha Jagatheeswaran, 'Policy Brief: Politics, Policies and Practices with Land acquisitions and Related Issues in the North and East of Sri Lanka', Center for Policy Alternatives, November 2013, p. 37.

⁸⁵ 'The Ugly price of Beautification'; CPA Petition: "They would be required to make an initial payment of Rs. 50,000 with a further Rs. 50,000 to be paid within the first 3 months towards maintenance and upkeep and monthly installments of Rs. 3960 over the next 20 years for the proposed new apartments".

⁸⁶ Ugly price of Beautification; CPA 2014.

⁸⁷ Mahinda Chinthana, accessed at <http://www.president.gov.lk/pdfs/MahindaChinthanaEnglish.pdf>.

village communities who were unaware of the proposed project and the potential increase in the value of their land were deceived in land acquisitions.^{88, 89}

Uma-Oya Development Project: Classified as a multi-purpose project designed to support the industrial hub that is being designed for Hambantota, as well as to provide drinking water, hydro power, and provision of water for irrigation.¹ Funded by Iran and the Sri Lankan government the project, since the time of inception and even during 2014, the issues of displacement, resettlement, have been highlighted.

Hambantota : The main complaints consist of land loss, inadequate compensation and loss of agricultural land. Even during 2014, compensation remained a concern for the affected communities, while the harbor and the airport did not do as expected during initial estimates.

Sampur: In 2007 regulations were issued under section 5 of the public security ordinance published in Gazette Extraordinary No.1499/25 of 30th May 2007 effectively declaring the areas of land as a high security zone. Sampur's Special Economic Zone (SEZ) consists of 5,000 acres of land that required hundreds of families

⁸⁸ Vindya Buthpitiya, 'Post-War Development in Sri Lanka: Rights Responsibilities and Disjunctures', Law & Society Trust (ESCR Program), November 2013.

⁸⁹ 'Theppam', Law and Society Trust (ESCR Program' accessed at <https://vimeo.com/116041274>.

to move and relinquish their hereditary ownership. IDPs are housed in temporary relief camps in Kiliveddi, Manachchenale and Pattidal Welfare Centre.⁹⁰

Panama: Appropriation of 1220 acre land in Shastrawela, Ragamwala in Panama by the Special Task Force and the Sri Lanka Navy⁹¹ which was later used to build hotels and conference halls forced the communities out of the region.⁹²

Article 17 of the UDHR states that everyone has the right to own property alone as well as in association with others and that no one shall be arbitrarily deprived of his property. The Constitution of Sri Lanka does not recognize the right to own land as an expressed fundamental right. However, an acquisition by the state may be challenged on the ground of arbitrary action under article 12(1) of the Constitution. An acquisition can also be challenged under Article 140 of the Constitution through an application in the nature of Certiorari, Prohibition and/or Mandamus on the basis of the doctrine of *ultra vires*.

The main piece of legislation governing acquisitions of private land, the Land Acquisition Act, allows for the Government to take land for a ‘public purpose’, which has been defined in the case law to mean “public utility and

⁹⁰ ‘Big picture: putting the mega development ambitions of Sri Lanka in context’, Law and Society Trust, *The Island*, 13 August 2014.

⁹¹ ‘The Occupation of Land in Panama by Navy and Special Task Force (STF)’, People’s Alliance for Right to Land, accessed at <http://www.parlsrilanka.org/issues/tourism/item/193-the-occupation-of-land-in-panama-by-navy-and-special-task-force-stf>.

⁹² Nirmala Kannagara, ‘Panama Land grab Exposed’, *The Sunday Leader*.

benefit of the community as a whole.” In the *Waters Edge* case, the Supreme Court made a strong statement that objectives such as ‘beautification’ of an area, the creation of a few hundred jobs, the creation of a cricket ground and finally and most importantly, the ability to have the above at the expense of an investor rather than at the hands of the State do not constitute a direct benefit to the public. These are the very same arguments that are forwarded to justify urban beautification projects as well as mega development projects.

While the constitutional regime provides certain remedies to an affected landowner, appellate courts have consistently held that when the Minister of Lands declares by Gazette under the provisions of the Land Acquisitions Act that any land is required for a public purpose, it cannot be questioned in any court. This has been departed from, by the higher judiciary, wherein the Supreme Court held that the public purpose reflected in the gazette in question must be expressly stated.⁹³ As per the Tourism Authority Act No. 33 of 2008, land so acquired for a tourist development project as being a Strategic Development Project is vested in the Tourist Board, even where such land may well have been privately owned. Furthermore, the President is empowered to give outright grants of state land for such projects regardless of the fact that these state lands may have been in the occupation of citizens. In such a situation those aggrieved will be deprived of a remedy given the immunity afforded to the President’s actions.⁹⁴

⁹³ 2000(1) SLR 112 per Mark Fernando J.

