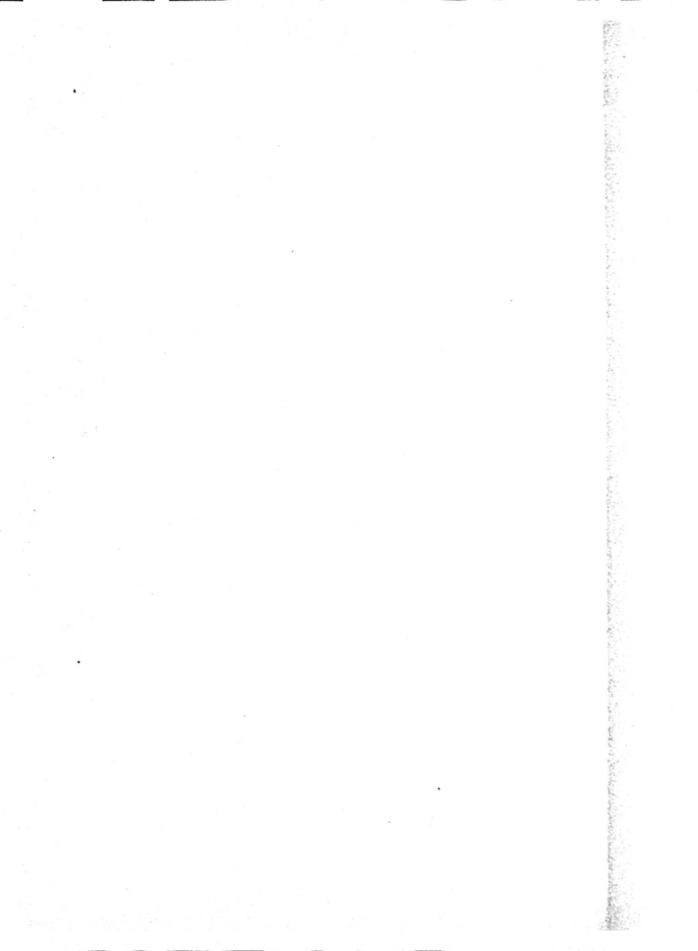


SRI LANKA:
STATE OF HUMAN RIGHTS
2014



# SRI LANKA: STATE OF HUMAN RIGHTS 2014

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# **CONTENTS**

NT	RIBUTORS	viii
VIE	WERS	ix
BRE	EVIATIONS & ACRONYMS	хi
REV	WORD	xiii
RC	DUCTION	xv
P		xxi
		нтѕ
1.	Introduction	1
2.	Watershed Events in 2013	3
	2.1 The UNHRC Session	3
	2.2 The Northern Provincial Council Elections	8
	2.3 CHOGM	10
3.	The Human Rights Situation in 2013	11
	3.1 Extrajudicial Killings	11
	3.2 Enforced and Involuntary Disappearances	15
		17
4.		21
JU	DICIAL PROTECTION OF HUMAN RIGHTS	;
1.	Introduction	25
2.	The Judiciary in the Broader Context of	
	Governance in 2013	27
3.	Methods of Analysis	32
4.	Fundamental Rights Jurisdiction	33
	VIE BRE REVEROUS PO OV IN 1. 2. 3.	OVERVIEW OF THE STATE OF HUMAN RIGIN 2013  1. Introduction 2. Watershed Events in 2013 2.1 The UNHRC Session 2.2 The Northern Provincial Council Elections 2.3 CHOGM 3. The Human Rights Situation in 2013 3.1 Extrajudicial Killings 3.2 Enforced and Involuntary Disappearances 3.3 Arbitrary Arrests and Detention 4. Conclusion  JUDICIAL PROTECTION OF HUMAN RIGHTS 1. Introduction 2. The Judiciary in the Broader Context of Governance in 2013 3. Methods of Analysis

4.1 Right to equality	34
4.2 Right to freedom from torture	44
5. Special Determinations	54
5.1 Bills related to Fiscal policy	55
5.2 Right to Vote: Internally Displace	ed Persons 59
5.3 Judicial protection for human righ	its in
evaluating legislative policy	62
6. State of Judicial Protection of Human	Rights 62
7. Conclusion & Recommendations	65
III LAND ISSUES: RETURN AND RESET	TLEMENT
LLRC RECOMMENDATIONS	
1 Introduction	69
2 Domestic and International Framework	k Relating
to Land, Return & Resettlement	71
3 LLRC Recommendations Regarding La	and Issues
and Development in Relation Thereto	86
4 Institutions Set Up to Deal with Land	Rights 106
5 Recommendations & Conclusions	113
IV THE RECONCILIATION REPORT (LI	LRC) AND THE
RELEVANCE OF THE RIGHT TO RE	STITUTION
1. Introduction	117
2. International Framework of Standards	for HLPR 125
3. Current Status of the Right to Restitut	
3.1 Militarisation	133
3.2 Land restitution	142
3.3 Vulnerability	155
4. Conclusion & Recommendations	163
iv	

V	KE	LIGIOUS FREEDOM	
	1.	Introduction	167
	2.	Background: Legal Framework, Judicial	
		Precedent & Recent Developments	168
	3.	Impact of Militant Sinhala Buddhist Nationalism	173
		3.1 Bodu Bala Sena (BBS)	173
		3.2 Sinhala Ravaya	174
		3.3 Ravana Balaya	175
	4.	Attacks on Religious Freedom (2013)	176
		4.1 Attacks on Muslim places of worship	177
		4.2 Attacks on Christian places of worship	181
		4.3 Attacks on Buddhist places of worship	183
		4.4 Intra-religious violence	183
		4.5 Continuing challenges	184
	5.	Religious Freedom in the North and East	185
	6.	International Focus on Religious Freedom in	
		Sri Lanka	188
	7.	Conclusion	190
VI	FF	REEDOM OF EXPRESSION & THE MASS	
	M	EDIA: WEAK SUPPORT FOR DEMOCRACY B	Y
	NI	EWS MEDIA	
	1.	Introduction	193
	2.	Legal Framework of Freedom of Expression	195
	3.	C. C. Land of Farmacoion	197
		3.1 General Condition of Repression	197
		3.2 Blocking of internet websites	202
		3.3 Repressive conditions continue in 2013	202
		-	

4.	Notable Types of Violations in 2013 : Media as	a
	Tool of Repression	204
	4.1 Media against media	205
	4.1.1 The hounding of Callum Macrae of UK's	
	Channel 4 TV	206
	4.1.2 The Prageeth Ekneligoda case	207
	4.2 Media against social rights and justice	
	campaigners: the misuse of State media	210
5.	News Media against Ethnic 'Minorities'	
	and as Promoter of Ethnic Domination	212
	5.1. Ethnic oppression and the news media	213
	5.2. News media reporting ethnic violence	
	in 2013	214
	5.3. Attacks on minority religions undermine	
	religious freedom	217
	5.4. Media promotion of ideologies of supremac	y
	and counter-supremacy	218
	5.5. Web media and religious oppression	219
	5.6. Under reportage of violence against women	
	and gender equality issues	220
6.	News media industry weaknesses in upholding	
	media rights	220
	6.1 Lack of industry support against rights	
_	violations	221
7.	Recommendations	222
	7.1. To the Government	222
	7.2 To the News Media Industry	223
	7.3 General	224

SCHEDULE I	
UN Conventions on Human Rights & International	
Conventions on Terrorism signed, ratified or acceded to	
by Sri Lanka as at 31st December 2013	225
SCHEDULE II	
ILO Conventions Ratified by Sri Lanka as	
at 31st December 2013	231
SCHEDULE III	
Humanitarian Law Conventions Ratified by Sri Lanka as	
at 31st December 2013	235
SCHEDULE IV	
Some Human Rights Instruments NOT Ratified by	
Sri Lanka as at 31st December 2013	236
SCHEDULE V	
Fundamental Rights (FR) Cases Decided during the	
year 2013	239
SCHEDULE VI	
Cases cited in Sri Lanka	241
BIBLIOGRAPHY	243
INDEX	259

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#### ABBREVIATIONS & ACRONYMS

BBS Bodu Bala Sena

CBO Community Based Organisations

CEDAW Convention on the Elimination of all forms of

Discrimination against Women

CHOGM Commonwealth Heads of Government Meeting

CPA Centre for Policy Alternatives

GA Government Agent

GoSL Government of Sri Lanka

HLPR Housing, Land and Property Restitution

HSZ High Security Zones

ICCPR International Covenant on Civil and

Political Rights

ICESCR International Covenant on Economic, Social

and Cultural Rights

IDP Internally Displaced Person

IHP Indian Housing Programme

INGO International Non-Governmental Organisation

LDO Land Development Ordinance

LLRC Lessons Learnt and Reconciliation Commission

LTTE Liberation Tamil Tigers of Eelam

NCEA National Christian Evangelical Alliance

NEHRP North East Housing Rehabilitation Programme

NGO Non-Governmental Organisation

NHDA National Housing Development Authority

NIRP National Involuntary Resettlement Policy

NLC National Land Commission

NPA National Plan of Action to Implement

the Recommendations of the LLRC

NPC Northern Provincial Council

OHCHR Office of the High Commissioner for

Human Rights

PARL People's Alliance for Right to Land

PSC Parliamentary Select Committee

PTA Prevention of Terrorism Act

RDA Rural Development Authority

REPPIA Rehabilitation of Persons, Properties and

Industries Authority

SLAF Sri Lankan Armed Forces

SLMC Sri Lanka Muslim Congress

TID Terrorism Investigation Department

TNA Tamil National Alliance

UAS Unified Assistance Scheme

UNHRC United Nations Human Rights Council

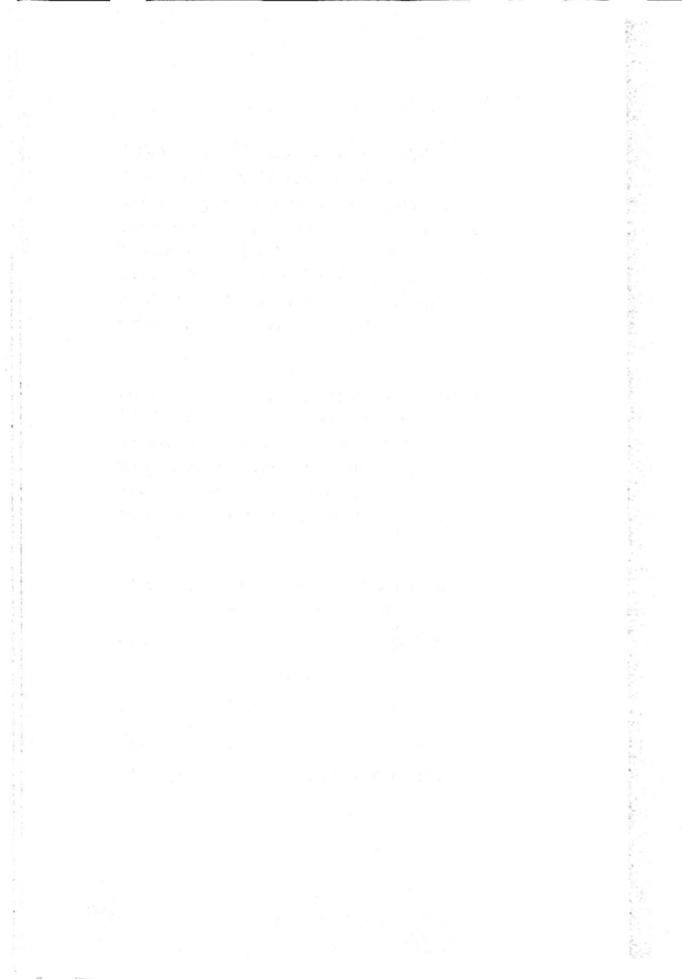
#### **FOREWORD**

Since 1993, LST publishes the annual State of Human Rights report as a means of assessing Sri Lanka's compliance with international human rights norms and domestic obligations. The SHR serves both as a measure of Sri Lanka's achievements during the period, and also as a means of identifying the key areas of concern for human rights in that year. The chapters are authored by experts in their respective fields and necessarily contain some overlap due to the cross-cutting nature of many of the rights under review.

This year the report covers 5 main areas of concern in addition to the overview. Two chapters consider the levels of implementation by the State of the recommendations made by the LLRC on the areas of restitution, reconciliation and land issues and resettlement while the other three chapters deal with judicial protection of human rights, religious freedom and freedom of expression.

The report covers the period January 2013 to December 2013.

Law & Society Trust Colombo



### INTRODUCTION

This volume of Sri Lanka: State of Human Rights includes analyses of the right to land and restitution in the post armed conflict context and evaluations of the right to freedom of expression, freedom of religion and an overview of the general respect for human rights in 2013. According to the assessment in these chapters, on the whole, serious human rights violations have decreased in comparison to the previous years. However, other equally serious human rights violations occurred in 2013 which suggest that the discontinuity of the previous forms of violations does not by any means signal a progression. The assessment of human rights in the post-armed conflict context demonstrates that while some progress has been made to provide remedies for violations of human rights and some efforts have been made in resettlement, they fall short of both the recommendations of the Lessons Learnt and Reconciliation Commission (LLRC) and international human rights standards. The Judiciary has been weakened, compromised and therefore ineffective in defending any of these rights, due to the problematic manner in which the Chief Justice was impeached in early 2013. These issues have been critically analysed in the six chapters of this volume.

In 'Overview of the State of Human Rights in 2013' Gehan Gunatilleke argues that primarily due to increasing pressure from the international community, gross violations of human rights have been significantly less in 2013 as opposed to the previous years. He cites the resolutions adopted by the UN Human Rights Council in 2012 and 2013 and the Commonwealth Heads of Government Meeting that was held in Colombo in 2013 as having compelled the Sri Lankan government into an 'appeasement' approach in which it sought to avoid any gross violations of human rights. However, he further argues that perhaps certain

components within the government continue to have faith in a 'repressive' approach which was evident in some of the notable human rights violations of 2013 including the Weiliweriya incident. Gunatilleke suggests therefore that international advocacy can lead to progressive outcomes at the ground level but that that could be merely a result of strategic manoeuvring on the part of a government seeking to avoid further international scrutiny. He notes that the 'appeasement' approach of the government could very well be temporary as it remains at odds with its policy towards human rights in the immediate past.

Within this understanding of the overall state of protection for human rights, the Northern Provincial Council election is identified as a significant achievement and the Weliweriya incident an anomaly. Interestingly, Gunatilleke only comments in passing on the impeachment of the Chief Justice, and does not offer any insights as to whether it is an example of the repressive approach of the government. The usefulness of Gunatilleke's analysis lies in the way in which he comments on the overall approach of the government to the idea of 'human rights' particularly in the context of the gradually intensifying international scrutiny of Sri Lanka's human rights record and the pressure to demonstrate political commitment to its improvement.

Against the broad analysis offered in the first chapter, the analysis of the judicial protection for human rights in chapter two suggests that in specific contexts, the respect for human rights remains static at its best. The independence of the Judiciary was completely undermined over the last few years through a series of interventions by the government, including the 18th Amendment to the Constitution. However, the impeachment of the Chief Justice in early 2013 was a high watermark in this trend. The analysis of the judicial protection of human rights in 2013 makes

it clear that serious human rights violations are not being resolved before the Judiciary. Those issues are either being taken up at the international level or in certain cases, take the form of street protests. Several other issues which were brought before the Court, such as the petition alleging torture of a prison inmate in relation to a prison riot, were dismissed by the Court in an extremely problematic manner.

The fundamental rights petitions that were determined by the Court in 2013 were in relation to the right to equality and the right to be free from torture. The analysis of the jurisprudence of the Court on both these rights suggests that the judicial approach to the protection of human rights is weak. Even where more progressive judicial precedent on fundamental rights are followed, the Supreme Court does not strengthen the jurisprudential basis of that trend or expand it.

'Land Issues: Return, Resettlement and LLRC Recommendations' by Dinushika Dissanayake reveals that five years after the end of the internal armed conflict, land issues in the North and East remains unresolved and in certain cases are further aggravated. Through an assessment of the relevant international standards and the Sri Lankan policy and practice in 2013, Dissanayake convincingly argues that very little has been done to address the human rights violations experienced by those seeking to return and resettle in war affected areas of the North and East. Her analysis also demonstrates that land issues are primarily political issues, thereby rendering the affected individuals and families invisible and powerless in finding effective remedies for the violations. The assessment of the attempts by the government to implement the LLRC recommendations on land issues exposes the lack of commitment and political will to give effect to those recommendations. An infrastructure expansion model of development and the prioritisation of 'national security' continue to undermine the rights of persons to return and resettle in war affected areas. As suggested by Dissanayake, comprehensive documentation, the establishment of the National Land Commission and the release of land occupied by the military are essential, among other things, in ensuring the respect for the rights related to return and resettlement in the war affected areas.

The analysis of the right to restitution in relation to land, housing and property by Rasika Mendis in the chapter titled, 'The Reconciliation Report (LLRC) and the relevance of the Right to Restitution' highlights several serious human rights concerns of the post armed conflict period. Using the LLRC recommendations as the point of reference, Mendis considers the degree to which the right to restitution has been realised in Sri Lanka. In relation to land, housing, resettlement and with regard to vulnerable groups such as women, her finding is that, implementation of the LLRC recommendations are far from satisfactory. This finding is juxtaposed with the large scale infrastructure development that is being carried out in the North and East, which, as pointed out by her, do not address the pressing issues faced by the war affected communities. She highlights the need for comprehensive programmes to respect and protect housing, land and property rights for identification of the vulnerabilities of different groups and communities: and for a rights based evaluation of the needs of the communities. Recognition and respect for the right to restitution, Mendis demonstrates, is a prerequisite for reconciliation.

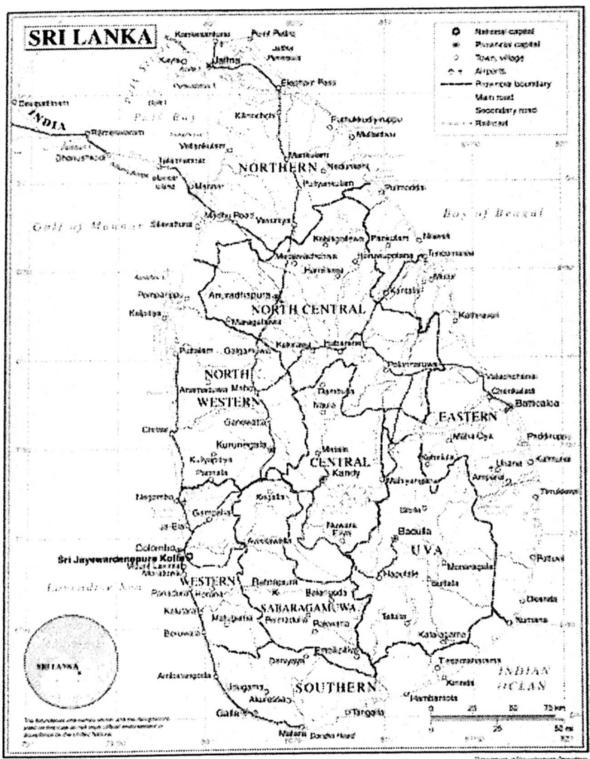
The assessment of the state of human rights in relation to the post armed conflict context, is followed by two chapters that investigate human rights within the broader national context. One is the right to religious freedom and the other the freedom of expression. Kalana Senaratne scrutinises the challenges posed in 2013 to religious freedom in Sri Lanka in the fifth chapter. It documents the re-emergence of militant Sinhala Buddhism in the post armed conflict period in the country. Senaratne discusses the different attacks on religious places of worship and religious practices that took place in 2013. He highlights the failure of institutions of law and order, particularly the police and courts in punishing those responsible for these acts. Senaratne's analysis demonstrates how the spread of Islamaphobia at the international level and ethno nationalism, and post-war triumphalism at the domestic level has fed into religious intolerance among some sectors in Sri Lankan society. The impact of this trend on the minority religious communities has been very serious as shown by Senaratne.

The freedom of expression in 2013, as analysed by Lakshman Gunasekera in 'Freedom of Expression & the Mass Media: Weak support for Democracy by News Media, continues to be a grave concern in Sri Lankan society. In comparison to previous years where freedom of expression was violated through the restriction of media freedom, extra judicial killings and involuntary disappearances of journalists etc., Gunasekera argues that in 2013 a more subtle but equally serious forms of restriction have been employed. One is the use of mass media for repression of more independent and critical media and the other is the suppression of the enjoyment of cultural rights through the freedom of expression by vulnerable groups and minority communities. In a comprehensive and critical analysis Gunasekera demonstrates the way in which state and private mass media have been used towards these ends. While the evaluation is focused on the freedom of expression, it demonstrates very clearly the links between freedom of expression and other individual and groups rights and also with democracy. For instance, the subversion of the freedom of expression has facilitated the erosion of the religious freedom of minorities in 2013. Gunasekera's analysis also reflects on the spread of ethnic rivalry and religious intolerance in social media.

The assessment of the human right to restitution; to land and resettlement; religious freedom; freedom of expression; along with the evaluation of the judicial protection of human rights and the general overview of human rights contributes to a more informed understanding of the respect for human rights in Sri Lanka in 2013. It comprehensively documents noteworthy political, legal and social developments of the year which have had an impact on the degree of protection afforded for human rights in Sri Lanka during this time.

#### Dinesha Samararatne

Editor



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# OVERVIEW OF THE STATE OF HUMAN RIGHTS IN 2013

Gehan Gunatilleke\*

#### 1. Introduction

The absence of regress is often mistaken for progress. The first three years of Sri Lanka's post-war history witnessed a rapid decline in human rights protection and promotion. The narrative was clear: in the wake of the war, Sri Lanka had inherited a pervasive culture of impunity, causing the human rights situation to swiftly deteriorate. Yet this deterioration paused in 2013 causing a small but significant ripple in the post-war narrative. What motivated this sudden suspension is yet to be fully understood. Nevertheless, the desperation with which the decrease in gross human rights violations was touted as 'progress' betrayed the intentions of a deeply conflicted government. On the one hand, it had compelling reasons-incentives, perhaps-to adopt a softer and more accommodative approach towards its opponents. These incentives emerged from specific developments and events that took place prior to and during 2013. The government was thus keen to appease the international community in pursuance of certain specific objectives. On the other hand,

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the regime had grown accustomed to dealing with dissent in the harshest terms possible—swift and often brutal repression. It was accused of extrajudicial killings, enforced and involuntary disappearances and arbitrary arrests and detentions as part of this repressive approach, which was adopted throughout the war and during its immediate aftermath. These competing approaches came to a head in 2013 when the government began to understand that the more 'visible' forms of gross human rights violations needed to be contained. Yet the endurance of the government's new approach remained contingent on the incentives that motivated it.

This overview chapter revisits Sri Lanka's human rights record in 2013 and presents a contextual interpretation of the apparent improvements that took place during the year. The chapter is organised into three sections. The first discusses certain watershed events that took place in 2013 and their impact on the human rights situation in the country. These events include the 22<sup>nd</sup> session of the United Nations Human Rights Council (UNHRC) in March, the Northern Provincial Council elections in September and the Commonwealth Heads of Government Meeting (CHOGM) in November. The second section deals with specific violations and abuses that took place during the year. Given the thematic focus of subsequent chapters (i.e. the Judiciary, land issues, reconciliation, the freedom of expression and religious freedom), the present chapter largely focuses on gross human rights violations including extrajudicial killings, enforced and involuntary disappearances, and arbitrary arrests and detentions. In the chapter's concluding section, the author attempts to put Sri Lanka's human rights record into perspective and offers some insights on how sustainable the current accommodative ethos might be.