⁹⁴ Jayantha de Almeida Guneratne, Kishali Pinto Jayawardena, Radika Guneratne, ‘Not This Good Earth: The Right to Land, Displaced Persons and the Law in Sri Lanka’ Law & Society Trust Publications, pp 45-46. However, the 19th Amendment to the Constitution of 2015 has amended the provisions on immunity. It is now possible to challenge the actions/omissions of the President if they violate fundamental rights.

Communities in the North and East experienced loss of personal title documents to state/private property or lands due to document destruction, arson or looting due to which were adversely affected when seeking compensation or asserting their rights with regard to government's acquisition of land in the North and East. Even those who possessed legal documents of their lands and homes that were taken over for High Security Zones (HSZ) were not provided with legal remedies.⁹⁵ This was true to those in Sampur who saw their lands being converted into a HSZ.

5.3 Right to health/water

Development and Health: Highlighted Facts

Chronic Kidney Disease of unknown Etiology: The disease which affects around 400,000 people, especially farmers in the North Central Province, has been highlighted by many as an effect of agro-chemical use.⁹⁶ As the chemical Glyphosate was pointed out by many international and national researchers as a possible cause⁹⁷, a partial ban on Glyphosate was introduced; in April 2014 such ban was placed on hold claiming that it was based on a theory that is yet to be fully proved. The high costs of medical treatment make it difficult for families to prioritize on issues such as education, nutrition.⁹⁸

⁹⁵ *Ibid*, p.13.

⁹⁶ 'Silent Killer', SLT Blog.

⁹⁷ 'Coverage: Chronic Kidney Disease' Chapter III (LST blog), May 2015.

⁹⁸ 'Silent Killer', SLT Blog.

Uma Oya: Uma Oya water supply project also affected the health of the community due to lack of access to water that arose as a result of the project. Thus, apart from irrigation issues, the right to water was also violated.

Chunnakam: The Northern Power Plant operating inside the Ceylon Electricity Board (CEB) premises in Chunnakam, allegedly releases waste oil contaminating the underground water springs in the region.⁹⁹ This is said to have affected over ten thousand families in the area.¹⁰⁰ The residents of the area have been advised against using water for their basic daily activities such as washing, bathing, and cooking.¹⁰¹

According to the International Covenant on Economic, Social and Cultural Rights, everyone has the right to the highest attainable standard of physical and mental health.¹⁰² This right includes the right to prevention, treatment and control of diseases. Violations of the obligation to protect include such omissions as the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others and specifically, the failure to enact or enforce laws to prevent the pollution of water, air and soil by industries.¹⁰³ In the

⁹⁹ 'Northern power plant's waste oil contaminates region's water supply', *The Sunday Times*, January 18, 2015.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² Article 12.

¹⁰³ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4.

recent case on the issue of pictorial warnings on tobacco packaging, the Court of Appeal accepted that the health of each and every citizen and all those living in Sri Lanka permanently or in a temporary capacity is paramount and needs to be protected.

Chronic kidney diseases affecting farmers in the North Central Province seems to be violating the right to health of those affected, disrupting the social and economic fabric and ultimately ending their lives. The Control of Pesticides Act No.33 of 1980 does not expressly deal with issues of cumulative effects of the use of pesticides over a long time. While regulations have been developed by the Sri Lanka Standards Institute to measure the content of pesticides in food or water, there are no enforcement mechanisms for such standards. The Government task force appointed in 2014 remained focused on the causative factors, as many committees prior to them were. The usage of agro-chemicals, cited as the probable cause through numerous researches both locally and globally, continues to be encouraged by the government with their fertilizer subsidies. Regulation of chemical usage too seems to be non-existent.

General Comment 15, on the right to water, regards access to safe drinking water as indispensable for leading a life in human dignity and as a prerequisite for the realization of other human rights.¹⁰⁴ The right to water is interconnected with the right of everyone to the enjoyment of the highest

¹⁰⁴ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, E/C.12/2002/11, at Para 1.

attainable standard of physical health.¹⁰⁵ In order to achieve the full realization of this right, the state must take steps to improve all aspects of environmental and industrial hygiene as well as take measures to prevent, treat and control occupational and other diseases.¹⁰⁶ In addition, the recognition of the right to just and favourable conditions of work, which includes the right to safe and healthy working conditions, implies access to clean water.

The Uma Oya project which was rejected in 1991 by the Asian Development Bank citing technical inadequacies and violation of water rights of the people, was taken beyond draft level in 2008. Since its inception and even during 2014, the issues of displacement, resettlement, and loss of irrigation land have been highlighted. Inclusive development seems to be largely ignored in this project.¹⁰⁷ In an area such as Chunnakam where most families' primary form of livelihood is farming, they are unable to use water for the purposes of cultivation given that the water not only has adverse health effects on humans but also has had an impact on crops and plants.¹⁰⁸

¹⁰⁵ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, Article 12; *Ibid*, at Para 8.

¹⁰⁶ *Ibid*.

¹⁰⁷ 'Land grabs galore in Uva', Nirmala Kannangara, <http://www.thesundayleader.lk/2014/09/28/land-grabs-galore-in-uva/>

¹⁰⁸ *Ibid*.

5.4 Right to Livelihood

Livelihoods: Highlighted Facts

Sampur: Livelihoods of fishing, agriculture and animal husbandry predominantly by Tamil communities have been affected by the land acquisition for the High Security Zone and the Special Economic Zone that left the communities in a permanent state of displacement. Although, the industrial park is slated to create 10,000 jobs, lack of interim measures have severely affected the livelihoods of the communities.¹⁰⁹

Kalpitiya: Kalpitiya Integrated Tourism Resort Project has also affected the livelihoods of fishermen by blocking roads to ports, restricting access to fishing waters and affecting the yield due to water sports. The project as Sampur is slated to create 15,000 and 50,000 direct and indirect employment respectively but lack of interim measures, vocational training makes these figures seem unrealistic.¹¹⁰

The right to work is enshrined in ICESCR and recognizes the right of everyone to the enjoyment of just and favourable conditions of work, in particular the right to safe working conditions.¹¹¹ As highlighted above, the contamination and the curtailment of water resources in Chunnakam and with

¹⁰⁹ Big picture: putting the mega development ambitions of Sri Lanka in context', Law & Society Trust, *The Island*, 13 August 2014.

¹¹⁰ Kalpitiya Integrated Tourism Resort, Chapter III (LST Blog), February 2015 accessed at <http://lawandsocietytrust.blogspot.com/2015/02/kalpitiya-integrated-tourism-resort.html>.

¹¹¹ Article 6.

regard to Uma Oya project respectively, adversely affect the right to livelihood of those who use water as a primary resource to engage in their livelihoods. This is relevant equally to the case of farmers to whom the engagement of their livelihood poses a fatal risk in the nature of Chronic Kidney Disease.

States have an obligation to ensure the right of access to employment, especially for disadvantaged and marginalized individuals and groups, permitting them to live a life of dignity.¹¹² Article 14(g) of the Sri Lankan Constitution protects the freedom to engage by in any lawful occupation, profession, trade, business or enterprise. This right can be considered to be directly affected in instances such as Kalpitiya, where those who have been engaged historically in the fisheries industry have been prevented from engaging in fishing due to land and resources being overtaken by the aggressive promotion and entrenchment of the tourism industry in the area.

In order to create conditions favourable to the enjoyment of the right to work, the State must take appropriate measures to ensure that both the private and public sectors reflect an awareness of the right to work in their activities.¹¹³ Hoteliers who acquired land demarcated their boundaries with walls or fences restricting the access to ports and the beach enjoyed by the fishermen for decades,¹¹⁴ despite them

¹¹² UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 18: The Right to Work (Art. 6 of the Covenant)*, 6 February 2006, E/C.12/GC/18.

¹¹³ *Ibid.*

¹¹⁴ TNI, (2014), *The Global Ocean Grab: A Primer*, Available at: http://www.tni.org/sites/www.tni.org/files/download/the_global_ocean_grab.pdf<Accessed 20th November 2014>

not trespassing on any private land. It is the obligation of the State therefore to ensure the protection of the livelihoods of these fishermen without subjecting them to the harassment of private businesses.