#### 2. Watershed Events in 2013

The three watershed events discussed in this section are not only relevant to human rights protection and promotion in Sri Lanka; they are intrinsically linked to each other. The UNHRC resolution of March 2013 and the international advocacy that preceded it exerted considerable pressure on the government to hold the Northern Provincial Council elections. The implementation of the UNHRC resolution was a critical point of discussion during election campaigning. Moreover, international support for Sri Lanka hosting CHOGM was made contingent on the government holding these elections. CHOGM itself proved to be a forum for the discussion of Sri Lanka's human rights record. This thematic focus in fact derailed the government's efforts to highlight post-war economic progress during the Summit.

These watershed events had an important impact on Sri Lanka's human rights record because they incentivised the government to contain gross human rights violations. Hence the events had an unmistakably positive impact on human rights protection and promotion during 2013.

#### 2.1 The UNHRC Session

The 22<sup>nd</sup> session of the UNHRC, held in March 2013, featured a resolution on 'Promoting Reconciliation and Accountability in Sri Lanka'. This resolution was a follow-up to Resolution 19/2 adopted during the 19<sup>th</sup> session of

Final Report of the Centre for Monitoring Election Violence, Report on Election Related Violence: Provincial Council Elections 2013 – Northern Province (October 2013), at 5. The report speculates: 'Indian support for the holding of the November 2013 Commonwealth Heads of Government Meeting (CHOGM) in Colombo, was employed as a key source of leverage in this respect.

the Council held in March 2012. The new resolution reiterated the government's responsibility to effectively implement the constructive recommendations of the Lessons Learnt and Reconciliation Commission (LLRC), and conduct an independent and credible investigation into alleged violations of international human rights law and international humanitarian law.<sup>2</sup> The resolution received widespread support amongst member states from all the regions represented in the Council.<sup>3</sup> One important inclusion in the 2013 resolution was the reference to the Northern Provincial Council and a specific welcoming of the government's decision to hold the elections in September 2013.

The overall impact of successive UNHRC resolutions on the human rights situation in Sri Lanka warrants discussion. The resolutions in both 2012 and 2013 defined a specific role for the Office of the High Commissioner for Human Rights (OHCHR) to monitor the implementation of the resolutions and report to the Council. High Commissioner for Human Rights, Navanethem Pillay, in fact visited Sri Lanka from 25 to 31 August 2013. Field visits in Jaffna, Killinochchi, Mullaitivu and Trincomalee were successfully carried out during the visit. Despite the fact that propagandists continued to personally attack the High Commissioner during her visit, the general sentiment within the OHCHR was that the visit was a success. Such success would have been unlikely if not

<sup>&</sup>lt;sup>2</sup>UN Human Rights Co uncil Resolution 22/1 – Promoting reconciliation and accountability in Sri Lanka, 9 April 2013, A/HRC/RES/22/1.

<sup>&</sup>lt;sup>3</sup> Despite being from the Asian bloc, India and South Korea voted in favour of the resolution, while Malaysia abstained.

Opening remarks by UN High Commissioner for Human Rights Navi Pillay at a press conference during her mission to Sri Lanka Colombo, 31 August 2013, at http://www.ohchr.org/EN/NewsEvents/Pages/ DisplayNews.aspx?NewsID=13673&LangID=E.

for a distinct governmental intention to showcase its cooperation. In an oral update before the UNHRC on 25 September 2013, the High Commissioner in fact thanked the Sri Lankan government for 'its excellent cooperation during the planning and conduct of her visit'.<sup>5</sup>

This framework of monitoring significantly increased scrutiny of Sri Lanka's human rights record during 2013. Moreover, a proliferation of international advocacy and information sharing during the period amplified scrutiny. The positive impact of this process is borne out in the noticeable improvement in Sri Lanka's human rights record in 2013. For instance, the overall number of extrajudicial killings and disappearances between March 2012 and December 2013 decreased in comparison to the spate of incidents recorded in 2011 and early 2012. The timing of the UNHRC resolution in March 2012 ought not to be seen as coincidental. Meanwhile, the media's attitude to human rights scrutiny gradually transformed during the period between March 2012 and March 2013. According to one on-going study, the press was unanimously opposed to the UNHRC resolution of March 2012, only occasionally covering the Opposition's criticism of the government's foreign policy.6 By contrast, in March 2013, the homogeneity of the press was replaced by bi-polarity wherein the alternative press began to adopt a more pragmatic approach in discussing the

<sup>&</sup>lt;sup>5</sup> Oral update of the High Commissioner for Hum an Rights on promoting reconciliation and accountability in Sri Lanka, 25 September 2013, A/HRC/24/CRP.3/Rev.1, ['OHCHR Oral Update'], at para.2.

<sup>&</sup>lt;sup>6</sup> Verité Research, *The Media Analysis*, Volume 2, Issues 6,7,8 and 11 (February-March 2012).

resolution.<sup>7</sup> Pragmatism was now a compelling alternative to the government's previous intransigence.

Meanwhile, in January 2013, a Parliamentary Select Committee impeached Chief Justice Shirani Bandaranayake with complete disregard for due process. The Committee also wantonly disregarded a Supreme Court order, which held that the impeachment violated the Constitution.<sup>8</sup> This development severely undermined the credibility of the government at international fora and set the stage for yet another difficult session at the UNHRC. Space for the government's obduracy had therefore dwindled during the early part of 2013.

Given these circumstances, one might briefly speculate on the government's thinking during the time. The government appears to have believed that some improvement in the current human rights record would result in the relaxation of international pressure. This thinking underscored the government's advocacy efforts during the 22<sup>nd</sup> session of the UNHRC. The speech on 15 March 2013 by Mahinda Samarasinghe, the Special Envoy of the President and Head of Delegation to the 22<sup>nd</sup> session of

Verité Research, *The Media Analysis*, Volume 3, Issue 8 (March 2013). A more recent assessment of this trend is provided by Niran Anketell, 'The slow wheels of justice and change: a Sri Lankan case study?', *Groundviews*, 17 May 2014, at http://groundviews.org/2014/05/17/the-slow-wheels-of-justice-and-change-a-sri-lankan-case-study.

<sup>&</sup>lt;sup>8</sup> See S.C. Reference 3/2012. The Court interpreted Article 107(3) of the Constitution and concluded that only a law (i.e. an Act of Parliament) and not a Standing Order of Parliament could provide for matters relating to proof in an impeachment proceeding. The Parliamentary Select Committee responsible for investigating Chief Justice Shirani Bandaranayake 's alleged misbehaviour was established by Standing Order 78A and not by law. The Parliamentary Select Committee was therefore not an institution created and established by law. Thus it was held that the impeachment by the Parliamentary Select Committee violated the Constitution

the UNHRC, clearly reflects this thinking. The government was keen to showcase progress made in terms of improvements in the human rights situation and even made commitments to 'keep member and observer states informed of further developments in Sri Lanka in the field of promotion and protection of human rights." The government also took steps to improve its plans to implement the LLRC. Initial assessments of the National Plan of Action to Implement the Recommendations of the LLRC (NPA) indicated that the Plan omitted a large number of LLRC recommendations.10 In her report submitted to the UNHRC in March 2013, the High Commissioner for Human Rights criticised the NPA,11 and this criticism was reflected in the text of the March 2013 resolution. While at no point overtly accepting the criticism, the government opted to revise the Plan in 2013, thereby signalling its intention to cooperate on some level and showcase progress. Accordingly, on 4 July 2013, the Presidential Secretariat announced that the Cabinet of Ministers had approved the inclusion of 53 recommendations in an addendum to the NPA.12

<sup>&</sup>lt;sup>9</sup> Statement at the adoption of Report of the UPR Working Group by Hon. Mahinda Samarasinghe M.P., Minister of Plantation Industries, Special Envoy of H.E. the President of Sri Lanka on Human Rights, Leader of the Sri Lankan Delegation, 22<sup>nd</sup> Session of the UN Human Rights Council, 15 March 2013.

Nonitor - Statistical and Analytical Review No. 1 (November 2012). According to the study, 48 recommendations were omitted from the NPA. Report of the Office of the United Nations High Commissioner for Human Rights on advice and technical assistance for the Government of Sri Lanka on promoting reconciliation and accountability in Sri Lanka, 11 February 2013, A/HRC/22/38, at para.11.

Official website of the Presidential Secretariat of Sri Lanka, Cabinet approves action on 53 more LLRC recommendations, 15 July 2013, http://reading.gov.lk/index.php?option=com\_k2&view = item&id = 120: cabinet-approves-action-on-53-more-llrc-recommendations.

As discussed in detail in the next section of this chapter, the government's assurances appear to have been accompanied with actual concessions on the ground. In this context, it is reasonable to conclude that the UNHRC resolutions had a positive impact on Sri Lanka's human rights record in 2013.

#### 2.2 The Northern Provincial Council Elections

The Northern Provincial Council elections were held on 21 September 2013. The elections were the first since President R. Premadasa dissolved the Council (then part of an amalgamated North-Eastern Provincial Council) in 1990.13 One analysis of the elections concluded that they were the result of sustained pressure from the international community including India and Japan.14 The fact that the UNHRC resolution of March 2013 explicitly welcomed the announcement of the elections added to the pressure—not only to hold the elections, but also to ensure that they were relatively free and fair. The elections were, however, not without incident. Independent election monitors observed at least 27 major incidents involving election violence.15 Moreover, a disturbing trend of the military's involvement in campaigning for certain candidates as well as intimidating voters was observed.16 Yet the Tamil National Alliance (TNA) secured an overwhelming majority at the elections, capturing 30 of the 38 seats.

<sup>&</sup>lt;sup>13</sup> The then President dissolved the Council following the unilateral declaration of independence by then Chief Minister of the North-Eastern Provincial Council, Varatharajah Perumal.

<sup>&</sup>lt;sup>14</sup> Final Report of the Centre for Monitoring Election Violence, Report on Election Related Violence: Provincial Council Elections 2013 – Northern Province (October 2013).

<sup>15</sup> Ibid. at 5-6.

<sup>16</sup> Ibid. at 9-11.

The election results demonstrated the Northern electorate's prioritisation of accountability and human rights. The TNA's pre-election statement was unambiguous in its commitment to pursuing accountability and the implementation of the UNHRC resolutions in March 2012 and March 2013.17 Meanwhile, the government continued to channel resources into infrastructure development in the hope that the people of the North would value economic development over accountability and human rights. This line of reasoning was evident in its posturing at the UNHRC during the 23rd session of the Council.18 In the lead up to the elections, extrajudicial killings, disappearances and arbitrary arrests and detentions in the North and East reduced, with no major incidents reported during the time. Improvement in the human rights situation was certainly part of the optics of the government strategy to win the elections and appeare the international community in the lead up to the next session at the UNHRC. However, the government's strategy failed, as nearly 80 percent of the votes went to the TNA.

<sup>&</sup>lt;sup>17</sup> Tamil National Alliance, Northern Provincial Council Election Statement, at http://tnapolitics.org/?page\_id=1845&lang=en.

<sup>&</sup>lt;sup>18</sup> See Statement by H.E. Mr. Ravinatha P. Aryasinha, Permanent Representative of Sri Lanka and Leader of the Sri Lanka Delegation to the 23<sup>rd</sup> Session of the Human Rights Council, 27 May 2013, at http://www.defence.lk/new.asp?fname=Sri\_Lanka\_National\_Statement\_delivered\_by\_Ambassador\_20130528\_07. The Ambassador stated:

The Government continues to focus on infrastructure development activities in the Northern and Eastern Provinces through significant public investment, in road construction, power generation and transmission, port development and extension of railway lines, etc. 139 destroyed and damaged schools were reconstructed and rehabilitated while 348 schools had been reopened in the Northern Province in 2012. On 14 May 2013, the 43-kilometre Medawchchiya-Madhu segment of the 106 kilometre long Medawchchiya - Thalaimannar railway line was commissioned under the first phase of the Northern Railway Project.

What these election results mean in terms of human rights protection and promotion in Sri Lanka is still to be fully understood. The imminence of the elections incentivised the government to improve its human rights record and demonstrate good faith. However, the election results themselves—a clear denunciation of government policies in the North—may change these incentives. As discussed in the next section, the final quarter of 2013 in fact reflected such a shift.

#### 2.3 CHOGM

The 23<sup>rd</sup> Commonwealth Heads of Government Meeting (CHOGM) was held in Sri Lanka, from 15 to 17 November 2013. In the lead-up to the Summit, a number of states expressed concern over the human rights situation in Sri Lanka. In fact, the heads of state of Canada, India and Mauritius boycotted the Summit citing Sri Lanka's dismal human rights record. The countries that did attend were under significant pressure by human rights groups to condemn the Sri Lankan government for failing to curb impunity and ensure accountability for crimes committed during the war and its aftermath. British Prime Minister, David Cameron responded by visiting Jaffna on 14 November and issuing an ultimatum to the Government of Sri Lanka the next day. He stated:

If that investigation is not completed by March then I will use our position on the UN Human Rights Council to work with the UN Human Rights Commissioner and call for a full credible independent international enquiry.<sup>20</sup>

<sup>&</sup>lt;sup>19</sup> 'Commonwealth summit opens in Sri Lanka amid rights row', *The BBC*, 15 November 2013, http://www.bbc.com/news/world-asia-24951296

<sup>&</sup>lt;sup>20</sup> 'David Cameron sets deadline for Sri Lanka war crimes investigation', The Telegraph, 16 November 2013, at http://www.telegraph.co.uk/news/worldnews/asia/srilanka/10454028/David-Cameron-sets-deadline-for-Sri-Lanka-war-crimes-investigation.html

Each of the watershed events discussed in this section was seen as an opportunity to divert international attention away from human rights and accountability issues. Hence the government sought to focus its efforts around showcasing progress and highlighting improvements. Despite the true intentions of the government, its strategy of appearement resulted in important concessions during this time period: provincial elections were held in the North for the first time in 25 years, and gross human rights violations in the country decreased noticeably.

## 3. The Human Rights Situation in 2013

This section explores developments during 2013 with respect to three key human rights issues: extrajudicial killings, enforced and involuntary disappearances and arbitrary arrests and detentions. Torture may also be classified alongside these gross human rights violations. Yet the issue is not dealt with in this chapter due to the fact that there were no major incidents of torture reported in 2013.

## 3.1 Extrajudicial Killings

2013 witnessed a decline in the number of extrajudicial killings in Sri Lanka. Only the Weliweriya incident, which resulted in the deaths of three civilians, stood out. On 1 August 2013, residents of Rathupaswala, a village in Weliweriya in the Gampaha District, protested against the contamination of drinking water due to the release of chemicals by a factory in the area.<sup>21</sup> The military was brought in to quell protestors, and in the ensuing mêlée, three

<sup>&</sup>lt;sup>21</sup> 'The story of the Rathupaswala incident', Ceylon Today, 12 August 2013, at http://www.ceylontoday.lk/59-39888-news-detail-the-story-of-the-rathupaswala-incident.html.

Sri Lanka: State of Human Rights 2014

civilians—Akila Dinesh, aged 17, Ravishan Perera, aged 19, and an unnamed 29-year-old man—died.<sup>22</sup>

The military's involvement in Weliweriya was made possible under Section 12 of the Public Security Ordinance, No. 25 of 1947. The Section reads:

Where circumstance endangering the public security in any area have arisen or are imminent and the President is of the opinion that the police are inadequate to deal with such situation in that area, he may, by Order published in the Gazette, call out all or any of the members of all or any of the armed forces for the maintenance of public order in that area.

The President was already in the habit of issuing such proclamations on a monthly basis regardless of the circumstances. Hence, at the time of the incident, the Army had already been called out through a Presidential Proclamation dated 3 July 2013.<sup>23</sup> The Army was accordingly deployed to suppress approximately 3,000 protestors, who had staged their protest and had obstructed traffic on the Colombo-Kandy road. Following violent exchanges between the protestors and Army personnel, the Army opened fire on the protesters, eventually killing three.<sup>24</sup> The incident was

<sup>&</sup>lt;sup>22</sup> Amnesty International, Sri Lanka: Investigators of alleged army killings of protesters should be truly independent, 5 August 2013, athttp://www.amnest y.org/en/news/sri-lanka-investigators-alleged-army-killings-protesters-should-be-truly-independent-2013-08-05.

<sup>&</sup>lt;sup>23</sup> See Gazette Extraordinary No. 1817/31 of 3 July 2013, under which the President called out the Armed Forces to maintain public order in all dis tricts of Sri Lanka, including the District of Gampaha.

<sup>&</sup>lt;sup>24</sup> Ceylon Today, op.cit.

specifically condemned by the international community and was a subject of concern during the 24th session of the UNHRC in September 2013.<sup>25</sup> The incident was also condemned within domestic quarters. Commentators were virtually unanimous in concluding that the military had acted excessively in dealing with civilian dissent.<sup>26</sup> Moreover, it was pointed out that militarisation in the North and East had cultivated an environment of impunity throughout the country, and that excessive use of force had now become the 'first resort'.<sup>27</sup>

Possibly due to mounting domestic and international pressure, an Army Court of Inquiry headed by Major General Jagath Dias was appointed soon after the Weliweriya incident. It submitted its report to the Commander of the Army on 21 August 2013.<sup>28</sup> The Brigade Commander who was in charge of the Weliweriya area at the time and three sector commanders were relieved of their posts pending a final inquiry. At the end of 2013, the report of the Court of Inquiry was yet to be published and prosecutions were yet to be announced. Hence actual progress in terms of bringing perpetrators to justice appeared to be typically slow.

<sup>&</sup>lt;sup>25</sup> OHCHR Oral Update, at para.20.

Dayan Jayatilleka, 'Weliweriya, Gampaha: Black Thursday 2013', DailyFT, 3 August 2013, at http://www.ft.lk/2013/08/03/weliweriya-gampaha-black-thursday-2013; Harim Peiris, Weliweriya and the challenge of demilitarizing the North', Groundviews, 5 August 2013, at http://groundviews.org/2013/08/05/weliweriya-and-the-challenge-of-demilitarizing-the-north.

<sup>&</sup>lt;sup>27</sup> M.A. Sumanthiran, 'United in Grief', *The Island*, 9 August 2013, at http://www.island.lk/index.php?page\_cat=article-details&page=article-details&code\_title=85447.

<sup>&</sup>lt;sup>28</sup> Ministry of Defence, *Press Communiqué - Weliweriya Incident*, 30 August 2013, at http://www.defence.lk/new.asp?fname=Press\_Communique\_Weliweriya\_Incident\_20130830\_03.

Meanwhile, a 'board of senior officers' was appointed to study the findings of the Court of Inquiry and to make recommendations as to 'how similar situations, particularly with regards to Army's involvement, could be averted in the future' [siq].<sup>29</sup> Yet, at present, the outcome of this process remains unclear.

Since 2013 was a relatively quiet year on the human rights front, the Weliweriya incident remains somewhat anomalous. The incident was, in every sense, unusual for 2013. It took place in the South of the country, whereas no such incident had taken place even in the North since the suppression of student protests in Jaffna in November 2012. Moreover, it was grossly excessive—the military used flak jackets and assault rifles to deal with unarmed Sinhalese civilians. The incident reflected a curious overreaction perhaps explicable only by the mounting pressure on the defence establishment to display restraint—an approach it was wholly unaccustomed to. Weliweriya therefore represented much more than the 'consequences' of militarisation or of impunity; it revealed the internal tension within government in terms of the tried and test model of repression and the faltering and somewhat unconvincing model of international appeasement. The government was experiencing an internal struggle between the proponents of these two models. By August 2013, the proponents of the former model were perhaps growing increasingly impatient with the proponents of the latter. This tension was already brewing beneath the surface when the military was called into action in Weliweriya.

Weliweriya incident: top army officers relieved from posts', *Daily Mirror*, 30 August 2013, at http://www.dailymirror.lk/news/34632-weliweriya-incident-top-army-officers-relieved-from-their-posts.html.

#### 3.2 Enforced and Involuntary Disappearances

Not a single enforced or involuntary disappearance was reported in 2013. Human Rights Watch, in its World Report for 2014, only referred to past incidents that remained uninvestigated. Similarly, the UN High Commissioner for Human Rights, in her oral update to the UNHRC during its 24th session, only made reference to new processes introduced to investigate past disappearances. Neither report indicated that new incidents had taken place in 2013.

Meanwhile, the President appointed a Commission of Inquiry on 15 August 2013 to inquire into disappearances in the Northern and Eastern Provinces between 1990 and 2009.<sup>32</sup> The appointment was in pursuance of implementing the recommendations of the LLRC and was presented as an important step in ascertaining the whereabouts of persons who disappeared during and immediately after the war.<sup>33</sup>

Two major criticisms may be offered with respect to the new Commission of Inquiry. First, the appointment did not amount to the full implementation of the LLRC recommendation concerned. The LLRC recommended the appointment of a 'Special Commissioner of Investigation' to investigate alleged disappearances and provide material to the Attorney General to initiate criminal proceedings.<sup>34</sup>

<sup>&</sup>lt;sup>30</sup> Human Rights Watch, World Report 2014: Sri Lanka, at http://www.hrw.org/world-report/2014/country-chapters/sri-lanka?page=2.

<sup>31</sup> OHCHR Oral Update, at para.13.

<sup>32</sup> Gazette Extraordinary No.1823/42 of 15 August 2013.

<sup>&</sup>lt;sup>33</sup> Progress Monitoring Report: National Plan of Action for the Implementation of LLRC Recommendations – Responsibilities by Thematic Area (November 2013).

<sup>&</sup>lt;sup>34</sup> Report of the Commission of Inquiry on Lessons Learnt and Reconciliation (November 2011) ['LLRC Report'], para.9.51.

What was established instead was a Presidential Commission of Inquiry under the Special Presidential Commissions of Inquiry Law, No. 7 of 1978. The difference, though technical, is not negligible. A proliferation of similar commissions has been witnessed over the years in Sri Lanka, with little or no results in terms of ascertaining the whereabouts of the missing or bringing perpetrators to justice. As correctly pointed out by Amnesty International during the 24th session of the UNHRC in September 2013, the previous ten commissions of inquiry appointed since the 1990s 'have lacked independence and effective witness protection [and have] made recommendations that are rarely implemented.'35

Second, the timeframe pertaining to the Commission's mandate was somewhat peculiar. On the one hand, it arbitrarily begins in 1990, leaving out grave incidents that may have taken place one or two years before. For instance, the Commission has no mandate to inquire into the mass grave recently discovered in Matale, which is suspected of holding victims of enforced disappearances between 1989 and 1990. On the other hand, the timeframe excludes postwar disappearances, including the 'white van' incidents reported throughout 2010-2012. These disappearances include the high profile disappearances of journalist Prageeth Eknaligoda in January 2010 and Janatha Vimukthi Peramuna activists, Lalith Kumara Weeraraj and Kugan Murugananthan in December 2011.

<sup>&</sup>lt;sup>35</sup> Amnesty International, Written statement submitted by Amnesty International, a non-governmental organization in special consultative status, 10 September 2013, A/HRC/24/NGO/96.

<sup>36</sup> Ibid.

<sup>37</sup> OHCHR Oral Update, at para.13.

During 2013, the government reined in elements responsible for previous disappearances to ensure that no new disappearances took place. Moreover, as highlighted above, it introduced new measures to investigate past disappearances. Both these developments reflect the government's intent to demonstrate its will to address the issue of disappearances. These developments, however, remain 'demonstrations of will', rather than initiatives meant to produce results. The careful circumvention of contentious timeframes such as the 1989 disappearances and post-war disappearances, and the use of a model with a proven track-record of failure, indicate that the government's priority was in showcasing progress as oppose to achieving it. Hence Sri Lanka's track record in 2013 with respect to enforced and involuntary disappearances is somewhat misleading. Any shift in the framework of incentives that motivates the government's appeasement strategy may result in a vastly different outcome in the years to come. Hence this apparent suspension of the regime's use of disappearances as a means of countering dissent may be short-lived.