Human rights law requires that in providing employment opportunities, women should not be adversely affected. Furthermore, the Constitution provides for special consideration to be given to women's concerns.¹¹⁵ Yet, it is not often that one observes a gender impact assessment being conducted in the process of fashioning development policies. In Kalpitiya, women who are housewives have no alternative means of employment besides helping their husbands in fishing activities, household activities and looking after their children. Although they have the capacity to work, employment opportunities are scarce, hence the increased rates of unemployment.¹¹⁶ With displacement affecting their livelihoods, women are no longer able to engage in their housework while also helping their husbands in fishing activities.

5.5 Right to education

Education: Highlighted Facts

Kalpitiya: Education is a pressing issue in both Dutch-Bay and Palliyawatte GS divisions. There are only three schools in Dutch Bay: a Muslim school and a Sinhala School in Mohothuwarama, and a Tamil School in Uchchimunai. All these schools only offer education up

¹¹⁵ Article 12(4).

¹¹⁶ Theppam (Documentary).

to Grade 6 and thereafter students have to travel daily to Kalpitiya town for their higher education, which is not practical due to difficulties in transportation and the prohibitive expenses involved. Thus, most children discontinue their education after Grade 6. The situation is severe in Palliyawatte GS division where only one school is available, which is presently defunct. Although there are a number of schools in Kalpitiya town, a low-income family in Kalpitiya cannot afford to educate their children.¹¹⁷

CKDu and Education: In the case of Chronic Kidney Disease of unknown/non-traditional Etiology, the medical costs and the inability to continue their livelihood activities again creates low educational levels within communities affected by the disease, especially among youth. As estimated in 2012, dialysis costs around LKR 10,000 (Approximately 100 US Dollars) and a kidney transplant costs around LKR 800,000 (Approximately 8000 US Dollars).¹¹⁸

In addition to providing free and compulsory primary education, according to international human rights standards States have an obligation to progressively introduce free and equal secondary education (including vocational training) for all, and equal access to free higher education on the basis of capacity. The state has an obligation to ensure that education has to be within safe physical reach (e.g. a neighbourhood school) and also that education be affordable to all.¹¹⁹

¹¹⁷ Theppam, fact file, Law & Society Trust (ESCR Program), 2014.

¹¹⁸ 'Silent Killer' (LST Blog).

¹¹⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999.

Often development has a disparate impact on the education of the children of those families adversely affected. On the one hand, negative effects on livelihood have a direct effect on the poverty levels of such families, thereby making it financially impractical for them to send their children to school. While education itself is free, those displaced and in poverty in Kalpitiya find it difficult to cope with the incidental expenses such as expenses related to travel and other supplies.¹²⁰ Furthermore, those who have been subject to eviction in urban areas claim that their children's education had been disrupted as they had to move away to relatives or far away from schools their children were attending. Furthermore, when relocated into different school zones they only had access to schools that are not considered as good as the ones to which they used to have access.¹²¹

6. Recommendations

In light of the factual and legal context outlined above, the authors put forward certain recommendations that may assist the government in furthering its development agenda within a human rights framework. It is submitted however that these recommendations are not exhaustive and contain conceptually broad suggestions as well as specific measures that can be practically put in place with regard to particular violations identified above.

Shift the development agenda from the Millennium Development Goals to Sustainable Development Goals

The discourse on development in the post 2015 context is likely to change due to innovative approaches in appraising

¹²⁰ Theppam: Fact file.

¹²¹ 'The Ugly Side of Beautification', p. 35.

the problem of poverty. This new approach seems to focus on the contextual causes of deprivation and transformation, which is more amenable to incorporating a human rights approach rather than the previous system, which adopted a mere material or minimal outcomes approach. Therefore, the development agenda in the post 2015 phase must be.

- human rights oriented in that it is participatory and engages citizens, not only the government;
- must be monitored through an open, transparent and consultative process; and
- the targets themselves must be based on human rights standards so as to reflect the holistic approach to development as was outlined above.

Increase the participatory nature of development projects

The authors note that one of the main reasons that there is a disjuncture between the development process and the people who are directly being affected by such activities is due to a top-down approach to policy making. Therefore, it is suggested that the participation of individuals and communities must be encouraged at all levels of the policy making process.

- Consultations must be conducted at the grassroots level in order to identify specific stakeholders and their specific needs that must be catered to. Accordingly, specific concerns of children, women, those in religious and cultural minorities and those affected by war must be taken into account and policies should be sensitized to their concerns.
- An effective development policy is one that balances the social, economic and environmental dimensions in a manner that minimizes violations of human rights. Prior to a development policy being passed the government should

be required to carry out a human rights screening process in order to identify possible human rights violations that may arise in the process of carrying out a project, and therein be required to identify alternative methods that would lessen such impact. This process should be conducted with the consultation of the affected communities.

Achieving Transitional Justice through Engaging Minorities in the Development Process

In addition to general participation of all stakeholders, special attention must be provided in terms of those previously affected by the war and who continue to be affected due to long lasting effects of armed conflict. It must be taken into account that with regard to ethnic minorities, development must be carried out in a manner which reinforces their faith in the State, enables them to move past a history of conflict and thereby achieve genuine reconciliation. To this extent:

- Development projects in the north and the east should not be used as an excuse by central government to curtail the powers of the provincial councils;
- Devolution of power should be fully implemented to the effect that local communities would be able to take ownership of their development agenda in a manner which best suits their economic, social and cultural requirements;
- The involvement of the military in development initiatives must be stopped given that it perpetuates a culture of fear and insecurity that permeated the war era. A process of demilitarization must be instituted.
- State must take into account the difficulties faced by those affected by war in proving title to land and devise methods which would restore their lands to them;

- Implement LLRC recommendations on land and resettlement, in particular those recommendations that relate to:
 - ◆ the Security Forces disengaging from all civil administration related activities as rapidly as possible;
 - ◆ the HSZs in Trincomalee-Sampur, as well as small extents of private land utilized for security purposes in the districts being subject to review with a view to releasing more land; and
 - ◆ all families who have lost lands and or houses due to formal HSZs or to other informal or *ad hoc* security related needs being given alternate lands, and or compensation being paid according to applicable laws.

Making rights more accessible and enforceable

It is the opinion of the authors that the lack of awareness of human rights has to do with the fact that it is not perceived as a tool that can be effectively used by the people to practically solve problems. When human rights are presented as lofty ideals without provision of realistic tools to use it to one's advantage, people lose faith in the ideal itself. Therefore, it is recommended that:

- human rights awareness programs be structured in a manner which provides grassroots level individuals with knowledge of how their rights can be enforced;
- Public officials and private businesses must be provided awareness of their duties and responsibilities with a clear message of the sanctions that will be enforced against them in case of non-compliance; Access to independent and impartial mechanisms should be provided to seek redress for grievances that arise in the process of

development activities being carried out; and solutions that are provided by the mechanisms must be enforceable against state actors as well as private actors.

Providing case specific solutions to uphold particular rights

The authors finally submit certain specific measures that could be implemented to alleviate the concerns with regard to issues that have been highlighted in the previous sections of the chapter.

Food Security

- Establish clear guidelines on pesticide regulation for pesticide registrar as well as for the companies, limiting the over sale of agro-chemicals;
- Provide training on agro-chemical usage to farmers and those involved in its sale in the community level; and
- Encourage alternative farming, through subsidies that support healthier and more environmental friendly farming practices

Increase health services at regional health centers

- Equipment provision at more regional health centers decreasing the travel time and distance for patients with special focus on those who are affected by CKDu due to high incidence of death by the disease

Stabilizing the lives of those who have been displaced and/or resettled

- Provision of alternate lands and/or payment of compensation in compliance with due process which should be followed in land acquisition and when carrying out mega development projects, Livelihood assistance

including schemes for peasant farmer groups and for farmer cooperatives, as well as extending advise and other support such as for introducing possible pilot projects on application of dry-farming methods for cultivation of upland crops in un-irrigated areas

- Special consideration needs to be provided to resolving discrimination against Women headed households, and facilitating equal opportunity and equity to the elderly and persons with disabilities.
- Clear guidelines should be established by institutions such as Board of Investment, Sri Lanka Tourism Development Authority, the Urban Development Authority for developers to ensure livelihood protection of the communities, until development projects become functional realizing the estimated job creation rate.
- Establishment of vocational training centers to train the local community on required skills of the newly introduced industries.