# 3.3 Arbitrary Arrests and Detention

The spate of arbitrary arrests and detentions, witnessed during much of 2012, abruptly ended in 2013. This development was in many ways consistent with the situation with respect to extrajudicial killings and disappearances. As discussed below, a handful of arbitrary arrests and detentions were, however, reported.

The UN High Commissioner for Human Rights, in her oral update during the 24th session of the UNHRC observed that 11,758 detainees had been 'rehabilitated and reintegrated

into society.'38 A further 91 cases were reported as pending. The High Commissioner also noted her disappointment in the lack of progress in terms of repealing the *Prevention of Terrorism (Temporary Provisions) Act*, No. 48 of 1979 (PTA). It was observed that 'cases of arbitrary detention under the PTA continue to be recorded...50 such cases of arrests, all recorded between 2009 and 2013, were brought to [the High Commissioner's] attention.'39

The case of Azath Salley was amongst the few arbitrary arrests and detentions reported during 2013. On 2 May 2013, the police arrested Salley, the General Secretary of the National Unity Alliance, for allegedly committing offences under Section 2(1)(h) of the PTA. Section 2(1)(h) reads:

Any person who...by words either spoken or intended to be read or by signs or by visible representations or 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...shall be guilty of an offence under this Act.

In a letter to the President dated 26 April 2013, Salley had been strongly critical of the government's inaction in investigating an attack on the Dambulla Mosque in 2012.<sup>40</sup> The letter was also critical of a Sinhala-Buddhist extremist group, *Bodu Bala Sena*, which enjoyed the support of certain

<sup>38</sup> Ibid. at para.14.

<sup>39</sup> Ibid.

<sup>&</sup>lt;sup>40</sup> See Kishali Pinto-Jayawardena, Jayantha de Almeida Gunaratne & Gehan Gunatilleke, *The Judicial Mind: Responding to the Protection of Minority Rights* (January 2014), at 262.

elements within government and was seen as instrumental in anti-Muslim attacks. He was later misquoted in a Tamil Nadu bi-weekly magazine called Junior Vikatan, which carried an interview in which he allegedly called on Muslims to take up arms.41 In a fundamental rights application filed before the Supreme Court, Salley's representatives claimed that he had been misquoted and that the arrest and detention amounted to a violation of his fundamental rights guaranteed by the Constitution.42 However, the case was never heard due to Salley's release on 10 May 2013.

Azath Salley's case remains another curious indication of a growing tension between two competing approaches within the government. The defence establishment was once again swift in responding to dissent in the manner it was most accustomed to. The PTA was the most obvious tool in this context and there was little hesitation in employing the Act to justify the arrest and detention of a major irritant. However, the case did not snowball into the travesty of justice and the public relations nightmare that J.S. Tissainayagam's arrest and detention in 2009 eventually became.43 By contrast, Salley's release was quickly secured through 'political negotiations', which culminated in Salley addressing an apologetic affidavit to the President.44 The case against him disappeared overnight. It was another clear instance where a model of caution prevailed over the usual repressive model. The eventual outcome of the case was

<sup>41</sup> Ibid. at 263.

<sup>42</sup> Ibid. Also see Petition of Azath Salley in SC (F.R) Application No. 164/ 2013.

<sup>43</sup> For a detailed analysis of Tissainayagam's case, see Pinto-Jayawardena et al, op.cit. at 243-244.

<sup>44</sup> Ibid. at 264.

also consistent with the government's intention to appease the international community during the time. A high-profile case of this nature would have severely undermined the government's image in the wake of the UNHRC Resolution in March and the impending Summit in November. Therefore, accepting the coerced 'apology' and ordering his release seemed the most sensible option.

Given the extraordinary influence wielded by the defence establishment, the tension between the two competing approaches within government is likely to be short-lived. While Azath Salley's case is an instance where the appearement approach prevailed over the repressive approach, the steady decline of incentives may see the return of the latter approach. In fact, the conclusion of CHOGM heralded such a return. In late November 2013, the Terrorism Investigation Department (TID) arrested seven Tamil youth from Jaffna and Mannar, including Raveendran Kajeepan, Alfred Piratheepan, Murukaiya Ashokkumar and Nageswarasri Yarsan. The youth were detained under the PTA and eventually transferred to the Boosa Detention Centre.

These new arrests echoed the arrests and detentions of students from the University of Jaffna in November 2012, coinciding with Mahaveerar Naal (i.e. the LTTE Heroes Day). If the same pattern from 2012 is repeated, it is likely that the arrested youth would be 'rehabilitated' and released

<sup>&</sup>lt;sup>45</sup> See Civil Society Statement Condemning the Arrest and Unlawful Detention of Seven Tamil Youth, and Calling for their Immediate Release, 18 December 2013, at http://www.scribd.com/doc/213654301/Statement-Calling-for-the-Immediate-Release-of-7-Tamil-Youth-Illegally-Detained-Under-PTA.

in 2014.46 However, one critical difference between the release of the Jaffna University students and the circumstances of the more recent arrests ought to be considered. The parents of the Jaffna University students appealed to the President at a time when the incentives towards appeasing the international community were at its highest. In the lead up to the UNHRC session in March 2013, the arbitrary arrest and detention of university students reflected poorly on the country's human rights record. Hence it would have seemed sensible to release the students, particularly if they posed no serious threat to the state. The same incentives may not influence the government's thinking in March 2014 should it become clear to the government that no amount of appeasement will cause a decline in international pressure. In this context, it is likely that the defence establishment will dictate the approach to arrests and detentions during 2014.

#### 4. Conclusion

It remains to be seen whether 2013 marked the beginning of an encouraging transformation in Sri Lanka, or whether it was merely a year in which gross human rights violations were carefully contained in view of certain incentives. Given the sporadic incidents of extreme violence amidst the relative restraint displayed in general, the human rights situation in 2013 appeared to be the culmination of an uneasy truce. Certain forces within government were keen to deflect

<sup>&</sup>lt;sup>46</sup> Pinto-Jayawardena et al, op.cit. at 258-262. The government arrested four students from the University of Jaffna—V. Bavananthan, Paramalingham Darshananth, Kanakasundaraswami, Jenamejeyan and Shamugam Solomon—and charged them under the PTA Regulations. The students were eventually released in January and February 2013 on the orders of the President.

international pressure by containing the most visible human rights violations and showcasing progress in implementing the LLRC recommendations. However, the defence establishment was less enthusiastic about this approach and occasionally undermined it by overtly committing those very violations.

In conclusion, it may be appropriate to further reflect on the tension that emerges from the government's complex and often contradictory positions on human rights during the year. The overarching backdrop to the human rights situation has already been examined to some extent in the preceding sections. The government was therefore clearly incentivised to showcase improvements to the international community. This approach was adopted in pursuance of two specific objects. First, the government aimed to counter pressure on the accountability front. The UNHRC Resolution of March 2012 had begun a process by which the international community could apply sustained pressure on the government to ensure accountability for alleged crimes committed during the final stages of the war. The Resolution, however, highlighted ongoing violations of human rights as well. Hence there appeared to be an incentive offered to the government in terms of improving its human rights record in exchange for reduced international pressure. The extent to which this incentive was deliberately offered remains unclear. Nevertheless, the government's intention to showcase improvements on the human rights front during 2013 could be easily detected. Second, the government wished to host CHOGM. The precise reasons behind this ambition are not known. Yet it is possible to speculate that hosting several key heads of state at an international summit and being named the Chair of the Commonwealth until the

next summit is held, were matters of prestige and confidence building—considerations that this government deeply prioritised.<sup>47</sup> Improving the human rights record and holding democratic elections in the Northern Province were thus seen as important precursors to realising this ambition.

Two lessons emerge when analysing the internal tension (i.e. between the appeasement approach and the repressive approach) within government. First, the government's positive response to incentives clearly demonstrates the potency of international advocacy. One of the arguments against the UNHRC resolutions on Sri Lanka in 2012 and later in 2013 was that they would disrupt the fragile domestic reconciliation process that had already begun through the LLRC. Yet, in reality, they had the opposite effect. Heightened international scrutiny after the March 2012 Resolution appeared to have had a positive impact on the government's approach to human rights and the implementation of the LLRC. This impact may be observed throughout 2013 and resulted in a more pragmatic strategy of containing rights violations and showcasing progress.

Second, it became increasingly clear that views within government at the time were in no way homogenous. The ambition to appease the international community did not necessarily emerge from a consensus within government. The human rights record during 2013 repeatedly demonstrated a 'difference of opinion' within government, which resulted in contradictory approaches being played out in reality. While

<sup>&</sup>lt;sup>47</sup> See Speech by President Mahinda Rajapaksa addressing the 22<sup>nd</sup> Commonwealth Heads of Government Meeting (CHOGM), 15 November 2013, at http://www.president.gov.lk/speech\_New.php? Id=137.

the dominant approach was one of appeasement and showcasing progress, the defence establishment often responded to dissent in a manner that undermined this approach. One way of interpreting these anomalous incidents is to dismiss them as exceptions to the dominant approach. Yet these incidents are not anomalous within a broader timeframe, i.e. if the timeframe were to include the entire post-war period. The repressive measures adopted in Weliweriya for instance, though somewhat anomalous in 2013, were perfectly consistent with the approach of the defence establishment between 2010 and 2012.48 In this context, it is necessary to appreciate the internal tension within government and the inclination towards repressive means given the opportunity. 2013 might merely be the year in which the appeasement approach dominated the thinking. It in no way signals the end of the repressive approach—an approach that may resurface if the apparent objectives of appeasement are not met.

<sup>48</sup> For example, in May 2011, Roshen Shanaka was shot dead by the Police during a protest against the government's mandatory pension scheme for private sector employees. In August 2011, 100 Tamil men from Navanthurai, Jaffna were dragged from their homes by the military, brutally assaulted and 'arrested' following a protest against the alleged involvement of the military in attacks on women. In February 2012, Warnasuriya Anthony Fernando, a 35-year-old fisherman, was shot dead by the Special Task Force of the Police while protesting against a fuel price hike. In July 2012, several Tamil political prisoners were severely beaten by the Special Task Force following a hostage taking incident. Ganesan Nimalaruban and Mariyadas Delrukshan eventually succumbed to their injuries. In November 2012, a peaceful protest organised by the students of the Jaffna University was brutally suppressed by the Army. Many of the protestors were later hospitalised due to injuries sustained in the attack. Also in November, the Army was deployed to quell a riot at the Welikada prison, where they shot and killed 27 prisoners.

# JUDICIAL PROTECTION OF HUMAN RIGHTS 2013 Dinesha Samararatne

#### 1. Introduction

Sri Lanka has been described as a paradox for different reasons by commentators and researchers: the different spheres of society – the religious, political, and the social, generate inconsistencies that pose challenges to those who seek to understand the nuances and complexities Sri Lankan society. The popular adherence to different religions contrasts with religious intolerance and even violence; professed moral values contrast with gender based violence and incidences of child abuse; and political commitments seemingly for the benefit of the people of Sri Lanka contrasts with nepotism and ethno nationalism.

Judicial protection of human rights too, at different points in the recent history of the country has presented such inconsistencies. Particularly in the 1990s the Sri Lankan

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Supreme Court developed a vibrant body of jurisprudence that was progressive in its interpretation in a larger context of serious human rights violations. For instance, the three decade long internal-armed conflict between the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam which ended in May 2009 and the insurrection led by the Janatha Vimukthi Peramuna 1989 – 1991 resulted in grave violations of human rights. It is against that backdrop that the Supreme Court advanced a dynamic interpretation of several human rights including the freedom of expression and the right to be free from torture.

As demonstrated in this Chapter, the current context of judicial protection of human rights presents similar contrasts. In the aftermath of the internal armed conflict, the Judiciary seems to be more cautious in its approach to the protection of human rights. Moreover, human rights violations and rule of law related issues remain unresolved and in certain areas of life, have increased. The independence of the Judiciary has been undermined in an unprecedented manner, attracting both local and international criticism. While a rigorous and academic reflection on these inconsistencies is beyond the scope of this Chapter, it presents a critical analysis of the jurisprudence of the Court in an effort to contribute to a better understanding of the nature of the judicial protection that is being offered for human rights in contemporary Sri Lanka.

The first part of the Chapter considers the functioning of the Judiciary against the larger canvass of the political, social

<sup>&</sup>lt;sup>1</sup> For an analysis of the same, see, Deepika Udagama, 'Taming of the Beast: Judicial Responses to State Violence in Sri Lanka' (1998) 11 Harv Hum Rts J 269.

and economic experiences of Sri Lanka in 2013. The second part briefly describes the analytical approach adopted in this Chapter. The judgements on fundamental rights applications that were made during the year are analysed in part three. They are primarily in the area of right to equality and the prohibition on torture. The fourth part evaluates the manner in which the Judiciary addressed human rights in reviewing proposed legislation for their constitutionality. The fifth part assesses the degree of protection afforded to human rights by the Judiciary in 2013 in light of the discussion in the earlier sections.

# 2. The Judiciary in the Broader Context of Governance in 2013

The year began with the impeachment of the Chief Justice in January 2013. The 18th Amendment to the Constitution of 2010 and prior to that the express disregard of the 17th Amendment to the Constitution made it possible for the Chief Justice to be impeached in a manner that undermined the independence of the Judiciary. The 17th Amendment limited the discretionary powers of the Executive President in making appointments to significant positions, including in the Judiciary, by providing for an expert body, the Constitutional Council, to make recommendations for those appointments. Since 2005 the Constitutional Council was not appointed and the President made appointments to those offices directly. The 18th Amendment to the Constitution, replaced the Constitutional Council with a Parliamentary Nominations Council whose recommendations were not binding on the President. Moreover, the Amendment also removed the limit on the number of terms an Executive President could serve. This Amendment therefore, further strengthened an already powerful Executive Presidency and was in violation of norms of accountability and democracy. It is ironic that the Special Determination which upheld the constitutionality of the then proposed 18th Amendment was delivered by Chief Justice Bandaranayake who was subsequently impeached by the same Government.<sup>2</sup>

The impeachment was considered by local and international stakeholders as a serious assault on the independence of the Judiciary. For instance the statements issued by the Bar Association, the UN Special Rapporteur on the independence of judges and lawyers and the International Bar Association condemned the impeachment as being in violation of the basic norms of fairness.3 The lack of due process in the inquiry by the Parliamentary Select Committee into the allegations made by the motion to impeach presented in Parliament by the Government, and the disregard of the ruling of the Court of Appeal by the Parliament with regard to the procedure followed in the impeachment are the two main reasons for the criticism of the impeachment.4 Moreover the subsequent appointment to the office of the Chief Justice was also criticised both for the manner in which the appointment was made and for the close association of the appointee with the current Government.<sup>5</sup> Furthermore,

<sup>&</sup>lt;sup>2</sup> In Re the Eighteenth Amendment to the Constitution SC (SD) No 1/2010, SC Minutes 31 August 2010.

<sup>&</sup>lt;sup>3</sup> See for instance, A Crisis of Legitimacy: The Impeachment of Chief Justice Bandaranayake and the Erosion of the Rule of Law in Sri Lanka, report of the International Bar Association's Human Rights Institute (April 2013).

<sup>&</sup>lt;sup>4</sup> Shirani Bandaranayake v Speaker of Parliament CA (Writ) Application 411/2012, CA Minutes 7 January 2013. The ruling of the Court of Appeal was overturned by the Supreme Court in AG v Shirani Bandaranayake SC Appeal No 67/2013, SC Minutes 21 February 2014.

<sup>&</sup>lt;sup>5</sup> Mohan Peiris: Before a tougher hurdle Daily Mirror 17 January 2013, available at http://www.dailymirror.lk/opinion/172-opinion/25058-mohan-peiris-before-a-tougher-hurdle.html, accessed on 25 August 2014.

soon after the new appointment, several members of the Judiciary were given transfers, in contravention of established norms and conventions.<sup>6</sup> The dwindling confidence in the independence of the Judiciary suffered a further set back due to the subsequent promotions and new appointments that were made to the appellate judiciary.<sup>7</sup> Some of these promotions were made ignoring more senior judges while new appointments were suspect due to the unsuitability of the appointees and their close links to the Government.

Sri Lanka continued to experience a crisis in governance in the year 2013. Among the many incidents and the numerous issues that came up during this time the protests against the alleged ground water pollution at Rathupaswela and the killing of at least one person by the military in quelling the protest; and the milk powder crisis stand out significantly. Attacks against religious minorities, and the (re)emergence of extremist Sinhala-Buddhist nationalism as proposed by a few organizations led by Buddhist monks is another problem that emerged during this time. The response of the Government, the police and the Human Rights Commission

<sup>&</sup>lt;sup>6</sup> Legal profession jolted by shuffle in judiciary Sunday Times 7 April 2013, available at http://www.sundaytimes.lk/130407/news/legal-profession-jolted-by-shuffle-in-judiciary-40398.html accessed on 25 August 2014.

<sup>&</sup>lt;sup>7</sup> Spotlight on new appointment to Supreme Court Daily Mirror 6 May 2014, available at http://www.dailymirror.lk/opinion/172-opinion/46740-spotlight.html, accessed on 25 August 2014.

<sup>&</sup>lt;sup>8</sup> See for instance, Powdered milk crisis exacerbates as pressure builds up for price revision The Island 28 December 2013, available at, http://www.island.lk/index.php?page\_cat=article-details&page=article-details&code\_title=94943 accessed on 26 August 2014 and Wary Weliweriya Daily Financial Times 3 August 2013, available at http://www.ft.lk/2013/08/03/wary-weliweriya/ accessed on 26 August 2014.

<sup>&</sup>lt;sup>9</sup> See for instance The Media Analysis, February 4, 2013 – February 10, 2013 (Verite Research).

to these issues has been inadequate. Persons responsible for related criminal behaviour, including attacks against places of worship, and business establishments remain unidentified and unpunished. Moreover militarization of different spheres of life in Sri Lanka including management of the development of infrastructure; dengue eradication programmes; leadership training of entrants to state universities for instance, has continued. Consequently, the rule of law has eroded significantly in Sri Lanka. Impunity, particularly for criminal behaviour, for those with political power has further weakened the rule of law and crippled the criminal justice system of the country, as was demonstrated in the Tangalle murder case in which the main suspect was the chairman of the local authority.

The post-armed conflict concerns regarding accountability for human rights violations that took place during the conflict and transitional justice too were carried forward to 2013. Issues related to the acquiring of land in the North and East; the continuation of high security zones; and the heavy military presence in the North continued to be raised by civil society and the political representatives of these areas. The contribution of the judiciary to the resolution of these issues remained negligible.<sup>11</sup>

These ground realities in Sri Lankan society, were captured in both the report of the Office of the High Commissioner

<sup>&</sup>lt;sup>10</sup> See for instance, Jonthan Goodhand, 'Sri Lanka in 2011: Consolidation and Militarization of the Post-War Regime' (January/February 2012) 52(1) Asian Survey 130.

<sup>&</sup>lt;sup>11</sup> For an analysis see, Jayantha de Almeida Guneratne et al The Judicial Mind in Sri Lanka: Responding the to the Protection of Minority Rights (LST 2014) 247 onwards.

for Human Rights (OHCHR) that was presented to the Human Rights Council and to some extent in the resolution adopted by the Council in 2013.<sup>12</sup> The OHCHR report was guided by the resolution adopted by the Human Rights Council in 2012 and analysed how the issues highlighted by that resolution continued to remain valid.<sup>13</sup> The issues included rule of law and administration of justice; extra judicial killings and enforced disappearances; land issues; freedom of opinion and expression; demilitarization; and reconciliation. Detailed recommendations were made in this report, including a recommendation to establish a 'truth-seeking mechanism as an integral part of a more comprehensive and inclusive approach to transitional justice'.<sup>14</sup>

In the domestic debates and political rhetoric about human rights and their violations, the concept of state sovereignty has figured significantly. Even though Sri Lanka is a party to all major human rights treaties (except two), the Government has been rejecting UN monitoring of human rights violations and condemning the resolutions of the UN HRC as

<sup>&</sup>lt;sup>12</sup> Report of the Office of the United Nations High Commissioner for Human Rights on advice and technical assistance for the Government of Sri Lankan on promoting reconciliation and accountability in Sri Lanka, Twenty-second session, Human Rights Council 11 February 2013 and Resolution adopted y the Human Rights Council on Promoting reconciliation and accountability in Sri Lanka 22/19 April 2013.

<sup>&</sup>lt;sup>13</sup> Resolution adopted by the Human Rights Council on Promoting reconciliation and accountability in Sri Lanka 19/2 3 April 2012.

<sup>&</sup>lt;sup>14</sup> Para 63(a), Report of the Office of the United Nations High Commissioner for Human Rights on advice and technical assistance for the Government of Sri Lankan on promoting reconciliation and accountability in Sri Lanka, Twenty-second session, Human Rights Council 11 February 2013.

amounting to unlawful interference in domestic affairs<sup>15</sup> and as a violation of the sovereingty of the state. It has failed to give due regard to the obligations the Sri Lankan State has willingly accepted under international human rights treaty law without reservations.

The larger context of 2013 has been one that seriously undermined the respect for human rights in Sri Lankan society and one in which political power weakened the rule of law. The judicial branch of the state too has been crippled by these realities and as demonstrated in this Chapter, has not been able to provide protection of human rights in a meaningful way.

## 3. Methods of Analysis

The fundamental rights determinations of 2013, were obtained through the website of the Sri Lankan Supreme Court are analysed. Additionally, the Special Determinations made with regard to the constitutionality of Bills are also considered, as they were reported in the Hansard reports of 2013. This body of jurisprudence is critically evaluated in terms of the fundamental rights recognised in the Constitution interpreted within Sri Lanka's obligations under international human rights law. 17

The main limitation of the study undertaken in this Chapter is that it is based on partial information that is available in the

<sup>&</sup>lt;sup>15</sup> Sri Lanka has not ratified the Convention on the Rights of Persons with Disabilities and the Convention against Enforced Disappearances.

<sup>&</sup>lt;sup>16</sup> Available at http://supremecourt.lk/index.php?option= com\_geda &Itemid=115

<sup>&</sup>lt;sup>17</sup> Sri Lanka has ratified all the major human rights treaties with no reservations except the treaties on rights of persons with disabilities and enforced disappearances.

public realm. For a more nuanced understanding of judicial protection of human rights it is necessary to know how many new fundamental rights applications had been filed in 2013 and the rights alleged to be violated. It is also necessary to know how many cases were dismissed or withdrawn during this time. Dismissal in particular, provides insight to the degree of protection afforded by the Judiciary to human rights and is generally difficult to capture in an analysis as there is minimal information available on such cases. Apart from the fundamental rights jurisdiction, jurisprudence emanating from the writ jurisdiction and lower courts such as the Magistrate's Courts too need to be considered if a more informed evaluation is to be made of judicial protection of human rights in 2013. The lack of access to information is a significant obstacle in carrying out a more detailed study of this nature.