SCHEDULE I

UN Conventions on Human Rights & International Conventions on Terrorism signed, ratified or acceded to by Sri Lanka as at 31st December 2014*

(37 in total, in alphabetical order, with the 1 signed in 2007 denoted by an asterisk)

Additional Protocol to the Convention on Prohibitions or Restrictions on the use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol IV, entitled Protocol on Blinding Laser Weapons)

Acceded on 24 September 2004

Cartangena Protocol on Bio Diversity

Acceded on 26 July 2004

* The consent of a State to be bound by a treaty is expressed by the signature of its representative when the treaty provides that signature shall have that effect. In many instances, the parties may agree either in the text of the agreement or in the negotiations accompanying the formation of the text, that signature alone is not sufficient; a further act is required to signify consent to be bound which is called ratification. Treaties in which this approach is adopted usually intend that the signature will merely authenticate the text of the agreement. The purpose of ratification is to provide the government of the States concerned with a further opportunity to examine whether they wish to be bound by a treaty or not. For those States which did not participate in the original negotiation and were not signatories to the treaty but nonetheless wish to become parties to the treaty, can do so by acceding to the treaty. Once a State has become a party to the treaty, it enjoys all the rights and responsibilities under the treaty irrespective of whether it became a party by signature and ratification or accession

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Convention on Biological Diversity

Acceded on 23 March 1994

Convention against Corruption

Acceded on 11 May 2004

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

Acceded on 3 January 1994

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others

Acceded on 15 April 1958

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Ratified on 5 October 1981

Convention on Prohibitions or Restrictions on the use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (with Protocols I,II, and III)

Acceded on 24 September 2004

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents

Acceded on 27 February 1991

Convention on the Prevention and Punishment of the Crime of Genocide

Acceded on 12 October 1950

* *Convention on the Rights of Persons with Disabilities*

Signed on 30 March 2007.

Convention on International Trade in Endangered Species of Wild Fauna and Flora

Acceded on 4th May 1979

Convention on the Rights of the Child (CRC)

Ratified on 12 July 1991

Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation

Acceded on 6th September 2000

International Convention against the Taking of Hostages

Acceded on 6 September

International Convention for the Suppression of Acts of Nuclear Terrorism

Acceded on 14 September 2005

International Convention for the Suppression of Financing of Terrorism

Ratified on 6 September

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

Acceded on 18 February 1982

International Convention on the Protection of All Migrant Workers and Members of their Families

Acceded on 11 March 1996

International Covenant on Civil and Political Rights (ICCPR)

Acceded on 11 June 1980

International Covenant on Economic, Social and Cultural Rights (ICESCR)

Acceded on 11 June 1980

International Covenant on the Suppression and Punishment of the Crime of Apartheid

Acceded on 18th February 1982

Kyoto Protocol to the Framework Convention on Climate Change

Acceded on 3 September 2002

Optional Protocol 1 to the International Covenant on Civil and Political Rights (ICCPR)

Acceded on 3 October 1997

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Ratified on 15 January 2003

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict

Ratified on 6 September 2000

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography

Ratified on 22 October 2006

Protocol against the Smuggling of Migrants by Land, Sea and Air – Supplementing the United Nations Convention against Transnational Organised Crime

Signed on 15 December 2000

Protocol on Prohibitions and Restrictions on the use of Mines, Booby traps and Other Devices (Protocol 11 as amended on 03 May 1996) annexed to the Convention on Prohibitions or Restrictions on Use of certain Conventional Weapons

Acceded on 24 September 2004

Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children – Supplementing the United Nations Convention against Transnational Organised Crime

Signed on 15 December 2000

Protocol on Prohibitions and Restrictions on the use of Mines, Booby-traps and Other Devices (Protocol 11 as amended on 03rd May 1996) annexed to the Convention on Prohibitions or Restrictions on Use of certain Conventional Weapons

Acceded on 24 September 2004

The Ramsar Convention on Wetlands

Acceded on 15 October 1990

United Nations Convention against Transnational Organised Crime

Signed on 15 December 2000

United Nations Convention on the Law of the Sea

Acceded 19 July 1994

Vienna Convention on Consular Relations

Acceded on 4 May 2006

Vienna Convention for the Protection of the Ozone Layer

Acceded 15 December 1989

SCHEDULE 1I

ILO Conventions Ratified by Sri Lanka as at 31 December 2014

No	Convention Name	Ratified Date	Present Status
C4	<i>Night work (Women) Convention, 1919</i>	08.01.1951	<i>Denounced</i>
C5	<i>Minimum Age (Industry) Convention, 1919</i>	27.09.1950	<i>Denounced</i>
C6	<i>Night Work of Young Persons (Industry) Convention, 1919</i>	26.10.1950	<i>Denounced</i>
C7	<i>Minimum Age (Sea) Convention, 1920</i>	02.09.1950	<i>Denounced</i>
C8	<i>Unemployment Indemnity (Shipwreck) Convention, 1920</i>	25.04.1951	
C10	<i>Minimum Age (Agriculture) Convention, 1921</i>	29.11.1991	<i>Denounced</i>
C11	<i>Rights of Association (Agriculture) Convention, 1921</i>	25.08.1951	
C15	<i>Minimum Age (Trimmers & Stockers) Convention, 1921</i>	25.04.1951	<i>Denounced</i>
C16	<i>Medical Examination of Young Persons (Sea) Convention, 1921</i>	25.04.1950	

No	Convention Name	Ratified Date	Present Status
C18	<i>Workmen's Compensation (Occupational Diseases) Convention, 1925</i>	17.05.1952	
C26	<i>Minimum Wage Fixing Machinery Convention, 1928</i>	09.06.1961	
C29	<i>Forced Labour Convention, 1930</i>	05.04.1950	
C41	<i>Night Work (Women) Convention (Revised), 1934</i>	02.09.1950	<i>Denounced</i>
C45	<i>Underground Work (Women) Convention, 1935</i>	20.12.1950	
C58	<i>Minimum Age (Sea) Convention (Revised), 1936</i>	18.05.1959	
C63	<i>Convention concerning Statistics of Wages and Hours of Work, 1938</i>	25.08.1952	<i>Denounced</i>
C80	<i>Final Articles Revision Convention, 1946</i>	00.09.1950	
C81	<i>Labour Inspection Convention, 1947</i>	03.04.1950	
C87	<i>Freedom of Association and Protection of the</i>	15.11.1995	
C89	<i>Right to Organise Convention, 1948</i>	31.03.1966.	<i>Denounced</i>

No	Convention Name	Ratified Date	Present Status
C90	<i>Night Work (Women) Convention (Revised), 1948</i>	18.05.1959	
C95	<i>Night Work of Young Persons (Industry) Convention (Revised), 1948</i>	27.10.1983	
C96	<i>Protection of Wage Convention, 1949</i>	30.04.1958	
C98	<i>Pre-charging Employment Agencies Convention (Revised), 1949</i>	13.12.1972	
C99	<i>Rights to Organise and Collective Bargaining Convention, 1949</i>	05.04.1954	
C100	<i>Minimum Wage Fixing Machinery (Agriculture) Convention, 1951</i>	01.04.1993	
C103	<i>Equal Remuneration Convention, 1951</i>	01.04.1993	
C105	<i>Maternity Protection Convention (Revised), 1952</i>	07.01.2003	
C106	<i>Abolition of Forced Labour Convention, 1957</i>	27.10.1983	
C108	<i>Weekly Rest (Commerce and Offices) Convention, 1957</i>	24.04.1995	

No	Convention Name	Ratified Date	Present Status
C110	<i>Seafarers' Identity Documents Convention, 1958</i>	24.04.1995	
C111	<i>Conditions of Employment of Plantation Workers Convention, 1958</i>	27.11.1998	
C115	<i>Discrimination (Employment and Occupation) Convention, 1958</i>	18.06.1986	
C116	<i>Radiation Protection Convention, 1960</i>	26.04.1974	
C131	<i>Final Articles Revision Convention, 1961</i>	17.03.1975	
C135	<i>Minimum Wage Fixing Convention, 1970</i>	16.11.1976	
C138	<i>Worker's Representatives Convention, 1971</i>	11.02.2000	
C144	<i>Minimum Age for Admission to Employment, 1973</i>		
C160	<i>Tripartite Consultations to Promote the Implementation of ILO Convention, 1976</i>	01.04.1993	
C182	<i>Labour Statistics Convention, 1985</i> <i>Worst Forms of Child Labour Convention, 1999</i>	01.03.2001	

SCHEDULE III

Humanitarian Law Conventions Ratified by Sri Lanka as at 31st December 2014

*Geneva Convention for the Amelioration of the Conditions of the
Wounded and Sick in the Armed Forces in the Field, 1949*

Ratified on 28 February 1959

*Geneva Convention for the Amelioration of the Conditions of the
Wounded, Sick and Shipwrecked Members of the Armed Forces at
Sea, 1949*

Ratified on 28 February 1959

*Geneva Convention Relating to the Protection of Civilian Persons in
Time of War, 1949*

Ratified on 28 February 1959

*Geneva Convention Relating to the Treatment of Prisoners of War,
1949*

Ratified on 28 February 1959

SCHEDULE IV

Some Human Rights Instruments NOT Ratified by Sri Lanka as at 31st December 2014

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity - 26 November 1968 (date of adoption), 11 November 1970 (entered into force)