# 4. Fundamental Rights Jurisdiction

Eleven judgements were identified as having been reported in the year 2013.<sup>18</sup> The cases involved the right to equality and the right to freedom from torture. While the outcomes in some of these cases upheld rights, the jurisprudence is

Alles v Road Passenger Services Authority of the Western Province SC (FR) 448/2009 SC Minutes 22 February 2013; Asoka v Dayawansa SC (FR) 431/2010 SC Minutes 22 February 2013; Dharmasiri v Provincial Director of Health Services of the Sabaragamuwa Province SC (FR) 414/2013 SC Minutes 5th August 2013; Jayawardana v Principal, DS Senanayake College SC (FR) 231/2012 SC Minutes 18 December 2013; Noon v University Grants Commission SC(FR) 352/2010 SC Minutes 28 November 2013; Amavindi v Principal Dharmashoka Vidyalaya SC (FR) 138/2013 SC Minutes 18 December 2013; Pathinayaka v Police Sergeant Bandara SC (FR) 367/2010 SC Minutes 3 May 2013; Peiris v Weerakon Inspector of Police SC(FR) 278/2008 SC Minutes 25 October 2013; Pirushanthan v University of Peradeniya SC (FR) 478/2009 SC Minutes 13 February 2013; Ranathungage v Commissioner General of Labour SC (FR) 620/2010 SC Minutes 7 May 2013; Jayasuriya v Police Constable Mankkaratnam SC (FR) 43/2008 SC Minutes 18 November 2013.

bare and minimalist. Furthermore, certain significant issues arising from the facts of some of the cases do not attract the attention of the Court, and the basis for awarding compensation within the fundamental rights jurisdiction is unclear.<sup>19</sup>

# 4.1. Right to equality

The entitlement of all human beings to the equal enjoyment of human dignity and rights is at the heart of the concept of human rights. In many jurisdictions the judicial enforcement of this norm has evolved from the recognition of formal equality, the prohibition of discrimination on certain grounds including race and gender to include substantive equality. In certain instance the right to equality and non-discrimination has been relied on in addressing systemic inequalities. Internationally, the concepts of equality and non-discrimination have been expressly recognised through treaties and interpreted progressively in the jurisprudence of treaty bodies.

In Sri Lanka, the judicial expansion of the right to equality to include substantive equality took place in the 1990s. Moreover the right to equality has been resorted to by the Judiciary in expanding the scope of the fundamental rights chapter itself to include for instance, the right to education. The right to equality has also been interpreted by the Judiciary to include several principles of administrative law including the doctrine of legitimate expectation and principles of natural justice.

<sup>&</sup>lt;sup>19</sup> Madhushika Jayachandra & Dinesha 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 1, 38 onwards.

In the year 2013, several of the judicial determinations on fundamental rights were in relation to the right to equality. Those cases were in regard to appointments to the public sector; access to education; and due process.

# (a) Appointments in the Public Sector

Three of the cases on the right to equality in 2013 relate to appointments and promotions in the public sector. The jurisprudence of the Court in these cases focuses on formal equality. Over two decades the Supreme Court has developed a rich body of jurisprudence on the requirement of due process and fairness in recruitments and promotions in the public sector through Article 12(1).<sup>20</sup> The cases reported in 2013 can be considered as a continuation of that trend. The need for the vindication of due process is all the more significant given the politicization of the public service and its notable expansion under the present government.<sup>21</sup>

In the case of Ranathungage v. Commissioner General of Labour<sup>22</sup> the Court had to consider whether the classification of appointees on the basis of the examinations they sat for, in the process of selection, was a violation of the right to equality. Under the relevant Gazette notification, recruitment to this post had been under two categories: a Limited Competitive Examination and an Open Competitive Examination. Those recruited under the latter were given

<sup>&</sup>lt;sup>20</sup> See for instance, Mario Gomez, Emerging Trends in Public Law (VijithaYapa 1998) 155 onwards.

<sup>&</sup>lt;sup>21</sup> Growth of 60 percent in Public Sector Employment in 2013, available at, http://www.news.lk/news/item/1106-growth-of-60-percent-in-public-sector-employment-in-2013, accessed on 27 August 2014.

<sup>&</sup>lt;sup>22</sup> SC (FR) 620/2010 SC Minutes 7 May 2013.

an earlier date of appointment while the petitioners appointed under the former, had been given a later date.

In this case Court concluded that the two categories cannot be clubbed together as they are not similar. The petitioner sought to rely on the case of Ramupillai v Festus Perera where Court held that once recruited from different categories individuals thereafter are similarly placed in terms of future promotions.23 Court distinguished the Ramapillai case on the basis that the appointments were different from promotions. Accordingly, the case was dismissed. However, it could be argued that the Court's reasoning is problematic. Once the candidates were selected for the particular office, they ought to be treated equally for the purpose of the date of appointment etc. The respondents have not provided a reasonable justification for differential treatment. Whether the difference between appointments and promotions warrant the departure made by Court from the Ramupillai case, is therefore, arguable.

The Alles v Road Passenger Services Authority of the Western Province<sup>24</sup> involved a challenge to the appointments made to the post of Assistant Manager (Transport) Grade 4 in the Western Province. The petitioners claimed that even though they had applied for a promotion to the said position, it was arbitrarily denied to them and other persons who were not qualified for the post were appointed instead. The authority was found to have had conducted at least two different interviews and the letters of appointment issued referred to an interview that had in fact not been conducted.

<sup>&</sup>lt;sup>23</sup> Ramupillai v Festus Perera [1991] 1 Sri LR 11.

<sup>&</sup>lt;sup>24</sup> Alles v Road Passenger Services Authority of the Western Province SC (FR) 448/2009 SC Minutes 22 February 2013.

Considering these irregularities, the Court declared the purported interview to be invalid and quashed the appointments. Holding that the right to equality of the petitioners had been violated, the Court ordered that fresh interviews be held for the relevant post. No order was made with regard to compensation or costs.

The above cases point to the non-adherence to due process in appointments and recruitments to the public service. While victims of such practices have a right to an effective remedy, it is questionable as to whether the sole and exclusive jurisdiction of the Supreme Court to determine fundamental rights petitions is the suitable forum for the consideration of such violations. The Human Rights Commission, for instance, ought to provide suitable remedies for victims of such violations, thereby saving the time of the Court and allowing the Supreme Court to perhaps deal with more serious violations of human rights. At present however, due its lack of political independence, the Human Rights Commission remains weak and ineffective.

The process adopted in the selection of academics to a state university was challenged in the case of *Pirashanthan v University of Peradeniya*.<sup>25</sup> Court held that the petitioner's right to equality was violated and declared that 'the Petitioner is entitled to be considered for appointment' to the relevant academic position. It is noteworthy that the Court did not cite any judicial authorities in arriving at this conclusion nor to the justification (if any) provided by the respondents in this matter. The Court relied heavily on the record of the interview process and the scheme of recruitment in arriving

<sup>&</sup>lt;sup>25</sup> SC (FR) 478/2009 SC Minutes 13 February 2013.

at its conclusion. The right to equality jurisprudence includes several cases specifically relating to appointments and promotions in the state university sector: *Perera v. Chairman Public Service Commission being a recent example*.<sup>26</sup> The Court however does not consider that body of jurisprudence.

The right to equality as guaranteed in the above cases is formal and procedural. The Court adopts a narrow approach in identifying the factual and jurisprudential issues to be analysed. For instance, the lack of due process in appointments in the public service ought to be analysed in the larger context of its politicisation, and corruption. The Court however, does not concern itself with these questions. It does not seek to make an effort to interpret the right to equality to capture the underlying causes of discrimination.

## (b) Access to Education

Several other fundamental rights determinations under the right to equality were in relation to access to education. Access to education in Sri Lanka is now synonymous with access to schools perceived to be well serviced and those which offer a competitive academic environment for students. Admission to schools such as national schools has become increasingly competitive as a result. Admission to state run universities too remain extremely competitive for this reason. Education remains one of the most accessible means of social mobility in Sri Lanka. It is no surprise therefore that three of the cases reported for 2013 relate to access to education.

<sup>&</sup>lt;sup>26</sup> Perera v Chairman Public Service Commission SC(FR) 598/2008, SC Minutes 05 July 2010.

In the case of Jayawardana v. Principal, DS Senanayake College<sup>27</sup> the Court had to consider whether applicants must prove that they have legal title to their permanent residence in order to qualify for admission on the basis of proximity to the school. The Court observed that in these situations, neither the interview board when making selections nor the Court in determining a fundamental rights application had the authority to make a finding as to the legality of the occupation of the relevant property. If the applicant establishes residency, the Court held that the corresponding marks should be assigned. Accordingly it was held that the right to equality had been violated. The school was directed to admit the child and the state was ordered to pay the petitioners Rs 30 000 as costs. It must be noted that no judicial authorities or legal principles are referred to or analysed in supporting the conclusion arrived at by the Court.

Regrettably, the Court does not articulate the reasons for disregarding the question of legality of residence. The significance of the right to access to education for the enjoyment of other rights and the responsibility of the state to ensure universal access to primary education could have been referred to by the Court. Furthermore, by not concerning itself with the legality of the residency, Court was adopting an equitable approach to property, ownership and occupation. Such a view regarding occupation of land within the capital of the country is significant as it ensures that children of even unlawful occupants within the city, could enjoy access to well serviced schools on the basis of proximity and thereby guarantee the universal right to education.

<sup>&</sup>lt;sup>27</sup> Jayawardana v Principal, DS Senanayake College SC (FR) 231/2012 SC Minutes 18 December 2013.

The case of Amavindi v. Principal Dharmashoka Vidyalaya<sup>28</sup> too involved a challenge to the selection process to a primary school. The petitioners challenged the allocation of marks in the selection process. The Court found that as per the relevant circular 0.5 marks should be added to the petitioner's application but noted that the addition would not qualify the child to be admitted to the school, but would only improve her rank in the waiting list. The application was accordingly dismissed with no finding as to whether the right to equality had been violated.

The dismissal of this case is problematic. On the one hand the Court accepts that an error has been made in the allocation of marks. On the other hand it dismisses the case. The reason for declining to determine whether the right to equality was violated or not, seems to be that even when the due marks were allocated the child did not qualify for admission. This is a consequentialist approach which is not suitable for the determination of fundamental rights petitions. The concept of human rights is based on the intrinsic value of the human being. Therefore, the Court ought to be primarily concerned with whether the selection process violated the rights of the petitioner or not, regardless of whether the correct allocation of marks would result in the child being admitted to the school.

The case of Noon v. University Grants Commission<sup>29</sup> involved an allegation that the right to equality has been violated in denying the petitioner access to education to a state

<sup>&</sup>lt;sup>28</sup> Amavindi v Principal Dharmashoka Vidyalaya SC (FR) 138/2013 SC Minutes 18 December 2013.

<sup>&</sup>lt;sup>29</sup> Noon v University Grants Commission SC(FR) 352/2010 SC Minutes 28 November 2013.

university. The petitioner sought to rely on the special provisions for university admission for children of members of the Sri Lankan Foreign Service. On an examination of the facts, Court found that the petitioner in fact, did not qualify under such circular. The petitioner argued that there had been a previous instance where a student had been granted admission under this specific category even though that student had not satisfied the required criteria. Court refused to accept that as a justification for the petitioner's claim by holding that, the right to equality 'cannot be understood as requiring officers to act illegally because they have acted illegally on previous occasions'. Ocurt further held that Article 12(1) 'provides only for the equal protection of law and not for the equal violation of the law'. The petition was accordingly dismissed.

The jurisprudential basis of the above analysed cases concerning the access to education is significantly weak. Even though the Sri Lankan Constitution does not recognise a right to education there is an established line of case-law in which the right to equality has been interpreted to include the right to education.<sup>32</sup> The Z Score case of 2012 is a recent example.<sup>33</sup> Both the Directive Principles of State Policy and

<sup>&</sup>lt;sup>30</sup> Noon v University Grants Commission SC(FR) 352/2010 SC Minutes 28 November 2013 7.

Noon v University Grants Commission SC(FR) 352/2010 SC Minutes 28 November 2013 8.

<sup>&</sup>lt;sup>32</sup> See for instance, Dinesha Samararatne, 'Economic and Social Rights in an 'Activist' Sri Lankan Supreme Court' (December 2008) 254 LST Review 12, 14.

<sup>&</sup>lt;sup>33</sup> Kavirathne v Commissioner General of Examinations SC (FR) No 29/2012, SC Minutes of 25 June 2012. For an analysis of this case, see, Dinesha Samararatne, 'A Provisional Evaluation of the Contribution of the Supreme Court to Political Reconciliation in Post-War Sri Lanka (May 2009-August 2012) Research Paper No 5 (ICES, March 2013) 38 onwards.

the Universal Declaration of Human Rights were referred to in that case in affirming the right to education as part of the fundamental rights guarantees in Sri Lanka. Moreover, as a state party to the Child Rights Convention and the International Covenant on Economic, Social and Cultural Rights, the state has a responsibility to guarantee the right to education. The judicial determinations however do not draw on these legal norms when recognising the right to access to education within the right to equality even though Sri Lanka has a legal obligation to respect these rights.

#### (c) Due Process

The requirement of due process in the exercise of public power has been enforced through Article 12(1) in Sri Lanka for about two decades.<sup>34</sup>Arbitrary and discriminatory decision making has been effectively challenged on this basis. Mario Gomez for instance, has argued that this progressive trend is attributable at least in part due to the cross-fertilization of the fundamental rights jurisdiction by the writ jurisdiction and the principles of administrative law.<sup>35</sup>

The case of *Pathinayaka v Police Sergeant Bandara*<sup>36</sup> indicates that this trend was continued in some degree in 2013. The petitioner in this case claimed that he was subjected to unreasonable, discriminatory and arbitrary treatment by the Traffic police and claimed that his right to equality had been violated. According to the petitioner, he had been directed

<sup>&</sup>lt;sup>34</sup> See for instance, Mario Gomez, 'Blending Rights with Writs: Sri Lankan Public Law's New Brew' (2006 Supplement) Acta Jur 451.

<sup>35</sup> Mario Gomez, 'Blending Rights with Writs: Sri Lankan Public Law's New Brew' (2006 Supplement) Acta Jur 451.

<sup>&</sup>lt;sup>36</sup> Pathinayaka v Police Sergeant Bandara SC (FR) 367/2010 SC Minutes 3 May 2013.

to drive through a red light in Colombo by a police officer and had been charged for disobeying the traffic lights by two other police officers immediately thereafter. Furthermore, he stated that the police retained his driver's licence and provided him a permit for less than 14 days in violation of the Motor Traffic Act, and that the police subjected him to arbitrary treatment among other things, by not providing him with the name of the Court that he should appear before to defend himself against the charges made.<sup>37</sup> The Court upheld the claim of the petitioner and ordered that Rs 185 000 be paid as compensation and costs. The payments were to be made as follows: Rs 75 000 each by the first two respondents, Rs 25 000 by the third respondent: and Rs 10 000 as costs by all three respondents.

In this case too, regrettably, the Court cites no authorities to justify the conclusions it arrives at and neither does it engage with the issue of abuse of authority by the relevant police officers or make further orders such as calling for a disciplinary inquiry into the conduct of the said officers.

Such an omission is problematic in that it can lead to a weakening of judicial reasoning as a site of on-going debate and discourse as to the scope of protection of rights that can be afforded by the Judiciary.

# (d) Jurisprudence on the Right to Equality 2013

The judicial determinations considered above suggest that no significant advancements were made in the judicial protection on the right to equality. The judicial evaluations of the petitions are primarily within the concept of formal equality and mostly

<sup>&</sup>lt;sup>37</sup> Motor Traffic Act No 22 of 1973 as amended.

involve an assessment of facts. The jurisprudential analysis is minimal. Furthermore, the Court makes no attempt to link its deliberations with relevant precedent or Sri Lankan's obligations under human rights treaty law. Even the analysis of facts is narrow and disconnected from the larger social, economic and political context of Sri Lankan society. Where compensation has been awarded the basis for arriving at a particular amount is not apparent. The case-law therefore is weak in terms of its contribution to precedence and the advancement of judicial protection of human rights.

# 4.2. Right to freedom from torture

In international law the right to be free from torture is a peremptory norm which all states are required to respect. Sri Lanka has ratified the Covenant against Torture and Cruel, Inhuman or Degrading Treatment or Punishment and enacted enabling legislation for the same. The right to be free from cruel, inhuman, degrading treatment or punishment is one of the two rights which are absolute under the Sri Lankan Constitution.<sup>38</sup> However, scholars and advocates have established that this right has been subject to systemic violation by the police in the general context and by the police and the army in the context of the internal armed-conflict and post-armed conflict.<sup>39</sup> Jurisprudence of the Supreme Court affirms this finding.<sup>40</sup>

<sup>&</sup>lt;sup>38</sup> Article 11 of the Constitution. The absolute right is that of freedom of thought, conscience and opinion (Article 10).

<sup>&</sup>lt;sup>39</sup> See for instance, Kishali Pinto-Jayawardena, The Rule of Law in Decline; Study on Prevalence, Determinants and Causes of Torture and Other Forms of Cruel, Inhuman or Degrading Treatment of Punishment (CIDTP) in Sri Lanka, (Rehabilitation and Research Centre for Torture Victims 2009).

<sup>&</sup>lt;sup>40</sup> See for instance, Yogalingam Vijitha v Reserve Sub Inspector of Police, Police Station, Negombo SC Application 186/2001, SC Minutes 23 May 2002; Sriyani Silva v Iddamalgoda, Officer-in-Charge, Police Station, Payagala [2003] 2 Sri LR 63.

Three cases related to Article 11 were determined by the Supreme Court in 2013. However, a case which attracted considerable attention related to Article 11 was a case that was dismissed by the Court. This was the case filed by the father of Ganesan Nimalaruban. Nimalaruban was allegedly involved in a riot in the Vavuniya prison and was one of the two inmates who died immediately thereafter.41 The case was filed alleging torture among other things, on the basis that, the circumstances of Nimalaruban's death, and the circumstance under which he sustained his injuries was not clear. The Court refused leave to proceed in this matter and the media reported that several problematic remarks were made from the bench regarding the application.42 The judicial approach in this case suggests a complete disregard for the basis values of human rights and even a disregard to the basic principles of adjudication such as the right to fair hearing.

From the other cases reported in 2013, it cannot be said that any advancements were made in the judicial protection of the right to be free from torture. However, unlike in the right to equality cases, the Court makes some effort to refer and relate to its previous jurisprudence in these cases thereby ensuring some measure of continuity.

<sup>&</sup>lt;sup>41</sup> Justice denied: The denouement of Sri Lanka's Nimalaruban case, 15 October, Asian Correspondent, available at http://asiancorrespondent.com/114446/justice-denied-the-denouement-of-sri-lankas-nimalaruban-case/accessed on 27 August 2014; Ganesan Nimalaruban death: Sri Lanka rights case dismissed 14 October 2013 BBC, available at http://www.bbc.com/news/world-asia-24523526 accessed on 27 August 2014.

<sup>&</sup>lt;sup>12</sup> No human rights for terrorists—CJ 15 October 2013, Sri Lanka Mirror, available at, https://www.mirror.lk/news/11164-no-human-rights-for-terrorists-cj accessed on 27 August 2014.

Sri Lanka: State of Human Rights 2014

# (a) Standard of Proof

In the case of Jayasuriya v. Police Constable Manikkaratnam<sup>45</sup> the Court did not uphold a violation of Article 11 on the basis that the petitioner failed to meet the required standard of proof. The petitioner claimed that he was assaulted by the police in a public area. The police claimed that the petitioner was intoxicated at the time and was in possession of heroin. In determining this application, the Court applied its mind to two significant issues related to the interpretation of Article 11 including the standard of proof that ought to be met by the petitioner; and the nature of evidence required to establish torture.

With regard to the standard of proof, the Court affirmed previous jurisprudence and held that the balance of probability applies. However, the 'acts of conduct complained of must be qualitatively of a kind that a Court may take cognizance of'. Furthermore Court affirmed that torture can take many forms including 'psychological and physical'. With regard to evidence, Court noted that 'concise, cogent and strong' evidence is required and that corroboration through medical evidence is most appropriate. <sup>45</sup>

In this particular case, the petitioner makes a statement to the police and is subjected to a medical examination soon

<sup>&</sup>lt;sup>43</sup> Jayasuriya v Police Constable Manikkaratnam SC (FR) 43/2008 SC Minutes 18 November 2013.

<sup>&</sup>lt;sup>44</sup> Court relied on the dicta of Amerasinghe J in *Channa Peiris v Attorney* General in [1994] 1 Sri LR 1 referred to at p. 3 of the present judgment.

<sup>&</sup>lt;sup>45</sup> Court relied on the dicta of Amerasinghe J in *Channa Peiris v Attorney* General in [1994] 1 Sri LR 1 referred to at p. 3 of the present judgment.

<sup>&</sup>lt;sup>46</sup> Jayasuriya v Police Constable Manikkaratnam SC (FR) 43/2008 SC Minutes 18 November 2013, 4.

after he was arrested. As the Court notes, his statements are made under the influence of liquor and the petitioner states that he sustained injuries due to falling off his motorbike in his drunken state. Eight days later, he claims before another medical officer that the injuries were due to assault by the police. The Court finds that the two medical reports are conflicting and holds that the medical evidence is inconclusive and does not support the petitioner's claim.

It is significant that, the Court justifies the above decision by relying on both domestic judicial authorities and international jurisprudence from the Human Rights Committee and the European Court of Human Rights.<sup>47</sup> This is a welcome and progressive development as it suggests that the Court could be open to persuasion and adopt progressive interpretations of fundamental rights in light of similar developments in other jurisdictions and at the regional and international level.

The dismissal of the case based on inconclusive evidence is problematic. Even if the petitioner was intoxicated at the time of the first medical examination, it should have been possible to determine whether he had been assaulted by the police. Furthermore, these facts demonstrate the challenge faced by the Court in determining fundamental rights petitions on the basis of affidavits and petitions. Based on limited information the Court is called to make judicial determinations which have a critical impact not just on the petitioner but on larger society as it relates to the respect afforded to fundamental rights by the state — a matter that concerns society at large.

<sup>&</sup>lt;sup>47</sup> Soogrim v Trinidad and Tobago (1993) (Communication No 362/1989); Grant v Jamaica (1994) (Communication No 353/1988); Fillastre (On Behalf of Fillastre and Bizonarn) v Bolivia (1991) (Communication No 336/1988); Tomasi v France (1992) (15 EHRR 1).

# (a) Standard of Proof

In the case of Jayasuriya v. Police Constable Manikkaratnam<sup>43</sup> the Court did not uphold a violation of Article 11 on the basis that the petitioner failed to meet the required standard of proof. The petitioner claimed that he was assaulted by the police in a public area. The police claimed that the petitioner was intoxicated at the time and was in possession of heroin. In determining this application, the Court applied its mind to two significant issues related to the interpretation of Article 11 including the standard of proof that ought to be met by the petitioner; and the nature of evidence required to establish torture.

With regard to the standard of proof, the Court affirmed previous jurisprudence and held that the balance of probability applies. However, the 'acts of conduct complained of must be qualitatively of a kind that a Court may take cognizance of '.44 Furthermore Court affirmed that torture can take many forms including 'psychological and physical'.45 With regard to evidence, Court noted that 'concise, cogent and strong' evidence is required and that corroboration through medical evidence is most appropriate.46

In this particular case, the petitioner makes a statement to the police and is subjected to a medical examination soon

<sup>&</sup>lt;sup>43</sup> Jayasuriya v Police Constable Manikkaratnam SC (FR) 43/2008 SC Minutes 18 November 2013.

<sup>&</sup>lt;sup>44</sup> Court relied on the dicta of Amerasinghe J in Channa Peiris v Attorney General in [1994] 1 Sri I.R 1 referred to at p. 3 of the present judgment.

<sup>45</sup> Court relied on the dicta of Amerasinghe J in Channa Peiris v Attorney General in [1994] 1 Sri LR 1 referred to at p. 3 of the present judgment.

<sup>&</sup>lt;sup>46</sup> Jayasuriya v Police Constable Manikkaratnam SC (FR) 43/2008 SC Minutes 18 November 2013, 4.

after he was arrested. As the Court notes, his statements are made under the influence of liquor and the petitioner states that he sustained injuries due to falling off his motorbike in his drunken state. Eight days later, he claims before another medical officer that the injuries were due to assault by the police. The Court finds that the two medical reports are conflicting and holds that the medical evidence is inconclusive and does not support the petitioner's claim.

It is significant that, the Court justifies the above decision by relying on both domestic judicial authorities and international jurisprudence from the Human Rights Committee and the European Court of Human Rights.<sup>47</sup> This is a welcome and progressive development as it suggests that the Court could be open to persuasion and adopt progressive interpretations of fundamental rights in light of similar developments in other jurisdictions and at the regional and international level.

The dismissal of the case based on inconclusive evidence is problematic. Even if the petitioner was intoxicated at the time of the first medical examination, it should have been possible to determine whether he had been assaulted by the police. Furthermore, these facts demonstrate the challenge faced by the Court in determining fundamental rights petitions on the basis of affidavits and petitions. Based on limited information the Court is called to make judicial determinations which have a critical impact not just on the petitioner but on larger society as it relates to the respect afforded to fundamental rights by the state – a matter that concerns society at large.

<sup>&</sup>lt;sup>47</sup> Soogrim v Trinidad and Tobago (1993) (Communication No 362/1989); Grant v Jamaica (1994) (Communication No 353/1988); Fillastre (On Behalf of Fillastre and Bizouarn) v Bolivia (1991) (Communication No 336/1988); Tomasi v France (1992) (15 EHRR 1).

Asoka v. Dayawansa<sup>48</sup> too is a case where a petitioner's claim that his right to be free from torture was violated by the police, was dismissed by the Court. The Court found inconsistencies in the facts as presented by the petitioner and noted that the medical report does not make a conclusive finding on whether he had been subjected to torture. The petitioner and the police state two different dates as being the date of arrest: while the claim of the police is supported by the official records, the petitioner's claim is only supported by the affidavits of his wife and mother.

The Court examines previous determinations of the Court, in identifying the standard of proof that ought to be met in fundamental rights applications claiming a violation of Article 11. Quoting from one such case, Court holds that 'the standard required is not proof beyond reasonable doubt but must be of a higher threshold than mere satisfaction. The standard of prood (sic) employed is on a balance of probabilities test and as such must have a higher degree of probability and where corroborative evidence is not available it would depend on the testimonial credit worthiness of the Petitioner'.<sup>49</sup>

The petitioner in this case, is a labourer in an oil mill. Several bags of desiccated coconut are stolen overnight from the mill and the petitioner is suspected of having committed this theft. While the petitioner's statement regarding the date of arrest is not corroborated, a detailed description is provided by him of how he was assaulted while being detained at the police station.

<sup>48</sup> Asoka v Dayawansa SC (FR) 431/2010 SC Minutes 22 February 2013.

<sup>45</sup> Asoka v Dayawansa SC (FR) 431/2010 SC Minutes 22 February 2013, 1

<sup>3</sup> quoting from Edward Sivalingam v SI Jayasekera SC (FR) 326/2008, SC Minutes 10 November 2011, per Tilakawardane J.

Having considered the claims made before it the Court concludes that the petitioner has failed to establish that he had been subject to torture and dismisses the application. However, a question remains as to whether the standard of proof described by the Court, ought to be the test in claims such as the one in this case. Where a rural labourer files a petition before the Supreme Court alleging torture, the Court ought to be slow to dismiss such a case. Taking the police to Court on an allegation of torture, is no easy task in the current Sri Lankan political context and when an individual from a vulnerable community does so, in spite of the risks involved, such an application must be given due consideration. Furthermore, how does the Court evaluate the 'testimonial credit worthiness' of the petitioner? How does the Court satisfy itself that the records and petitions of the respondents reflect the correct facts? Difficult but also critical questions such as these point to the inadequacies of the procedure followed in determining fundamental rights applications. It may be necessary for the Court to have evidence led before it in order to establish more clearly the factual circumstances, particularly in relation to the prohibition on torture given the widespread and horrific practice of torture evidenced in the country.

# (b) Substitution for Petitioner

In the case of *Peiris v. Weerakoon Inspector of Police*<sup>50</sup> the Court had to consider the principles that would apply to the substitution of the petitioner in a fundamental rights application, where the petitioner dies during legal proceedings. The petitioner claimed that his right to be free from torture had been violated in March 2008 while in police

<sup>&</sup>lt;sup>50</sup> SC (FR) 278/2008 SC Minutes 25 October 2013.

custody. He filed his petition in July 2008 and while the matter was pending before Court, in December 2011, he commits suicide at 34 years of age. The application for substitution is made by the father of the petitioner.

Several reasons are acknowledged by the Court as having caused the delay in legal proceedings. One of them is that when the case was taken up for hearing, Court was informed that the Attorney-General intended to indict the petitioner before the relevant High Court. Court was also informed that an out of court settlement was being considered by the parties.

It is not clear as to why these explanations are acceptable to the Court in postponing the hearing of a petition in which the complaint is that of a violation of the right to freedom from torture. Even if the petitioner was to be indicted by the Attorney-General such an indictment cannot have a bearing on the unconstitutionality of the practice of torture in police custody. It has been previously demonstrated by this author that the practice of dismissing fundamental rights applications based on the claim by the state that the petitioner is to be indicted before a High Court; or released; or discharged is extremely problematic.51 It suggests a link between the procedures followed in determining whether the petitioner is guilty of criminal behaviour with the issue of torture. The right to be free from torture, must be guaranteed regardless of whether a person is guilty of criminal behaviour and regardless of whether the arrest,

<sup>&</sup>lt;sup>51</sup> Madhushika Jayachandra & Dinesha 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 1, 48 onwards.

detention and trial of such person is lawful or not. Therefore, it is unacceptable that the Court permitted the postponement of this matter based on these excuses provided by the respondents.

An equally serious concern is the seeming acceptance by Court that an out of court settlement is acceptable in a petition alleging torture in police custody. Previously, the Court has observed that once the Court is seized of a fundamental rights application, even if the petitioner withdraws the application, the Court may, in its discretion, continue to hear it and make a determination.<sup>52</sup> However, as noted elsewhere by the author, the dismissal of cases based on the petitioner's request or due to a settlement arrived at between the parties has been a discernible trend in more recent times.53 Unlike in other types of litigation, whether the violation of fundamental rights can be the subject of a settlement is questionable. If one takes the view that the violation of fundamental rights, particularly the right to be free from torture, is not simply an issue between the parties concerned, but also a serious issue for society at large, it becomes necessary to ensure the judicial determination of such petitions. Permitting out of court settlements, or allowing for the postponement of proceedings in anticipation of out of court settlements on the other hand, suggests that the violation of even the absolute fundamental rights

<sup>52</sup> See in this regard, ARB Amerasinghe Our Fundamental Right of Personal Security and Physical Liberty (Sarvodaya Vishva Lekha 1995) 61. For cases see, Porage Lakshman v Fernando [1990] 1 Sri LR 318 and Herath Banda v Sub-Inspector of Police Wasgiyawatte Police Station SC (FR) 270/1993, SC Minutes 29 November 1993, as cited in ARB Amerasinghe, 61.

<sup>53</sup> Dinesha Samararatne, 'A Provisional Evaluation of the Contribution of the Supreme Court to Political Reconciliation in Post-War Sri Lanka (May 2009-August 2012) Research Paper No 5 (ICES, March 2013) 40 onwards.

recognised in the Constitution, can be the subject of mediation and settlement. The broader and serious consequences of the practice of torture in a society, is not given adequate consideration in such an approach.

The Court permits the substitution of the petitioner's father in this case. Court considers the concept of litis contestatio and relying on judicial precedent holds that given that the relevant pleading had been filed at the time of death of the petitioner, the petition can continue to be heard with a substitution of the petitioner's heirs. This is a commendable conclusion. However, the basis for this conclusion is derived from principles of private law and not from public law. As mentioned above, reliance on the distinctive nature of fundamental rights, particularly the prohibition of torture, and its wider impact on society, may have been a better foundation for arriving at this very same conclusion.

Another significant finding by the Court is that the death of the petitioner is a novus actus interveniens (an intervening act) and therefore has no direct bearing to the substantial claims made by the petitioner. On this basis, the Court distinguishes the facts of this case from the case of Snjani Silva v. Iddamalgoda where the wife filed a fundamental rights application on behalf of her husband who had died due to torture in police custody. The Court argues that the petitioner committed suicide four years after he was released from police custody and determines that the petitioner was 'for all appearances occasioned by his own voluntary act of suicide'. Elsewhere the Court notes that the petitioner was 'youthful and unmarried'. While the suicide

<sup>54</sup> Peiris v Weerakoon Inspector of Police 6.

<sup>55</sup> Sriyani Silva v Iddamalgoda [2003] 1 Sri LR 14.

<sup>56</sup> Peiris v Weerakoon Inspector of Police 6.

<sup>57</sup> Peiris v Weerakoon Inspector of Police 4.

may very well be a voluntary and new act that is not linked to the alleged torture, perhaps the Court may have been able to support its conclusion better, if it had considered whether the alleged torture had any bearing on the petitioner committing suicide. The Court may have also considered whether the delay in determining the fundamental rights application, for reasons that were not substantially connected to the complaint that he had made, further added to a psychological condition which lead to the suicide of the petitioner.

In general the Supreme Court's approach to the understanding of torture has been determined overwhelmingly through a medical perspective and primarily evaluated on the basis of physical evidence of torture or cruel, inhuman degrading treatment or punishment. Even though the Court has recognised that torture can be inflicted to the physical or the psychological, there have been no known instances where Court has elaborated on the psychological aspects of torture or recognised it in a fundamental rights application. The present case could be considered as an instance where a broader understanding of torture may have provided more insight to the facts of the case.

# c) Judicial Protection of the Right to be Free from Torture in 2013

As was pointed out initially, the judicial protection on the right to be free from torture in 2013 is defined more in terms of its dismissal of petitions. The tragic case of Nimalaruban epitomises the problematic approach of the Judiciary; it suggests a failure to distinguish between the intrinsic worth of the human person as articulated in human rights from questions of responsibility for criminal behaviour. While in principle the balance of probabilities seems an appropriate standard of proof for fundamental rights petitions, the above discussed cases demonstrates its weaknesses in practice. Where there is no conclusive medical evidence, the Court is

compelled to make a subjective evaluation of the two versions of the facts presented to them. In making that evaluation, the Court seems to be more favourable towards the version offered by the police rather than towards that of the petitioner. Given the systemic and long standing practice of torture by the police and the inequalities in Sri Lankan society, this is a cause for concern and undermines the judicial protection of the right to be free from torture.

#### 5. Special Determinations

Nineteen Bills were challenged for their constitutionality before the Supreme Court in 2013. The majority of those Bills related to legislative policy on finance and taxation.<sup>58</sup> These determinations are examined in this section in an

<sup>58</sup> Fiscal Management (Responsibility) (Amendment) Bill SC (SD) 1 & 2 reported in 216(9) Parliamentary Debates (Hansard) 9 April 2013 1269; Strategic Development Projects (Amendment) Bill SC (SD) 6/2013 reported in 216(9) Parliamentary Debates (Hansard) 9 April 2013 1274; Finance (Amendment) Bill SC (SD) 3/2013 reported in 216(9) Parliamentary Debates (Hansard) 9 April 2013 1280; Betting and Gaming Levy (Amendment) SC(SD) 4& 5/2013 reported in 216(9) Parliamentary Debates (Hansard) 9 April 2013 1289; Notaries (Amendment) SC (SD) 7/2013 reported in 216(9) Parliamentary Debates (Hansard) 9 April 2013 1296; Powers of Attorney (Amendment) SC(SD) 8/ 2013 reported in 216(9) Parliamentary Debates (Hansard) 9 April 2013 1302; Registration of Documents (Amendment) SC(SD) 9/2013 reported in 216(9) Parliamentary Debates (Hansard) 9 April 2013 1308; Tax Appeals Commission (Amendment) SC(SD) 10/2013 reported in 216(9) Parliamentary Debates (Hansard) 9 April 2013 1312; Value Added Tax (Amendment) SC (SD)11/2013 reported in 216(9) Parliamentary Debates (Hansard) 9 April 2013 1315; Inland Revenue (Amendment) SC (SD) 12 & 13/2013 reported in 216(9) Parliamentary Debates (Hansard) 9 April 2013 1317; Nation Building Tax (Amendment) SC(SD) 14& 15/2013 reported in 216(9) Parliamentary Debates (Hansard) 9 April 2013 1320; Registration of Electors (Special Provisions) Bill SC (SD) 16/2013 reported in 217(5) Parliamentary Debates (Hansard) 5 June 2013 382; In Re the Twenty-First Amendment to the Constitution reported in 218(4) Parliamentary Debates (Hansard) 12 July 2013 538; Local Authorities Filling of Vacancies (Special Provisions) Bill SC (SD) 18/2013 reported in Parliamentary Debates (Hansard) 2013 3; Appropriation Bill SC(SD) 19/2013 reported in 216(9) Parliamentary Debates (Hansard) 221(1) 21 November 2013 2.

attempt to evaluate the degree of protection offered by the Judiciary for human rights in evaluating the constitutionality of legislative policies of the state in 2013.

### 5.1. Bills related to Fiscal policy

Most of the Bills that were challenged for their constitutionality were Bills related to different aspects of the Government's fiscal policy as reflected in legislative policies. In these determinations it seems that the Court fails to defend basic principles of governance, transparency and therefore of the rule of law in evaluating the constitutionality of Bills on fiscal policy. The relationship between the fiscal policy of the state and human rights and rule of law, is significant. For instance, Justice Mark Fernando, in delivering the Ninth Ambalavaner Memorial Lecture has explored this relationship in detail. <sup>59</sup>Justice Fernando demonstrates convincingly, that human rights ought to be the yardstick whereby the impact, effectiveness and the legality of fiscal policy of the state ought to be measured.

With regard to the Bills on fiscal policy proposed in 2013, the substantive provisions of those Bills, the challenges made and the determinations of the Supreme Court contain a significant overlap. Firstly these Bills have a retrospective effect and the petitioners argue that it violates the right to equality enshrined in the Constitution. For instance, the Fiscal Management (Responsibility) (Amendment) Bill sought to increase the GDP from 4.5% to 7% with retrospective effect and reduces the liabilities of the Government from 85% to

<sup>&</sup>lt;sup>59</sup> 'Human Rights and Fiscal Policy' Ninth Ambalavaner Memorial Lecture delivered at the International Fiscal Association 2001, published in Selected Essays and Extracts from Judgments by Justice Mark Fernando (Faculty of Taxation, Institute of Chartered Accountants of Sri Lanka 2004) 37.

Sri Lanka: State of Human Rights 2014

80% by 2013. Secondly, the different Bills afford tax benefits to particular groups which the petitioners claim is also a violation of the right to equality. Thirdly in certain cases the Bills validate with retrospective effect, acts that were not authorised by law. The petitioners therefore argue that the right to equality is violated. Fourthly, in relation to certain other Bills, the petitioners argue that Parliament does not retain control over public finance and that those provisions are therefore unconstitutional.

The Supreme Court holds that none of these Bills are inconsistent with the Constitution. The reasons relied on in arriving at this conclusion are almost identical.

With regard to the retrospective effect of the Bills and the retrospective validation of actions, the Court holds that except for legislation that creates an offence or imposes a higher penalty with retrospective effect, Parliament is not limited in its power to enact retrospective legislation. The Court relies on Article 75 of the Constitution and the special determination on the Code of Criminal Procedure (Special Provisions) in making this argument.<sup>60</sup>

In relation to tax benefits afforded to identified categories/ groups, the Court holds that as long as the classifications in the proposed Bills are intelligible and 'bears a reasonable and rational relation to the objects sought to be attained' that 'the Legislature has the greatest freedom of classification to determine which category or class of persons' should be

<sup>&</sup>lt;sup>60</sup> Code of Criminal Procedure (Special Provisions) Bill SC(SD) 16 & 17 of 2012.

granted concessions.<sup>61</sup>The Court relies on several authorities dating back to 1980 in arriving at this decision.

In Bills where discretion is vested with a public officer or Minister in making certain types of financial decisions, such as the declaration of tax exemptions and the declaration of Free Ports and Bonded Areas under the Finance (Amendment) Bill, the Court argued that such provisions are necessary due to the 'technicality of the subject matter' and the 'need for flexibility'. Furthermore, Court observes that certain safeguards continue to apply in relation to these decisions such as the scrutiny of the Auditor-General and therefore that the provisions do not amount to a 'derogation from the control of Public Finance by Parliament'. 63

This judicial approach to legislative policy on public finance culminates for the year 2013 in the special determination on the Appropriation Bill. The main challenge to the Bill is based on the finding of the Court in 2012 on the then Appropriation Bill that, the authority vested with the executive to raise loans within a fixed upper limit amounts to the vesting of unfettered discretion on an administrative authority and the removal of Parliament's control over public finance. The petitioners also argued that the authority given to the Secretary of the Treasury, the Deputy or the Director-General of the National Budget Department (under the order

<sup>&</sup>lt;sup>61</sup> Strategic Development Projects (Amendment) Bill SC (SD) 6/2013 reported in 216(9) Parliamentary Debates (Hansard) 9 April 2013 1274, 1277-1278.

<sup>&</sup>lt;sup>62</sup> Finance (Amendment) Bill SC (SD) 3/2013 reported in 216(9) Parliamentary Debates (Hansard) 9 April 2013 1280, 1283.

<sup>63</sup> Finance (Amendment) Bill SC (SD) 3/2013 reported in 216(9) Parliamentary Debates (Hansard) 9 April 2013 1280, 1283-1284.

of the Secretary of the Treasury) to reallocate monies amounts to the removal of such monies from the control of Parliament. In the special determination of the Supreme Court on the Appropriation Bill 2012, Justice Tilakawardene upheld these arguments and had held the corresponding provisions of the Bill to be unconstitutional.<sup>64</sup> However, in that instance, Parliament proceeded to adopt the Appropriation Bill without revising the clauses deemed to be unconstitutional by the Supreme Court.<sup>65</sup>

In 2013, under the leadership of a new Chief Justice, prior to the Appropriation Bill, the President consulted the Court on the constitutionality of the previously impugned clauses. A five judge bench of the Court responded to the reference by holding that those clauses are not inconsistent with the Constitution. In determining the constitutionality of the Appropriation Bill of 2013, the Court relies on this opinion and numerous other similar opinions of its previous courts. The Court holds that these mechanisms proposed by the Appropriation Bill continue to be subject to regular checks and balances for control of public finance and as such do not amount to the vesting of unfettered discretion.

The Supreme Court's piecemeal approach to the evaluation of the constitutionality of proposed bills prevents the Court from appreciating the characteristics of the fiscal policy of the government. Analysts of the fiscal policy of the government over the last few years have raised concerns

<sup>64</sup> SC (SD) 15/2012.

<sup>&</sup>lt;sup>65</sup> Appropriation Bill: Supremacy of Parliament overridden 16 December 2012 Sunday Times, available at, http://sundaytimes.lk/121216/news/appropriation-bill-supremacy-of-parliament-overriden-25083.html accessed on 27 August 2014.

over the concentration of financial control among a few ministries which are being headed by the President or his sibling the Minister of Economic Development.<sup>67</sup> Furthermore, due to two thirds majority enjoyed by the Government in Parliament, it is weakened as an institution that can operate as a check. The inability of COPE to ensure accountability even for reported and established cases of financial mismanagement is a case in point.<sup>68</sup> Finally, the focus on development in the post-armed conflict context by the present government has meant that large scale infrastructure projects are being financed through loans. Ensuring fiscal accountability and transparency assumes greater relevance in this context.

# 5.2. Right to Vote: Internally Displaced Persons

The Special Determination on the Registration of Electors (Special Provisions) Bill<sup>69</sup>considered the constitutionality of a Bill that sought to recognize the right to vote of persons who had been displaced due to the internal armed conflict and of their children. After an examination of the proposed provisions, the Court determined that the Bill was constitutional.

This Determination is noteworthy for the progressive approach adopted in evaluating the constitutionality of

<sup>66</sup> Reference dated 7 October 2013, SC Reference 01/2013.

<sup>&</sup>lt;sup>67</sup> See for instance, Jayani Ratnayake & Nishan de Mel Sri Lanka Budget 2013: Increasing Assistance, and Vulnerability (Verite Research 2012).

<sup>68</sup> Corrupt officials, politicians exposed (COPE) but committee lacks power: DEW 4 December 2011, Sunday Times, available at http://sundaytimes.lk/111204/News/nws\_12.html accessed on 27 August 2014.

<sup>69</sup> Registration of Electors (Special Provisions) Bill SC (SD) 16/2013 reported in 217(5) Parliamentary Debates (Hansard) 5 June 2013 382.

legislative policy. The Court endorses the definition of an IDP in the Bill while noting its similarity to the definition employed in the Introduction to the Guiding Principles on Internal Displacement.<sup>70</sup>

Three arguments were made before Court in challenging the constitutionality of the Bill. The first was that the process contemplated in it was confined to the electoral register that would be prepared by 1 June 2012 and as such the process might not allow for registration of IDPs who may resettle after that date. The Court rejected that argument and held that the Bill will continue to apply to persons who resettle and meet the requirements stipulated. Secondly, it was argued that the Bill did not provide for making objections to registration of persons but only for appeals challenging a refusal to register. The Court recommended that the relevant clause be revised to provide for objections. Finally, it was argued that the Bill makes a distinction between refugees and IDPs with no rational basis and as such was a violation of the right to equality. Court rejected this argument by holding that both domestic and international law requires a 'residence qualification' and that refugees have no 'intention to revert to Sri Lanka' and as such cannot be considered in the same category as IDPs.

The definition in the proposed Bill - 'A citizen of Sri Lanka who was permanently resident in the Northern Province or Eastern Province and was forced or obliged to leave his residence at any time prior to May 18, 2009, as a result of the armed conflict which took place in Sri Lanka, and currently resides in Sri Lanka outside his original place of residence in the Northern Province or Eastern Province.' (Clause 8 of the Bill). Definition in the Guiding Principles – 'For the purposes of these principles, internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence ... in order to avoid the effects of armed conflict ... and who have not crossed an internationally recognized border.'

Having dealt with the challenges to the constitutionality of the proposed Bill, the Court goes on to make observations regarding the right to vote of IDPs and its scope both in domestic and international law. For instance, it is observed that '... in countries experiencing internal displacement, the enfranchisement of the internally displaced is an important measure of the effectiveness and legitimacy of the overall electoral process and resulting governance structures. Moreover, because the holding of free and fair elections is a key component of repairing and rebuilding post-conflict societies, an inclusive electoral process can be critical for an effective reconciliation process and, therefore, also for sustainable peace and security.'71

Court affirms the significance of the right to vote by recalling seminal domestic jurisprudence such as the case of Karınathilaka v. Dissanayake. <sup>72</sup>Court also notes the conceptual link between the sovereignty of the People and the right to vote and notes that it is a 'necessary concomitant of the people's sovereign power. <sup>73</sup> Additionally, the Court refers to the following international authorities: the Universal Declaration of Human Rights (1948); the International Covenant on Civil and Political Rights (1966); General Comment 25 of the Human Rights Committee on the right to participate in public affairs (1996); and the Guiding Principles on Internal Displacement (1992). Court concludes its analysis by referring to the National Action Plan for the Protection and Promotion of Human Rights, which it notes,

Registration of Electors (Special Provisions) Bill SC (SD) 16/2013
 reported in 217(5) Parliamentary Debates (Hansard) 5 June 2013 382, 385.
 Karunathilaka v. Dissanayake [1999] 1 Sri LR 157.