Convention on the Political Rights of Women - 20 December 1952(date of adoption), 7 July 1954 (entered into force)

Convention on the Rights of Persons with Disabilities -13 December 2006 (date of adoption), 3 May 2008 (entered into force)

Convention Relating to the Status of Refugees - 28 July 1951 (date of adoption), 22 April 1954 (entered into force)

Hours of Work (Industry) Convention – 1919 (date of adoption), 1921 (entered into force)

ILO Convention 168 concerning Employment Promotion and Protection against Unemployment – 1988 (date of adoption), 1991 (entered into force)

ILO Convention No 102 concerning Minimum Standards of Social Security- 28 June, 1952(date of adoption), 27 April 1955 (entered into force)

ILO Convention No 122 concerning Employment Policy- 1964 (date of adoption),1966 (entered into force)

ILO Convention No 141 concerning Organisations of Rural Workers and their Role in Economic and Social Development – 1975 (date of adoption), 1977 (entered into force)

ILO Convention No 151 concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service- 1978 (date of adoption), 1981(entered into force)

ILO Convention No 154 concerning the Promotion of Collective Bargaining – 1981(date of adoption), 1983(entered into force)

International Convention for the Protection of All Persons from Enforced Disappearance
New York, 20 December 2006 (date of adoption), 23 December 2010 (entered into force)

Optional Protocol II to the International Covenant on Civil and Political Rights (ICCPR) – 15 December 1989 (date of adoption), 11July 1991 (entered into force)

Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – 2002 (date of adoption), 2006 (entered into force)

Optional Protocol to the Convention on the Rights of Persons with Disabilities - 13 December, 2006 (date of adoption), 3 May 2008 (entered into force)

Promotional Framework for Occupational Safety and Health Convention - 2006 (date of adoption), 2009 (entered into force)

Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)- 1977 (date of adoption), 1979 (entered into force)

Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol 11)- 8 June 1977 (date of adoption), 7 December 1978 (entered into force)

Protocol to the Convention relating to the Status of Refugees - 16 December 1966 (date of adoption), 4 October 1967 (entered into force)

Rome Statute of the International Criminal Court (ICC) – 17 July 1998 (date of adoption), 1 July 2002 (entered into force)

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SCHEDULE V

Fundamental Rights (FR) Cases Decided during the year 2014

Golden Key case SC (FR) 191, 192, 197-206, 208 – 216, 225, 226, 244, 246-255, 315, 335, 372 of 2009, SC Minutes 10 March 2014

Thenuwera v. Speaker of Parliament SC (FR) 665 – 672/2012, SC Minutes 24 March 2014

CPA v. Prime Minister SC (FR) 23/2013, SC Minutes 24 March 2014.

Arambawala v. Principal, Sirimavo Bandaranaike Vidyalaya SC (FR) 37/2013, SC Minutes 20 January 2014

Hewagama v. Secy Min of Higher Education - SC (FR) 73/2012, SC Minutes 3 October 2014

Sampath v. Secy Min of Higher Education SC (FR) 74/2012, SC Minutes 3 October 2014

Manoranjan v. Governor, Northern Province SC (FR) 261/2013, SC Minutes 11 September 2014.

Dhammarathana Thero v. OIC Police Station, Mibintale SC (FR) 313/2009, SC Minutes 9 November 2011.

Udawatta v National Water Supply & Drainage Board SC (FR) 349/2011, SC Minutes 27 November 2014

Fernando v. Police Sergeant, Welipenna SC (FR) 514/2010, SC Minutes 15 December 2014

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Lake House Employees Union v. ANCL SC (FR) 637/2009,
SC Minutes 17 December 2014

Issadeen v. Director General of Customs SC (FR) 248/2011, SC
Minutes 17 December 2014

Chaminda Wijewardhana v. Kurunegala Plantations Ltd SC (FR)
24/2013, SC Minutes 3 September 2014

De Silva v Chairman National Salaries and Cadres Commission
SC (FR) 64/2009, SC Minutes 27 March 2014

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transfers
transitional justice
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human development
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(OHCHR)
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Uthayan

U

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Underserved Settlements
unemployment
unethical conversions'
unitary state
United National Party (UNP).
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universal free education
university system
urban 'beautification'
urban beautification projects
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Urban Regeneration Project
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US, the European Union

V

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vocational training
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W

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workforce

Y

Youth