<sup>&</sup>lt;sup>73</sup> Registration of Electors (Special Provisions) Bill SC (SD) 16/2013 reported in 217(5) Parliamentary Debates (Hansard) 5 June 2013 382, 386.

was developed as part of a voluntary undertaking by the Government during the Universal Periodic Review of 2008 before the Human Rights Council of the United Nations which includes an undertaking to guarantee respect for the rights of IDPs.

# 5.3. Judicial protection for human rights in evaluating legislative policy

The judicial approach as reflected in the Special Determinations related to fiscal policy and the Special Determination related to the right to vote of IDPs represent contrasting judicial philosophies. One is a more static approach where the Court relies on past precedent in justifying its refusal to consider a more progressive and perhaps more radical approach to judicial review of fiscal policy and the other is a more progressive approach that seeks to justify itself vis-à-vis corresponding developments in international law. However, it must be noted that the outcome in both approaches is the same — it is a justification in support of the government's proposed legislative policy.

#### 6. State of Judicial Protection of Human Rights

In general, the judicial reasoning reflected in the fundamental rights applications and Special Determinations present a mixed approach. In certain cases, such as the case of Jayasuriya the Court carefully analyses previous authorities and develops a clear basis for the conclusions arrived.<sup>74</sup> In certain other cases, such as the case of Jayawardena Court arrives at its conclusions, based only on

<sup>&</sup>lt;sup>74</sup> Jayasuriya v Police Constable Mankkaratnam SC (FR) 43/2008 SC Minutes 18 November 2013.

an analysis of facts.<sup>75</sup> One case each under the two jurisdictions, the case of *Jayasuriya*<sup>76</sup> and the Special Determination on the right to vote of IDPs<sup>77</sup> refer to international authorities and thereby provide a stronger basis for its reasoning.

When considering the types of cases that were determined by the Supreme Court in 2013, and the human rights issues that arose in the broader public sphere – a significant gap can be identified. The right to equality and the right to be free from torture have been the most commonly upheld rights in the jurisprudence of 2013. However, the issues that the Court dealt with, and its reasoning, seem to be distinctively separate from the broader social and political context. The Court seems to have carefully maintained a separation between the two.

Whether such an approach is desirable or not requires debate. On the one hand, Court is required to make a judicial determination on matters before them and not on the state of respect for human rights in Sri Lankan society in general. However, in making such a determination, evaluating the scope of the right and the context in which the claim is made, ought to require due consideration, if judicial pronouncements on rights are to make an impact on the life experiences of Sri Lankans.

<sup>&</sup>lt;sup>75</sup> Jayawardana v Principal, DS Senanayake College SC (FR) 231/2012 SC Minutes 18 December 2013.

<sup>&</sup>lt;sup>76</sup> Jayasuriya v Police Constable Mankkaratnam SC (FR) 43/2008 SC Minutes 18 November 2013.

<sup>&</sup>lt;sup>77</sup> Registration of Electors (Special Provisions) Bill SC (SD) 16/2013 reported in 217(5) Parliamentary Debates (Hansard) 5 June 2013 382.

The culture of adjudication reflected in the jurisprudence of 2013 analysed in this Chapter is based on a positivist understanding of the role of law in society and has been perpetuated by legal education, litigation styles of lawyers and also by the approach to legal scholarship. The Sri Lankan legal system is yet to witness experimentation with an interdisciplinary approach to public law litigation where understandings drawn from other disciplines are used to further substantiate the legal arguments made before Court. It is perhaps a concern that must be addressed by all stakeholders in the sector and not just by the Judiciary.

As pointed out previously, Court's approach to the evaluation of legislative policy and the determination of its constitutionality has been carried out piecemeal, ignoring the trend that is evident in the policy decisions adopted by the State. This is cause for concern as the role of the Supreme Court in evaluating the constitutionality of those Bills is critical. In a political context where the Government holds a two-thirds majority in Parliament, the role of the Judiciary assumes even greater significance and becomes the only mechanism that can stem the majoritarian approach to the development of legislative policy. Therefore, the narrow approach adopted in evaluating the constitutionality of the legislative policies of the state, as reflected in the proposed Bills, becomes a cause for concern.

The jurisprudential basis for the orders made and for determining the amount of compensation continues to remain unclear in 2013. In the case of Jayawardena Rs 3 000 was awarded as costs, which in the Pathinayaka case Rs 185 000 was awarded as compensation. It has been pointed out elsewhere by the author that apart from the judicial dicta in the case of Saman v Leeladasa the basis for compensation

remains an unclear area in the fundamental rights jurisdiction of Sri Lanka.<sup>78</sup>

Overall, the Court in 2013 seems to have been moderate in its approach to the protection of human rights. No significant advances have been made in terms of the progressive development of the law in this area and the Judiciary has posed no significant challenges to the Legislature or the Executive. This comes as no surprise given the impeachment of Chief Justice Bandaranayake and the other events that have undermined the independence of the Judiciary. As far as the protection of human rights is concerned, the Supreme Court does not seem to be centre stage in 2013, as it ought to be in a vibrant democracy. Rather, public protests, such as the ones carried out by university students, debates in international fora such as the Human Rights Council seem to be the sites in which contestations on human rights claims are being played out. This suggests that public confidence in the Judiciary as a defender of rights is diminishing, which is a cause for serious concern, but given the context, is only to be expected.

#### 7. Conclusion and Recommendations

Through an analysis of determinations on fundamental rights applications and Special Determinations this Chapter has considered the degree of protection afforded to human rights through the fundamental rights jurisprudence of 2013. Neither the judgements on fundamental rights nor the

<sup>&</sup>lt;sup>78</sup> Madhushika Jayachandra & Dinesha 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 1, 38 onwards.

Special Determinations give reason for a commendable appraisal in this regard. In the broader political, social and economic context in which human rights violations and concerns regarding the deterioration of the rule of law continue to be raised both domestically and internationally, the jurisprudence of the Supreme Court seem detached and peripheral. The loss of credibility of the Judiciary subsequent to the impeachment of its former Chief Justice emerges as a possible explanation for this situation. Restoring the independence of the Judiciary therefore is a prerequisite in ensuring effective judicial protection for human rights in Sri Lanka. The repeal of the 18th Amendment and the reintroduction of a measure of transparency and accountability for appointments to key positions and the de-politicisation of those offices is essential for the restoration of the independence of the Judiciary.

De-politicisation of commissions including the Human Rights Commission could de-centralise the resolution of human rights based claims and thereby reduce the workload of the Court. An independent Human Rights Commission, with sound expertise in human rights, would also be able to assist the Judiciary in its adjudications thereby improving the quality of adjudication.

For a more nuanced understanding of the protection of human rights by the Judiciary additional information regarding dismissals, withdrawals of cases is required. The records of fundamental rights petitions should be made accessible for such an inquiry. The records of proceedings of lower courts too ought to be made accessible. The adoption of legislation that guarantees the right to information would ensure that such information is accessible. Even though civil society has been advocating the adoption of such legislation there has been no political commitment towards its adoption thus far.

The Judiciary should be trained to evaluate human rights claims made before the Court whether via fundamental rights petitions, writ applications or Special Determinations. Relevant international law and jurisprudence; comparative jurisprudence; critical evaluation of facts are examples of aspects in which training ought to be provided. Specialised training would also sensitise the Judiciary on ground realities of Sri Lankan society regarding the levels of protection afforded for human rights.

The above are some recommendations as to how the Judiciary could be empowered to increase the level of protection afforded for human rights. In a democratic society the Judiciary is called upon to play a critical role in the protection of rights. Therefore, advocating for the revival of an independent and dynamic Judiciary is essential if democracy is to thrive in Sri Lankan society.

# LAND ISSUES: RETURN AND RESETTLEMENT-LLRC RECOMMENDATIONS

Dinushika Dissanayake\*

#### 1. Introduction

The chapter explores the land issues faced by internally displaced persons in Sri Lanka due to the armed conflict in the North and East, in light of the recommendations made by the Lessons Learnt and Reconciliation Commission (LLRC). First, it explores the domestic legal framework developed to deal with internally displaced persons, as well as the international legal regime in relation to the right to land, and Sri Lanka's obligations under these conventions, guidelines and declarations.

Thereafter, the recommendations of the LLRC are looked at specifically from the point of view of the National Plan of Action, with discussion of the progress made in this regard, and where relevant, points of concern in relation to some developments in these areas. National institutions that should have been established in terms of the LLRC recommendations are also discussed. Finally, several recommendations have been framed that would bring the current progress in this regard in line with the

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Sri Lanka: State of Human Rights 2014

recommendations of the LLRC and with the requirements of international law.

Land issues in the North and East were exacerbated and magnified due to the armed conflict; with the lack of documentation, wanton destruction of documentation by armed groups during the conflict, secondary occupation and forcible evictions contributing to create an extremely complex web of land related problems in the post-war period. Resolving issues around land are critical to the pursuit of reconciliation, and it is vital to resettle and return those who have lost their lands or were forced to live in refugee camps for extended periods of time due to the armed conflict.

An Internally Displaced Person (IDP) is defined by the National Framework for Resettlement Policy as "persons who have been forced or obliged to flee or to leave their homes or places of habitual residence in particular as a result of or in order to avoid the effects of armed conflict situations of generalized violence".

The Guiding Principles on Internal Displacement defines an IDP as follows:-

"internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or

<sup>&</sup>lt;sup>1</sup> A Framework for Resettlement Policy, Revised Draft as at November 2013, Ministry of Resettlement, Colombo, accessed at ... on 2/5/2014.

natural or human-made disasters, and who have not crossed an internationally recognized State border."2.

For the purposes of the following discussion, the definition given by the National Framework for Resettlement Policy is adopted in order to ensure consistency in references to recommendations made by the Lessons Learnt and Reconciliation Commission.

# 2. Domestic and International Framework Relating to Land, Return and Resettlement

- a) Domestic framework
- i) Constitutional Framework

In view of the express guarantees given under Article 12 of the Constitution, all persons are equal before the law and are entitled to equal protection of the law<sup>3</sup>. In addition, under Article 12(1), all persons have a fundamental right to be free from discrimination, on account of race or religion among several other grounds.

Article 14(1)h of the Constitution of Sri Lanka states that all persons have the freedom of movement, and the right to choose his or her own place of residence within Sri Lanka.

Apart from the fundamental rights guaranteed by the Constitution, several other Articles also deal with land and matters relating to land in Sri Lanka. The Thirteenth

<sup>&</sup>lt;sup>2</sup>UN Economic and Social Council (ECOSOC), Guiding Principles on Internal Displacement, 22 July 1998, E/CN.4/1998/53/Add.2, available at: http://www.refworld.org/docid/3c3da07f7.html [accessed 21 May 2014], Principle 2.

<sup>&</sup>lt;sup>3</sup> Article 12, Constitution of the Democratic Socialist Republic of Sri Lanka of 1978.

Amendment to the Constitution brought about a significant amendment that is the delegation of several powers of the centre to the provinces. Under the amendment, land and matters relating to land, were also delegated to the Provincial Councils. List 1 of the 9th Schedule deals with the matters delegated to the Provincial Councils. An exposition on the Thirteenth Amendment and its ramifications would be beyond the ambit of this chapter, but it is significant to note that List 1 of the 9th Schedule describes the authority of Provincial Councils in relation to land as follows:-

"Land, that is to say, rights in or over land, land tenure transfer and alienation of land, land use, land settlement and land improvement, to the extent set out in Appendix II."

Appendix II deals with land and land settlement. The Appendix states that "State land shall continue to vest in the Republic and may be disposed of in accordance with Article 33(d) and written law governing this matter".

In this connection, it is also important to note that several legislative enactments also deal with land, its acquisition<sup>4</sup>, the grant of land and the grant of permits to develop the land among others. It is also clear that acquisition of land is governed by strict legal procedures, including *inter alia*, the issue of a notice in that regard, the opportunity for those opposing such acquisition to object, an appeal procedure, and an inquiry into the amount of compensation payable<sup>5</sup>. Even where acquisitions are purportedly for an urgent public purpose, those whose lands are being acquired still have

<sup>&</sup>lt;sup>4</sup>Land Acquisition Act No. 9 of 1950 (as amended).

<sup>5</sup> Id.

certain rights that are guaranteed by legislation. Therefore it is clear that land, and matters related to land, including the right of the state to acquire private land, is governed by several legislative and constitutional provisions.

## ii) National Involuntary Resettlement Policy- National Plan of Action

In terms of domestic policies that relate to land, resettlement and reconciliation, the revised draft of the Framework for Resettlement Policy as of 6 November 2013, (hereinafter referred to as the Framework) is of relevance. The Framework states that it "...outlines the administrative, logistical, advisory, humanitarian and other forms of support available to internally displaced persons, returnee refugees of legitimate Sri Lankan origin and resettled communities..." The Framework notes that the policy will be reviewed periodically in consultation with stakeholders while taking into account changing circumstances. This is commendable given the changing landscape of return and resettlement of IDPs.

As such, one of its policy objectives is "Restoration of Land Ownership and other lost documents". Its basic principles state that not only should resettlement be voluntary, internally displaced persons (hereinafter IDP's) "should be resettled in their places of original habitation". The resettlement options set out in the Framework also re-iterates that resettlement and reintegration are to be "at the places

<sup>&</sup>lt;sup>6</sup>A Framework for Resettlement Policy, cover page. Ministry of Resettlement, 2013 http://resettlementmin.gov.lk/site/media/pdf/english/Resettlement%20Policy%2007-11-13.pdf

<sup>&</sup>lt;sup>7</sup>A Framework for Resettlement Policy, Policy objective (xi), at p. 2.

<sup>8</sup> A Framework for Resettlement Policy, Basic Principle (ii) at p. 3.

of origin". However, relocation in 'acceptable alternate locations in close proximity to the original locations' is also envisaged, but with the consent of the internally displaced, and 'ensuring minimum disruption to the socio, cultural and economic life of those concerned. In addition, payment of compensation in the form of either market value of the property, or alternate land, is envisaged for those who are dispossessed of property.

Of greater interest to the current analysis are the land and property rights that are envisaged in the Framework. Private property rights, according to the framework, are recognized and respected, both of IDP's and returnee refugees. A most important principle is in relation to acquisition of private property for public purposes. The Framework states thus:-

"Land owned by IDP's and returnee refugees identified as required for public purposes will only be acquired through due legal process"<sup>11</sup>.

This principle is thereafter reinforced by the provision of a house for residential purposes in a relocated site, compensation to be paid in terms of relevant laws, or alternate land to be provided, in the event of acquisition of land for a public purpose. The framework further states that restitution of land and property will be "within legal and regulatory framework in force"<sup>12</sup>.

<sup>&</sup>lt;sup>9</sup>A Framework for Resettlement Policy, Resettlement Option (ii) at p. 4.

<sup>10</sup> A Frame work for Resettlement Policy, Resettlement option (iv), at p. 4.

<sup>11</sup> A Framework for Resettlement Policy, Land and Property Rights (ii), at p. 6.

<sup>12</sup> A Framework for Resettlement Policy, Land and Property Rights (v), at p. 6.

The significance of this principle, and its inclusion is especially of relevance in light of the fundamental rights case filed by the residents of Valikamam, which is pending before the Supreme Court of Sri Lanka at the time of writing. Several petitions, filed by a large number of petitioners before the Supreme Court and the Court of Appeal, alleging that the Sri Lanka Army is in illegal occupation of 6,381 acres of land belonging to the Valikamam North Division in the Jaffna, are pending before the Courts.

According to reports<sup>13</sup> the Petitioners alleged that they had been in occupation of their lands for the past 23 years, and had vacated these lands due to the conflict in the North, and only became aware that the Sri Lanka Army was now in occupation when the land was fenced and barricaded, with posters hung on these fences indicating that the land was to be acquired for the construction of battalion headquarters for the Sri Lanka Army<sup>14</sup>. They allege that they were never informed in writing that these lands were to be acquired<sup>15</sup>. They further allege that various business enterprises are also being operated within these lands, by the Army. Their claim is that this occupation and/or acquisition violates their right to equality as guaranteed by Article 12 of the Constitution<sup>16</sup>.

<sup>13</sup> Sunday Times, id.

<sup>&</sup>lt;sup>14</sup>Member of Parliament representing the Tamil National Alliance, M.A. Sumanthiran has alleged in 2013, that the land in Valikamam North, as well as in other areas in the Northern Province including Jaffna, Mullaitivu, Mannar, Vavuniya and Killinochchi, are to be taken over for "military purposes". He also asserts that section 2 notices (under the Land Acquisition Act) have been pasted on the locations. "6400 Acres of Private Lands Belonging to Tamil People in Valikamam North to be Acquired by Govt for Military Cantonments", M.A. Sumanthiran, M.P, 28 April 2013, available at http://dbsjeyaraj.com/dbsj/archives/20684, accessed on 5 August 2014. <sup>15</sup>Sunday Times, id.

<sup>16</sup>Sunday Times, id.

# b. International framework

The right to land is not codified as an international law right, although several other human rights such as the right to food, to water, the right to work, the rights of indigenous peoples and of women, all recognise the close association to the right to land. "Land access and use is frequently tied to the spiritual, cultural and social identities of peoples" 17.

Women's right to land is recognized by the Convention on the Elimination of all forms of Discrimination against Women (CEDAW)<sup>18</sup>, which Sri Lanka ratified in 1981. The Convention requires that women be ensured equal treatment in relation to land resettlement schemes as well as land and agrarian reform<sup>19</sup>.

The Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), all protect the right to an adequate standard of living, the right to privacy and property. Under Article 17 of the UDHR, every person's right to own property and to not be arbitrarily deprived of such property, is clearly recognised. The ICCPR, Article 17 guarantees that no one shall have his right to a home, and his right to privacy, arbitrarily or unlawfully interfered with. General Comment

<sup>&</sup>lt;sup>17</sup> "Land Rights Issues in International Human Rights Law", Elisabeth Wickeri, Anil Kalhan, Institute for Human Rights and Business, available at http://www.ihrb.org/pdf/Land\_Rights\_Issues\_in\_International\_HRL.pdf, accessed on 24 May 2014, hereinafter referred to as Wickeri and Kalhan.

<sup>&</sup>lt;sup>18</sup> Convention on the Elimination of all forms of Discrimination against Women (CEDAW), 1979.

<sup>19</sup> CEDAW, Article 14(g).

7 of the ICESCR recognises that forced evictions are incompatible with the right to property envisaged under the Covenant<sup>20</sup>.

The ICESCR has also expressly recognised the right to adequate compensation for any property as well as effectual remedies for violation of rights protected by the Covenant<sup>21</sup>. In addition, under Article 2(1) of the ICESCR, state parties have a duty to take measures to realise the right to adequate housing of its peoples, and General Comment 7 interprets this to include the right not to be forcibly evicted<sup>22</sup>. The duty of state parties extends to taking measures against those who effect such forced evictions<sup>23</sup>.

In this connection, Wickeri and Kalhan cite the following statement of the Special Rapporteur on adequate housing:-

"[l]and is often a necessary and sufficient condition on which the right to adequate housing is absolutely contingent for many individuals and even entire communities."<sup>24</sup>

<sup>&</sup>lt;sup>20</sup> Committee on Economic Social and Cultural Rights (CESCR), General Comment 7, The right to adequate housing (Art. 11(1)): forced evictions, 1 (May 20, 1997) [Hereinafter CESCR, General Comment 7], cited in Wickeri and Kalhan, *supra*.

<sup>&</sup>lt;sup>21</sup> Article 2(3).

<sup>&</sup>lt;sup>22</sup> General Comment 7, cited in Wickeri and Kalhan, supra.

<sup>&</sup>lt;sup>23</sup> Id.

<sup>&</sup>lt;sup>24</sup> Commission on Human Rights, "Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living", Miloon Kothari, 41, U.N. Doc. E/CN.4/2005/48 (March 3, 2005), cited in Wickeri and Kalhan *supra*.

The right to housing has been interpreted as not merely the right to a roof above one's head, but the more comprehensive right to peace, security and dignity<sup>25</sup>. This includes the habitability, affordability, location and services<sup>26</sup>. This means that when resettling persons, and providing them with alternative land, it is vital to ensure that it is suitable. For instance where land is given to farmers it must be ensured that it is arable land, and that the land itself is conducive to human habitation, that water is available, and that the comprehensive needs of human habitation are met.

When it comes to development based relocation of peoples, the emphasis in international law is the informed, consensual relocation of persons, upon adequate payment of compensation, and only where relocation is absolutely necessary. In addition, where consent cannot be obtained, the national regulatory framework for such acquisitions must be strictly followed, while adequate compensation must be paid after inquiry. Wickeri and Kalhan state in this connection as follows:-

"One overriding principle is to ensure that feasible alternatives are explored in consultation with all affected persons, and ensure that affected persons have prior notice that evictions are being considered. Where relocations are being considered for indigenous communities from traditional lands, the obligation on states to ensure participatory decision-making and consent of affected communities is heightened."<sup>27</sup>

<sup>&</sup>lt;sup>25</sup> General Comment 4, Committee on Economic Social and Cultural Rights (CESCR), General Comment 4, The right to adequate housing (Art. 11(1)), 7 (Dec. 13, 1991), hereinafter CESCR, General Comment 4.

<sup>&</sup>lt;sup>26</sup> Wickeri and Kalhan, on General Comment 4, supra.

<sup>&</sup>lt;sup>27</sup> Wickeri and Kalhan, supra at 7.

In this connection, the Basic Principles and Guidelines on Development Based Evictions and Displacement are also of interest. The Guidelines were first elaborated by the Special Rapporteur<sup>28</sup> in 2007, and provides guidance and assistance to states in dealing with, and preventing forced evictions and displacement due to development. The Guidelines are significantly pre-cursed by the following statement, which recognises and highlights the importance placed on the right to land and property by the international law regime:-

"The obligation of States to refrain from, and protect against, forced evictions from home(s) and land arises from several international legal instruments that protect the human right to adequate housing and other related human rights. 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."

It is noted that Sri Lanka has ratified the ICCPR<sup>29</sup>, the Convention on the Rights of the Child<sup>30</sup>, the CEDAW, and

<sup>&</sup>lt;sup>28</sup> Special Rapporteur on adequate housing as a component of the right to an adequate standard of living

<sup>&</sup>lt;sup>29</sup> ICCPR, supra.

<sup>&</sup>lt;sup>30</sup> Convention on the Rights of the Child, 1989, ratified by Sri Lanka in 1991.

the International Convention on the Elimination of All Forms of Racial Discrimination<sup>31</sup>.

#### i. Guiding Principles on Internal Displacement

The mandate to formulate guiding principles for dealing with issues related to internal displacement, was first given to the Representative of the Secretary General, in 1992 by the Commission on Human Rights, and subsequently re-affirmed by resolutions of both the General Assembly and the Commission.

In relation to land and displaced persons, under guiding principle 9, states have a particular obligation to protect against displacements of peoples or other groups who have a special dependency on and attachment to their lands. As an agricultural country, this special dependency attaches to peoples resident in most parts of Sri Lanka, and culturally it would be correct to state that Sri Lankans themselves as a nation have a special attachment to land quite apart from their economic dependence on land for sustenance.

The Principles are "intended to provide guidance to the Representative in carrying out his mandate; to States when faced with the phenomenon of displacement; to all other authorities, groups and persons in their relations with internally displaced persons; and to intergovernmental and nongovernmental organizations when addressing internal displacement". Therefore they are of great persuasive value to both the GoSL in addressing the needs of and responding to the requirements of IDP's, and to the civil society bodies,

<sup>&</sup>lt;sup>31</sup> International Convention on the Elimination of All Forms of Racial Discrimination, 1966, ratified by Sri Lanka in 1982.

the inter and non-governmental organizations, in evaluating and providing technical assistance in these efforts<sup>32</sup>.

# ii. Article 20, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights<sup>33</sup>

Article 20 of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights<sup>34</sup> states as follows:-

"As is the case with civil and political rights, both individuals and groups can be victims of violations of economic, social and cultural rights. Certain groups suffer disproportionate harm in this respect such as lower-income groups, women, indigenous and tribal peoples, occupied populations, asylum seekers, refugees and internally displaced persons, minorities, the elderly, children, landless peasants, persons with disabilities and the homeless."

These guidelines point to the importance of paying attention to vulnerable groups such as widows, female headed households, orphaned children and farmers, in addressing issues of land and resettlement. The LLRC in fact has recognised the increased vulnerability of these groups, and

<sup>&</sup>lt;sup>32</sup> Report of the Representative of the Secretary General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39, UN Economic and Social Council (ECOSOC), Guiding Principles on Internal Displacement, 22 July 1998, E/CN.4/1998/53/Add.2, available at: http://www.refworld.org/docid/3c3da07f7.html [accessed 21 May 2014].

<sup>33</sup> Maastricht guidelines on violations of economic, social and cultural rights 1997 at http://www1.umn.edu/humanrts/instree/Maastrichtguidelines.html.

<sup>&</sup>lt;sup>34</sup> Maastricht guidelines on violations of economic, social and cultural rights 1997, available at http://www1.umn.edu/humanrts/instree/Maastrichtguidelines\_.html, accessed on 24 May 2014.

in several of its recommendations has, most commendably, indicated that such persons must be prioritised when resolving land disputes and when providing land for their sustenance<sup>35</sup>. The LLRC states in this connection in its recommendations as follows:-

"Address the immediate needs of women, especially widows who most often have become heads of their households, by provision of livelihood and other income generating means to reduce immense economic hardships."

In addition, the LLRC has recommended that the State "Establish an Inter-Agency Task Force mandated to address in a comprehensive manner the needs of women, children, elderly and other vulnerable groups such as the disabled affected by conflict, and provide necessary relief."<sup>36</sup>

### iii. Pinheiro Principles- UN Principles on Housing and Property Restitution for Refugees and Displaced Persons

The United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons<sup>37</sup> are also a significant instrument which relates to the rights to land and resettlement of displaced persons. The principles provide a comprehensive, consolidated set of universal guidelines on resettling displaced persons, and further offers guidelines and solutions to the myriad legal and technical difficulties faced

<sup>35</sup> Recommendation No. 9.87.

<sup>36</sup> Recommendation No. 9.92.

<sup>&</sup>lt;sup>37</sup> United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons, 2005, hereinafter referred to as the Pinheiro Principles.

by states in managing persons displaced due to various reasons.

Principle 2.1 of the Pinheiro Principles is clear in its requirement that the right to land and property of displaced persons must be protected. It states as follows:-

"All refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal."

This means that not only must they be provided every opportunity to return to their lands and properties; they must be adequately compensated in the event that restoration of such lands is impossible. These principles recognize the right to restoration as a distinct right. The LLRC recommendations also appear to consider this aspect of restoration as a priority. For example, in relation to the Northern Muslims, the LLRC recommends as follows:-

"Facilitate the early return of the displaced Muslims to their places of origin in the Northern Province. Take immediate steps to assist in rebuilding of the mosques, houses and schools destroyed or damaged by the LTTE." 38

Recommendation No. 9.148 calls for a revamp of the law on prescription to prevent legitimizing forced evictions and

<sup>38</sup> Recommendation No. 9.194-195.

Sri Lanka: State of Human Rights 2014

secondary occupations of land that took place during the conflict.

Of all its recommendations in relation to land, perhaps Recommendation No. 9.152 is of the most importance, and reflects the international law regime's thinking on the importance of restitution. It states as follows:-

"Arrive at a bipartisan understanding that restitution of land is a national issue and will not be used as a tool by political parties to gain narrow political advantage"

The Pinheiro Principles also recognize the right not to be displaced from a persons' place of habitual residence<sup>39</sup> as well as the right to voluntarily return in safety and dignity<sup>40</sup> among several other significant rights, some of which are reflected in the LLRC recommendations.

## iv. UN Resolutions

The UN Human Rights Council (UN HRC) at its 19th Session, passed a resolution on Promoting Reconciliation and Accountability in Sri Lanka, in March 2012, with 24 countries voting in favour<sup>41</sup>. The resolution welcomed the LLRC recommendations including those on impartial resolution of land disputes and significantly, called upon the GoSL as follows:-

<sup>39</sup> Principle 5, Pinheiro Principles, supra.

<sup>40</sup> Principle 10, Pinheiro Principles, supra.

<sup>&</sup>lt;sup>41</sup> UN General Assembly, Human Rights Council: resolution / adopted by the General Assembly, 22 March 2012, A/HRC/RES/19/2, available at: http://ap.ohchr.org/documents/dpage\_e.aspx?si=A/HRC/RES/19/2 [accessed 20 May 2014].

"to implement the constructive recommendations made in the report of the Lessons Learnt and Reconciliation Commission and to take all necessary additional steps to fulfil its relevant legal obligations and commitment to initiate credible and independent actions to ensure justice, equity, accountability and reconciliation for all Sri Lankans"<sup>42</sup>

Thereafter, in March 2013, the UN HRC passed a resolution on Promoting Reconciliation and Accountability in Sri Lanka at its 22<sup>nd</sup> session<sup>43</sup>. In this resolution, the Council noted that all the recommendations made by the LLRC had not been included in the National Action Plan. By this resolution also, the GoSL was called upon to implement the recommendations of the LLRC in relation to impartial resolution of land disputes.

Meanwhile, in March 2014, the UN HRC approved another resolution on Promoting reconciliation, accountability and human rights in Sri Lanka, authorizing an international investigation into alleged atrocities committed during the last stages of the war in 2009. This resolution recognizes the progress made by the GoSL on a number of fronts, including land use and ownership and resumption of livelihoods<sup>44</sup>. It also recalls the LLRC recommendations

<sup>42</sup> id.

<sup>&</sup>lt;sup>43</sup> UN General Assembly, Human Rights Council: resolution / adopted by the General Assembly, 21 March 2013, A/HRC/RES/22/1, available at: http://ap.ohchr.org/documents/dpage\_e.aspx?si=A/HRC/RES/22/1 [accessed 20 May 2014], adopted with a majority of 25 votes in favour.

<sup>&</sup>lt;sup>44</sup> UN General Assembly, Human Rights Council: resolution/adopted by the General Assembly, 23 March 2014, A/HRC/25/L.1/Res.1, available at http://www.un.org/ga/search/view\_doc.asp?symbol=A/HRC/25/L.1/Rev.1 [accessed 24 May 2014], adopted with a majority of 23 votes in favor, 12 against and 12 abstentions.

which called for the implementation of independent dispute resolution of land related matters. It recognises however that the National Plan of Action does not encompass all the recommendations made by the LLRC.

## 3. LLRC Recommendations Regarding Land Issues and Developments in Relation Thereto

The LLRC has made, in all, 31 actionable recommendations in relation to land.

In this section, the LLRC recommendations in relation to land return and resettlement, in terms of the National Plan of Action for the implementation of LLRC recommendations as of February 2014, will be discussed. In addition, where additional information is available, developments in relation to each of these recommendations are discussed.

The official website for the National Plan of Action for the Implementation of LLRC Recommendations (which was formulated in July 2012), carries an updated version of the progress of the implementation of the recommendations. Other reports by civil society organizations, non-governmental organizations and the media have also been included to ensure that as many aspects as possible in relation to these developments in relation to the recommendations are discussed.

Recommendation 9.124 of the LLRC report relates to the right of a citizen to acquire land in any part of the country, and reside in any area of his/her choice, whilst ensuring that the land policy of the government would not be used as an instrument to effect unnatural changes to the

demographics of a given area. In addition, according to this recommendation, distribution of state land should be as provided for in the Constitution.

The activities envisaged in order to carry out this recommendation by the Ministry of Lands and Land Development and the Presidential Secretariat include the conducting of a study to ascertain whether practises infringe on legal rights to acquire lands. The official website reports that a study of the alienation of state land with specific reference to the North and East has been conducted<sup>45</sup>. However, there is no link available to access the results of this study, and the results of this study have not been accessible to the author.

In addition, the appointment of a fourth land commission was also envisaged, and the National Plan of Action states that "finalisation of activities relating to setting up of 4<sup>th</sup> land commission is underway", whilst the time frame is set as January 2014<sup>46</sup>. The other three previous land commissions which were established in Sri Lanka were in 1927, 1936 and 1985<sup>47</sup>.

National Plan of Action for the Implementation of LLRC Recommendations-Responsibilities by Thematic Areas, (February 2014), at page 24-25, available at http://www.llrcaction.gov.lk/en/npoa.html, accessed on 4.5.2014, hereinafter referred to as the 'National Plan of Action'. Gificial website for the National Plan of Action for the Implementation of LLRC Recommendations, available at http://www.llrcaction.gov.lk/en/npoa/land-return-and-resettlement.html, accessed on 4.5.2014 LLRC Action Plan proposes fourth Land Commission to address land information unit of the Presidential Secretariat, Sri Lanka), 2 August 2012, available at http://www.priu.gov.lk/news\_update/Current\_Affairs/ca201208/20120802llrc\_ation\_Plan\_proposes\_fourth\_land\_commission.htm, accessed on 8 July 2014.

Other recommendations are also linked to the establishment of a 4<sup>th</sup> Land Commission; for example, recommendation No. 9.126, which recommends that a publicity effort be undertaken to assure people that whilst the Land Policy and the Associated Programme is to make land available to all returning IDP's, that this would not be a substitute for the existing recourse available to courts of law<sup>48</sup>. At the time of writing, however, the 4<sup>th</sup> Land Commission had not been appointed<sup>49</sup>.

The Global Overview 2014 published by the International Displacement Monitoring Centre reports that IDP's were provided with housing on some relocation sites 'but not with documentation, leaving them without tenure security'50. In addition, the International Displacement Monitoring Centre reports that land issues are among the biggest obstacles to durable solutions in relation to the displaced in Sri Lanka. It reports as follows:-

"A circular published in January<sup>51</sup> favours secondary occupation over the right to restitution, and no mechanism exists to deal with conflicting land claims,

<sup>48</sup> LLRC Recommendation No. 9.126

<sup>&</sup>lt;sup>49</sup> May 2014.

<sup>&</sup>lt;sup>50</sup>"Global Overview 2014: People Displaced by Conflict and Violence", International Displacement Monitoring Centre, May 2014, at 76, available at http://www.internal-displacement.org/publications/2014/global-overview-2014-people-internally-displaced-by-conflict-and-violence, accessed on 21 May 2014.

<sup>&</sup>lt;sup>51</sup> The reference here is to the "Accelerated Programme on Solving Post Conflict State Lands Issues in the Northern and Eastern Provinces-Land Circular 2013/01", which was issued in January 2013. This circular was issued after the withdrawal of the highly criticised Land Circular 2011/4, which was challenged in Court, and thereafter withdrawn.

such as those in Mannar district where tensions between returning Tamil and Muslim IDP's flared in March."<sup>52</sup>

In relation to the Northern Muslims who were expelled from the Northern Province by the LTTE in the 1990's, the report also states that they have struggled in gaining access to lands, housing and livelihoods, and although some prefer to reintegrate in Puttalam, they have been unable to register as residents<sup>53</sup>.

Land Circular No. 2013/1 is an improvement on the previous circular which was later withdrawn by the Government, namely Land Circular No. 2011/4. Land Circular No. 2011/4 has been critically analysed in the State of Human Rights 2012/2011 Report, in the chapter on "Implementation of LLRC recommendations on Resettlement and Reconciliation", including the challenge to the said circular in the Court of Appeal, and therefore, will not be revisited here. In relation to the subsequent circular, namely 2013/1, the Centre for Policy Alternatives stated as follows:-

"While the Circular explicitly states that it deals with issues related to state land, there is reference to private land under 2.2.1.2 which deals with 'lost lands.' The Circular points to a number of scenarios through which land can be 'lost' such as lands being vacated or the occupants chased away during the conflict; being used for 'development activities under government institutions and armed forces' and 'where other people have permanently settled on those lands'. The Circular

<sup>52</sup> Ibid, International Displacement Monitoring Centre, at 76.

<sup>53</sup> Ibid, International Displacement Monitoring Centre, at 76.

instructs that alternate lands should be provided with consent of those who have 'lost lands'. There is also specific reference to private lands or lands distributed under state grants where the Circular provides for alternative land in accordance with 'compensation assessment carried during the acquisition process of those lands'54.

Needless to say, land continues to be at the heart of concerns relating to resettlement and reconciliation. The circular is to be implemented over a two year period - 2013 and 2014. It is also to strictly deal with state lands, and what it terms 'lost lands', as pointed out by the Centre for Policy Alternatives. A lack of clarity as to the definition of development activity' can also lead to misuse of these terms for alienation of state land.

However, the second circular is a commendable improvement on Circular No. 1/2011. The time period being limited to 2013 and 2014 however constrains the ability of the GoSL to resolve all the disputes encompassed by the circular within this narrow period of time, and ambiguities as to *inter alia* time frames and appeals processes may contribute to these difficulties<sup>55</sup>.

The Centre for Policy Alternatives however in a critique of the Circular, points out that whilst land can only be acquired

State Lands Issues in the Northern and Eastern Provinces", Land Circular: 2013/01, Centre for Policy Alternatives, March 2013, at 2, available at http://www.cpalanka.org/wp-content/uploads/2013/04/Land-Circular-Brief-Commentary-March-20134.pdf, accessed on 21 May 2014, hereinafter referred to as CPA.

<sup>55</sup> See CPA, supra.

under the law for a public purpose under the Land Acquisition Act No. 9 of 1950, it appears that under the Circular, 'lost lands', lands 'where other people have permanently settled' and land for 'development purposes', can be acquired. Whether this means that 'public purpose' is intended to include these purposes is not clear. In addition a question raised by CPA is whether the Minister will no longer be identifying the lands to be acquired and whether the Land Commissioner General has now been given the function of identifying the land as required by the Act. It has also been pointed out that development activities appear to take precedence and priority over the private land owner's rights. Another criticism is that the Circular does not set out the framework for issues relating to private land, although it deals with issues surrounding state land<sup>56</sup>.

To return to the analysis proper, this recommendation of the LLRC in relation to land also includes ensuring the effective implementation of statutes, such as the State Lands Ordinance, and Land Development Ordinance. The progress in relation to this recommendation is not recorded, and measuring its implementation therefore is difficult.

These provisions are echoed in Circular No. 1/2013<sup>57</sup>, which deals with several situations. Circular 1/2013 sets out the process/guidelines to be followed with regard to solving state land issues relevant to the Northern and Eastern provinces.

<sup>56</sup> See CPA, supra.

<sup>57</sup> Circular No. 1/2013, Jan. 2013, Land Commissioner General's Department, Ref. No. 3/4/1/LLRC, "Accelerated Programme on Solving Post Conflict State Lands Issues in the Northern and Eastern Provinces", available at http://www.llrcaction.gov.lk/assets/downloads/circulars/en/Land\_Cerculer\_2013.pdf, accessed on 4/5/2014.

The Circular recommends guidelines to be followed by all divisional secretaries, in several situations, including *inter alia*, (1) distribution of land to landless people, (2) distribution of land to those who have lost lands, (3) where land grants/permits have been lost/destroyed, or (4) where the relevant ledgers or land permit copies at the divisional secretariat have been destroyed/misplaced, and also (5) with the issue of annual permits<sup>58</sup>. Annual permits are to be renewed further, only if a permit had been issued previously, there has been uninterrupted possession, and has been continuously renewed to date. Significantly, in such cases, the circular recommends issue of long term lease bonds, or permits under the Land Development Ordinance.<sup>59</sup>

Another recommendation is that the Government of Sri Lanka (GoSL) issues a clear statement that private lands would not be utilized for settlements by any government agency. The National Plan of Action records this action point as having been completed, and that a policy has been formulated to deal with the issue of resettlement<sup>60</sup>.

Other recommendations include supervision and monitoring of the officers who will implement the said land policy<sup>61</sup>. Recommendation No. 9.137 is also relevant in this regard, since it recommends strengthening of human resource teams for implementation of the Return and Resettlement of Displaced Persons and Associated Programme<sup>62</sup>. Twelve officers, who have retired from the Sri Lanka Administrative Service, have been

<sup>58</sup> Regulation No. 2.2.2.4, Circular No. 1/2013 id.

<sup>&</sup>lt;sup>59</sup> Regulation No. 2.2.2.5, Circular No. 1/2013 ibid.

<sup>60</sup> National Plan of Action supra, p. 25.

<sup>&</sup>lt;sup>61</sup>LLRC Recommendation No. 9.129.

<sup>62</sup>LLRC Recommendation No. 9.137.

appointed as Assistant Land Commissioners as of February 2014, in the Northern and Eastern Provinces. Twenty-five Development officers have also been assigned to the same provinces, and Rs. 400 million have been allocated from the 2014 national budget, to the Ministry of Lands and Land Development, for implementation of LLRC recommendations in relation to land.<sup>63</sup>

On the other hand, the National Plan of Action lists several recommendations as having been completed, including conducting training programs for officers and community leaders, launching a communication campaign in the two national languages to encourage displaced persons to come forward to receive benefits under the Land Policy and the Associated Programme, etc<sup>64</sup>.

The National Plan of Action states that the participation of security forces officers has been confined successfully to expediting the release of lands that were being used for security purposes<sup>65</sup>.

In relation to granting land to all families who have been secondary occupiers, the Committee recommended that the lands they are currently occupying must be handed over to the original permit holders after investigation by the Investigating Committee. In this connection, recommendation No. 9.104 is also of relevance, since it recommended that the circular which recommends grant of ownership to IDP's who are resettled, be implemented. In

<sup>63</sup> National Plan of Action supra, p. 25.

<sup>64</sup> National Plan of Action supra, p. 26.

<sup>65</sup> Recommendation No. 9.134, see National Plan of Action supra, p. 26.

Sri Lanka: State of Human Rights 2014

this connection, the National Plan of Action states as follows:-

"Land Commissioner General's Circular No. 2013/01 is continuously monitored with Provincial Land Commissioners (North and East) and District Secretariats. Accordingly, 3,623 land requests (total 147,504 to date) have been received during January in the Northern Province under 03 categories in the Circular, i.e. new land requests, regulating documents and other land problems. 2,321 have been resolved, making a total of 24,389 land resolutions to date. In the Eastern Province, 490 land requests have been received in January (total 11,662 to date) and 83 have been resolved (total 1,260 to date). In the meantime, 21 Divisional Days were held in the North (360 Divisional Days to date) and 14 Divisional Days were held in the East (151 to date) for the public to make representations relating to their lands. 24 Land Kachcheris were conducted during January in the North (total 445 to date) to distribute land. 411 Tsunami Deeds have been issued in the Eastern Province.

Amendment to the *Prescription Ordinance* will be presented in Parliament by April, 2014.

Steps are being taken to Gazette the necessary Orders under the Special Mediation Boards Act, to establish Special Mediation Boards in certain areas where armed conflicts prevailed, to address certain identified land disputes that have arisen in those areas."66

<sup>66</sup> National Plan of Action supra, page 20.

Incidentally, the holding of Divisional days is included and provided for by Circular No. 1/2013<sup>67</sup>.

The recommendation in relation to the amendment of the Prescription Ordinance is also connected to Recommendation No. 9.148, which envisages an amendment to the Prescription Ordinance in relation to its application to land transfers or occupation affected during the time of the conflict in order to legitimize forced evictions and secondary occupations<sup>68</sup>. The National Plan of Action states that an amendment in this regard is to be presented to Parliament in February 2014<sup>69</sup>. However, no such amendment has been presented at the time of writing.

As of the time of writing, the only publicised amendment envisaged to the Prescription Ordinance has been in March 2013, in relation to statutorily extending the immunity available to the state from the prescription, in relation to both alienable and inalienable rights, under section 15, in view of the judgment in Attorney General v. Wilson, which limited this right to inalienable rights (such as immovable property or land)<sup>70</sup>. This amendment has hardly any relevance for the type of amendment envisaged by the LLRC. As of date, prescription to private lands can only be claimed where the claimant can prove adverse, uninterrupted possession for a period of ten years. As of July 2014, an amendment to

<sup>&</sup>lt;sup>67</sup>Circular 1/2013 supra, Regulation No. 2.2.2.2.

<sup>&</sup>lt;sup>68</sup>Recommendation No. 9.148.

<sup>69</sup> National Plan of Action, supra, at p. 29.

<sup>&</sup>lt;sup>70</sup> "Cabinet approves Open Ended State Immunity Against Prescription", Sunday Times, 17.3.2013, available at http://www.sundaytimes.lk/130317/news/cabinet-approves-open-ended-state-immunity-against-prescription-37341.html, accessed on 4.5.2014.

the Prescription Ordinance was reportedly to be presented to Parliament, on 24 July 201471. The amendment was to provide relief to those who were displaced during the war, and to apply to the period between 1983 and 2012, according to local media reports<sup>72</sup>. According to these reports the amendment was to remove the prescriptive period of ten years of adverse possession of land, to claim ownership to property, to allow those who were displaced by the war and forced to abandon their lands, to reclaim such land73. However, the amendment that actually passed by the House related only to the previously mentioned amendment to section 15 of the Prescription Ordinance74. Section 15 only relates to the state's entitlement to enjoy complete immunity from rules of prescription in recovering dues from others in delictual matters, and was not in relation to the LLRC recommendations<sup>75</sup>.

A significant recommendation in relation to alienation of state land is Recommendation No. 9.140, which states that the GoSL is to apply strict controls to ensure that state land is not alienated other than for IDP's until the proposed programme is implemented. The National Plan of Action lists this action point as completed<sup>76</sup>.

<sup>71 &</sup>quot;Amendment to the Prescription Ordinance in the House Next Week", The Sunday Times, 13 July 2014, available at http://www.sundaytimes.lk/140713/news/amendment-to-prescription-ordinance-in-the-house-next-week-106891.html, accessed on 23 July 2014.

<sup>72</sup> Id.

<sup>73</sup> ibid.

<sup>&</sup>lt;sup>74</sup> Parliamentary Debates (Hansard), Vol. 227, No. 7, 24 July 2014, available at http://www.parliament.lk/uploads/documents/hansard/1406693301027758.pdf, at pages 842-875, accessed on 5.8.2014.

<sup>&</sup>lt;sup>76</sup> National Plan of Action supra, at p. 27.

In this connection Recommendation No. 9.142 is also of relevance. The LLRC recommended that the GoSL review the two existing high security zones in Palaly and Sampur. As of February 2014, the National Plan of Action states that lands are currently being released, that relocation is ongoing, and that compensation would be paid by December 2015<sup>77</sup>. According to the report, the former High Security Zone in the North has ceased to exist, and the Palaly cantonment is the only area in which security restrictions remain. The report does note that the Sampur area is now a development zone under the Board of Investment. Accordingly 20,011 acres of private land, and 5,740 acres of state land have been released in the North and East, and a breakdown of these areas released by the armed forces is set out<sup>78</sup>.

In relation to alienation of land, including private land, the People's Alliance for Right to Land (PARL), a network of civil society organisations and individuals campaigning on issues of land-grabs and landlessness across Sri Lanka, highlighted four case studies where this recommendation, among others, had not been fulfilled as of March 2013.<sup>79</sup> One is the case of Valikamam North, discussed previously, in relation to which a fundamental rights case is pending before the Supreme Court of Sri Lanka. The other case

<sup>77</sup> National Plan of Action supra, at p. 28.

<sup>&</sup>lt;sup>78</sup>National Plan of Action supra, at p. 28.

<sup>&</sup>quot;Implementation of LLRC Recommendations on Land Issues in the North and East", Peoples' Alliance for Right to Land, 15.3.2013, available at http://www.lawandsocietytrust.org/PDF/PARL%20LLRC%20Implementation%20Land%20North%20and%20East%20March%202013.pdf, accessed on 4.5.2014, hereinafter referred to as PARL, March 2013.

studies relate to Mullikulam<sup>80</sup> (Mannar), ThiruMurugandi<sup>81</sup> (Killinochchi), and Sampur<sup>82</sup> (Trincomalee). In each of these locations, PARL reports that the one of the three armed

<sup>81</sup> Out of 463 fisher families reportedly displaced from ThiruMurugandi, as at March 2013, 382 had not been re-settled. 500 acres of land in the area is reportedly occupied by an army camp (as at March 2013), which land belonged to 120 families." Land Grabs In North And East Contradict LLRC Recommendations", People's Alliance for the Right to Land, March 2013, ESCR Newsletter, Law and Society Trust, Issue No. 5, at p. 5.

The LLRC recognizes (in para 6.13 of its report) that approximately 10,000 people were displaced in May 2007 from Sampur, Trincomalee, due to the establishment of the Trincomalee-Sampur High Security Zone. Thereafter Sampur was reportedly declared a Special Economic Zone (SEZ), for the construction of a coal power plant. 500 houses were reportedly destroyed for this purpose, and 2500 acres of paddy land taken over, which was the livelihood of 2000 families.1262 families (4036 individuals) reportedly were still in IDP camps as at March 2013. See "Land Grabs In North And East Contradict LLRC Recommendations", People's Alliance for the Right to Land, March 2013, ESCR Newsletter, Law and Society Trust, Issue No. 5, at p. 5.

<sup>80</sup> The LLRC recognizes in para 6.13 of its report that 150 families from the Mullikulum area in Mannar District, have lost their lands due to a navy installation in the area. At para 6.65 the LLRC has recommended that these people (those who have lost lands to High Security Zones) be given alternative land on an urgent basis;LLRC Report. Other reports suggest that 1000 acres of land, and 5 irrigation tanks are now inaccessible to 307 families from the Mullikulum Grama Niladhari area, therefore the statistics appear higher than those recognized by the LLRC. The People's Alliance for the Right to Land further reports as follows:- "Families of Sinhala naval personnel have been settled in that land. Two hundred and six households have temporarily settled in the forested area of Marichchikattu; while 54 families are living in Kayakuli village. These households lack decent shelter, sanitation, potable water and livelihoods in both areas. The people of Mullikulam have been displaced at least four times since 1990", "Land Grabs In North And East Contradict LLRC Recommendations", People's Alliance for the Right to Land, March 2013, ESCR Newsletter, Law and Society Trust, Issue No. 5, at p. 5.

forces are in occupation of large tracts of land, leading to the displacement of many IDP families originally from those areas.

In April 2013, when approximately 6,400 acres of land in Valikamam were reportedly acquired by the Military for "military purpose", Tamil National Alliance Member of Parliament, M.A. Sumanthiran is reported to have expressed the following views:-

"Section 2 notices under the Land Acquisition Act were pasted on trees in Valikamam North in the Jaffna Peninsula indicating that an extent of approximately 6,400 acres of private lands belonging to several thousand Tamil people would be acquired for Military cantonments.

Strangely, the notice says that the claimants are not traceable! The owners of these lands live just outside the so called illegal High Security Zone, in camps maintained by the government itself. They have lived there for over 25 years. And although their title to these lands were checked and cleared by a Committee appointed by the Supreme Court in 2006, they were not permitted to go and resettle on the false assertion that de-mining was not complete."83

<sup>83 &</sup>quot;6400 Acres of Private Lands Belonging to Tamil People in Valikamam North to be Acquired by Govt for Military Cantonments", M.A. Sumanthiran, Sri Lanka Brief, available at http://www.srilankabrief.org/2013/04/6400-acres-of-private-lands-belonging.html, accessed on 20 May 2014.

The public purposes set out for these acquisitions in Jaffna reportedly include military bases and military run holiday resorts<sup>84</sup>.

All of the land grabs appear to have similar purposes. Sampur, for example, was declared a High Security Zone, and the area was thereafter declared a special economic zone for the construction of the Sampur Coal Power Plant<sup>85</sup>. The High Security Zone established in Valikamam North in 1990 has reportedly resulted in 9,905 families being displaced (as at March 2013), consisting of 33,353 individuals<sup>86</sup>.

In another writ application before the Court of Appeal (August 2013), the son of the late Lakshman Kadirgamar, S. J. Christian Kadirgamar, petitioned the court to quash an acquisition notice issued by the Land Acquiring Officer, purporting to acquire his land situated in Valikamam North for a public purpose, which public purpose is further described as a land requirement for the "Defence Battalion Headquarters (Jaffna)"<sup>87</sup>. He further complained therein that the notice purports to refer to regularising handover of areas situated in a High Security Zone (Palaly and Kankasanthurai), whereas the land in question is not situated within a High Security Zone.

<sup>&</sup>lt;sup>84</sup> Supra, International Displacement Monitoring Centre, at 76.

<sup>&</sup>lt;sup>85</sup>"Land Grabs In North And East Contradict LLRC Recommendations", People's Alliance for the Right to Land, March 2013, ESCR Newsletter, Law and Society Trust, Issue No. 5, at p. 5.

<sup>&</sup>lt;sup>86</sup>"Land Grabs In North And East Contradict LLRC Recommendations", People's Alliance for the Right to Land, March 2013, ESCR Newsletter, Law and Society Trust, Issue No. 5, at p. 5.

<sup>&</sup>lt;sup>87</sup> "K'gamar's son petitions court over acquisition of land", 2<sup>nd</sup> August 2013, Daily Mirror, available at http://www.dailymirror.lk/news/33222-kgamars-son-petitions-court-over-acquisition-of-land.html, accessed on 9 July 2014.

In addition, in October 2013, the military reportedly demolished approximately 200 partially damaged houses/buildings in Valikamam North, drawing criticism both from the Tamil National Alliance and from the Chief Minister of the Northern Province, C.V. Wigneswaran<sup>88</sup>. The homes were reportedly in the village of Kattuwan in the Palaly Cantonment. This is despite several cases pending before both the Court of Appeal<sup>89</sup> and the Supreme Court in relation to at least some of these lands. The Court of Appeal permitted 1,474 petitioners to amend their petitions in relation to 6,831 acres of land which had been reportedly acquired by the Government in Valikamam<sup>90</sup>. In total 2,176 writ applications have been filed in relation to what the Petitioners allege are illegal acquisitions of their lands in Valikamam<sup>91</sup>.

Subsequent to the filing of these applications, the Sunday Observer reports the relocation of 14 Army camps of the 17 on Valikamam, to Palaly<sup>92</sup>. It is reported that these camps were on private lands and rent was being paid at market rates<sup>93</sup>. According to the report, land owners have barely made

<sup>&</sup>quot;Military demolishes homes in former HSZ in Valikamam", DharishaBastians, October 30, 2013, Daily Mirror, Financial Times, available at http://www.ft.lk/2013/10/30/military-demolishes-homes-in-former-hsz-in-valikamam/, accessed on 20 May 2014.

<sup>&</sup>lt;sup>89</sup> Id.

<sup>&</sup>quot;Court permits petition of Valikamam people", Eye Sri Lanka, available at http://www.eyesrilanka.com/2013/05/21/court-permits-petition-of-valikamam-people/, accessed on 20 May 2014.

<sup>91&</sup>quot;Army to relocate camps in Palaly", Sunday Observer, 2 June 2013, available at http://www.sundayobserver.lk/2001/pix/PrintPage. asp?REF=/2013/06/02/sec01.asp, accessed on 20 May 2014.

<sup>92</sup> Id.

<sup>93</sup> The Sunday Observer, ibid.

any complaints. Meanwhile, the owners of the new lands on which the army camps will be located, would be paid compensation at market rates, and alternative lands would also be provided to them<sup>94</sup>. The ground situation in relation to these promises thereafter, is unascertained.

Around the same time, the Chairman of the Valikamam North Pradeshiya Sabha was also reportedly threatened over the telephone, and the severed head of a cow placed in front of his office, presumably as a result of his office initiating the collection of information on the resettlement of families in the Palaly East area. The dispute in relation to the resettlements in Palaly East arose due to families being resettled in the said Palaly East area, despite there being other legal claimants to the same lands<sup>95</sup>. Tamil National Alliance (TNA) member of parliament E. Saravanabhavan volunteered the following explanation for the sudden resettlement of these families:-

"his party believed the sudden resettlement in Palaly East of persons with no legal claim to the area was an attempt to move persons out of certain other regions of Jaffna ahead of British Prime Minister David Cameron's visit there."

In this connection, it is also significant to note that, in relation to Sampur, it was first declared a High Security Zone,

<sup>94</sup> Id.

<sup>95 &</sup>quot;Chairman of Valikamam North PS receives threats over land acquisition claims", Dharisha Bastians, 12 November 2013, Daily Mirror, Financial Times, available at http://www.ft.lk/2013/11/12/chairman-of-valikamam-north-ps-receives-threats-over-land-acquisition-claims/, accessed on 20 March 2014.

<sup>96</sup> Id.

and thereafter re-gazetted as a Special Economic Zone for the construction of a coal power plant and industries by an Indian company. According to PARL, more than 2500 acres of paddy land are lost to cultivation, 2000 families have lost their livelihood, and 500 homes destroyed<sup>97</sup>.

As of April 1, 2014, the LLRC reported that the Security Force Headquarters in Kilinochchi (SFHQ-KLN) handed over 24 acres of land in Pooneryn, Mulankavil and Pulliyankulam areas to their rightful owners<sup>98</sup>. According to the LLRC, this was after a verification program to identify the rightful owners. This was in addition to financial and other livelihood support which was reportedly provided to civilians in Kilinochchi. This development is commendable since the de-militarisation of these former conflict areas is essential to the reconciliation process.

On the other hand, when it comes to seeking co-operation from a development partner to support the programme<sup>99</sup>, the National Plan of Action states that local funds have been allocated for this purpose, whilst as of end of 2012, approximately 3,189 million US dollars had been mobilized for this purpose<sup>100</sup>.

In July 2013, the Cabinet also included several additional recommendations as an addendum to the National Plan of Action upon cabinet approval. One of these

<sup>97</sup> PARL, March 2013.

<sup>&</sup>lt;sup>98</sup> Lessons Learnt and Reconciliation Commission, available at http://www.llrcaction.gov.lk/en/news/538-sri-lanka-army-returns-more-lands-to-original-owners.html, accessed on 20.5.2014.

<sup>99</sup> Recommendation No. 9.141.

<sup>100</sup> National Plan of Action supra, at p. 27.

recommendations is to effectively resolve the land issues of Muslims who lost their lands at the hands of the LTTE in the Eastern Province<sup>101</sup>. The recommendations envisaged the formulation of a program to address the land issues of such displaced Muslims. The progress report indicates that 6,391 plots of land have been alienated by the Land Commissioner General and 1,993 allotments have been alienated to facilitate the resettlement of Muslim families<sup>102</sup>.

The end date is December 2014, which gives the GoSL just under 8 months to fulfil the recommendation. But as referred to previously, the grievances of the Muslims appear to be still pending, and according to the International Displacement Monitoring Centre, although some Muslims are registered as having returned, "in reality they are thought to be still living in their places of refuge in Puttalam or alternating between Puttalam and the north for want of adequate assistance"<sup>103</sup>.

In relation to Sinhalese families that were evicted from the Northern Province<sup>104</sup>, the progress report indicates that 4,414 families have now returned, whilst 3,714 families had been evicted<sup>105</sup>. No time frame for completion has been indicated.

Designing a focal agency to study the special nature of problems faced by displaced families is another recommendation. The LLRC envisaged the identification of former threatened villages, and collection of information

<sup>101</sup> Recommendation No. 9.144.

<sup>102</sup> National Plan of Action supra, at p. 28.

<sup>103</sup> Supra, International Displacement Monitoring Centre, at 76.

<sup>&</sup>lt;sup>104</sup> Recommendation No. 9.145.

<sup>105</sup> National Plan of Action supra, at p. 29.

relating to land issues. The progress report indicates that a committee has been set up with the participation of four relevant ministries, to study these problems faced by displaced families. However, the first meeting had been held only on 21.1.2014, as well as a workshop on 18.2.2014 in four districts, and therefore no report has been submitted as yet, although the progress report states that the report will be submitted shortly<sup>106</sup>. As reported by the International Displacement Monitoring Centre, Sri Lanka 'has no comprehensive legislation or policy on IDP's"<sup>107</sup>, and the policy published by the Ministry of Resettlement in 2013 needs to be brought in line with international standards.

In relation to the National Land Commission (NLC), the LLRC recommended that action to establish the Commission be expedited, in compliance with the 13th Amendment to the Constitution<sup>108</sup>. Specifically, the LLRC has envisaged including the National Land Commission in the terms of reference of the PSC with a view to receiving recommendations. In this connection recommendation No. 9.152 is also of great relevance. The LLRC recommended that the GoSL arrives at "a bipartisan understanding that restitution of land is a national issue and will not be used as a tool by political parties to gain narrow political advantage". Progress on this particular recommendation is listed as 'ongoing'.

This recommendation is also linked to Recommendation No. 9.151 which recommends the development of a land use

<sup>106</sup> Id.

<sup>107</sup> Supra, International Displacement Monitoring Centre, at 76.

<sup>&</sup>lt;sup>108</sup> 13th Amendment to the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka.

plan. This is with the objective of guiding "the district administration in land conservation and alienation in order to ensure protection of environment and bio-diversity, sustainable economic development, leisure and recreational standards, religious, cultural and archaeological sites with a view to improving the quality of life of the present and future generations". The progress report indicates that a national level expert group has been appointed to advise on land use plan preparation. Meanwhile, Rs. 400 million, has been allocated in the 2014 budget for implementation of land related LLRC recommendations, while Rs. 800 million had been allocated in 2013 to improve land title and ownership. June 2015 is the target completion date for this recommendation.

## 4. Institutions Set Up to Deal with Land Rights

As discussed previously, one of the institutions that were to be set up to deal with land rights and resettlement was the 4th Land Commission, as per the National Plan of Action (note that the LLRC has not recommended the setting up of a Land Commission). However, as at the time of writing, the Commission has not been established, although the official website of the National Plan of Action states that the setting up of the Commission is being finalised.

The activities (activity 9.124(2)) envisaged under LLRC Recommendation No. 9.124, states as follows:- "Appoint a 4th Land Commission with a TOR similar to the previous three (i.e. the LC's of 1927, 1936 and 1985) to recommend policy to address issues" 109. It is significant that the LLRC

<sup>&</sup>lt;sup>109</sup> National Plan of Action, available at http://www.llrcaction.gov.lk/en/npoa/land-return-and-resettlement/240-9-124-ensure-that-any-citizen-of-sri-lanka-has-the-right-to.html, accessed on 8 July 2014.

did not recommend the appointment of a 4<sup>th</sup> Land Commission. It is the National Plan of Action, under activities listed for implementing Recommendation No. 9.124<sup>110</sup>, that has introduced the appointment of the 4<sup>th</sup> Land commission<sup>111</sup>.

The other important obligation that arises, vis-à-vis appointing specific institutions to deal with state policy on land, is the Constitutional requirement<sup>112</sup> to establish the National Land Commission, the establishment of which is also recommended by the LLRC<sup>113</sup>. Neither of these institutions has been established as at the date of writing.

One important distinction between the National Land Commission (per the Constitution and per the LLRC recommendation) and the Fourth Land Commission (referred to by the National Plan of Action), is that the establishment

In "Ensure that - (1) Any citizen of Sri Lanka has the right to acquire land in any part of the country, in accordance with its laws and regulations, and reside in any area of his/her choice without any restrictions or limitations. (2) Land policy of the Government is not an instrument to effect unnatural changes in the demographic pattern of a given Province. (3) Distribution of State land continues as provided for in the Constitution.", Recommendation 9.124, LLRC Recommendations

<sup>&</sup>quot;III Activity 9.124(2) states as follows:- "Appoint a 4th Land Commission with a TOR similar to the previous three (i.e. the LC's of 1927, 1936 and 1985) to recommend policy to address issues", National Plan of Action, available at http://www.llrcaction.gov.lk/en/npoa/land-return-and-resettlement/240-9-124-ensure-that-any-citizen-of-sri-lanka-has-the-right-to.html?highlight=WyJmb3IiLCI0dGgiLCJsYW 5kIiwiY29tbWlzc2lvbiIsImZvciA0dGgiLCJm b3IgNHRoIGxhbmQiLCI0dGggbGFuZCIsIjR0aCBsYW5kIGNvbW1pc3N pb24iLCJsYW5kIGNvbW1pc3Npb24iXQ==.

<sup>&</sup>lt;sup>112</sup>Per the 13th Amendment to the 1978 Constitution.

<sup>113</sup> Recommendation 9.150

of the National Land Commission is a Constitutional imperative, in terms of the Thirteenth Amendment to the Constitution<sup>114</sup>.

The National Land Commission (NLC) is to deal with the formulation of national policy in relation to the use of state land, and, most importantly, is to include representatives from each of the Provincial Councils in Sri Lanka<sup>115</sup>. In exercising the powers devolved on the Provincial Councils by the Thirteenth Amendment, such powers will be exercised by the Councils 'having due regard' to the national policy formulated by the National Land Commission<sup>116</sup>. At the same time, the policy is to be only on technical aspects, and not on political or communal aspects<sup>117</sup>, although technical aspects include socioeconomic factors that are relevant to natural resources management<sup>118</sup>. Therefore the appointment of an ad hoc 4<sup>th</sup> Land Commission will certainly fall far short of the type of inclusive and representative policy formulation that a National Land Commission would be able to accomplish.

Recommendation 9.150 of the LLRC recommendations deals with the appointment of the National Land Commission, and recommends its expedited establishment, per the 13th Amendment, whilst also noting that when 'proposing' such land policy, the Commission should consider the question of equitable distribution of land<sup>119</sup>. It states as follows:-

<sup>&</sup>lt;sup>114</sup> Article 3.1, Appendix 2, 13<sup>th</sup> Amendment to the Constitution.

<sup>&</sup>lt;sup>116</sup> Article 3.4, Appendix 2, 13<sup>th</sup> Amendment to the Constitution.

<sup>&</sup>lt;sup>117</sup> Article 3.3, Appendix 2, 13th Amendment to the Constitution.

<sup>&</sup>lt;sup>118</sup> Article 3.2, Appendix 2, 13th Amendment to the Constitution.

<sup>&</sup>lt;sup>119</sup>Recommendation No. 9.150, LLRC Recommendations.

"Expedite action on the establishment of a National Land Commission (NLC) in order to propose appropriate future national land policy guidelines as required under the 13th Amendment" 120.

It has been criticised that by using the term 'propose', the LLRC is in fact misinterpreting the wider powers given to the National Land Commission by the Constitution, to 'formulate' the national policy, (and confines it to merely 'proposing' guidelines for the equitable distribution of land)<sup>121</sup>.

In fact, the recommendation does refer to the fact that the NLC is empowered to formulate the national land policy, but appears to also refer to the NLC "proposing" guidelines based on equitable considerations, for the distribution of land. This then lends credence to the argument that the devolution of powers to the provinces, by their inclusion as representatives in the NLC, would be undermined, if the NLC can only propose guidelines, whereas the Centre would presumably formulate the policy itself. At the very least, it

<sup>120</sup> Recommendation 9.150, LLRC Recommendations.

that the Government should expedite action on the establishment of a NLC in order to propose appropriate future national land policy guidelines. In formulating land policy the proposed NLC should include Guidelines for the equitable distribution of State land. The Commission regrets to note that although this is a requirement under the 13th Amendment, and a draft Bill has been framed, successive Governments have failed to get it passed through the Parliament." (our emphasis). See "Fourth Land Commission And 13th Amendment", Austin Fernando, The Sunday Leader, 16 March 2014, available at http://www.thesundayleader.lk/2014/03/16/fourth-land-commission-and-13th-amendment/, accessed on 7 July 2014.

can lead to confusion and ambiguity as to the real role of the NLC, despite its constitutionally endowed powers. As Austin Fernando points out in an article in the Sunday Leader, the NLC, if appointed, should and would have been a living organisation, constitutionally empowered to formulate national policy relating to use of state land, for posterity, as opposed to a commission on land (i.e. a fourth land commission) which would come into operation on a specific mandate, deliver a report which may or may not be made public, and thereafter, cease to exist<sup>122</sup>. In this light, the establishing of the NLC assumes far greater importance than that of the fourth Land Commission, in prioritising the recommendations of the LLRC.

It is noteworthy, that whilst Recommendation 9.15 of the LLRC is to expedite the establishment of the NLC, the activity envisaged in the National Plan of Action for that particular recommendation is as follows:- "Include the proposal to establish a NLC in the TOR of the PSC with a view to receiving recommendations" (my emphasis). The moot point then is whether the GoSL (as per its National Plan of Action) sees the appointing of the NLC per the LLRC's recommendation, only for the NLC to make 'recommendations', or whether the NLC is to be established as per the 13th Amendment, replete with all the powers envisioned in the Constitution, to formulate a national policy for use of state land. The key performance indicator for the activity simply states "Proposal included in TOR of PSC"123. There is no time line set out for implementation.

<sup>122</sup> Fernando, Austin, id.

<sup>&</sup>lt;sup>123</sup>National Plan of Action, available at http://www.llrcaction.gov.lk/en/npoa/land-return-and-resettlement/260-9-150-expedite-action-on-the-establishment-of-a-national-land-commission-nlc-in-order-to-propose-appropriate-future-national-land-policy-guidelines-as-required-under-the-13th-amendment.html.

Under the activities envisaged for Recommendation 9.132 (which recommends conducting training programs for members of various committees), the National Plan of Action states as follows:- "The proposed 4th Land Commission to take cognizance of the recommendation 9.126124, 9.128125, 9.129126, 9.131127 to 9.136128 and consider the feasibility of

<sup>128</sup>Organize and hold a well-publicized 'Community Consultation Meeting' in each District Secretariat area prior to the launch of the First Committee investigation process. Establish a mechanism to rapidly consider constructive suggestions made through this process", Recommendation 9.136, LLRC Recommendations.

Associated Programme, seeks to make available land to all returning IDPs as expeditiously as possible and is not a substitute for recourse to the Courts of Law where people are in possession of valid legal proof of their claim to the land in question", Recommendation 9.126, LLRC Recommendations.

<sup>&</sup>lt;sup>125</sup> "Provide the needed human and financial resources for Land Policy and the Associated Programme.", Recommendation 9.128, LLRC Recommendations

of the Land Policy and the Associated Programme by respective Government Agents and monitor implementation quality at the national level by the Land Commissioner General", Recommendation 9.129, LLRC Recommendations. Although this recommendation carries the same activity as 9.124 (i.e. 4th Land Commission to consider the feasibility of this recommendation), the National Plan of Action also states that the activity is completed, although the 4th Land Commission is not even appointed. <sup>127</sup>"Organize a well-planned media seminar on the Land Policy and the Associated Programme to enable the Media to project an accurate and clear view of the Programme", Recommendation 9.131, LLRC Recommendation. The activity is listed as the 4th Land Commission to consider the feasibility of this among other recommendations, but the activity is also listed as completed, although the 4th land Commission was never appointed.

recommendations is to effectively resolve the land issues of Muslims who lost their lands at the hands of the LTTE in the Eastern Province<sup>101</sup>. The recommendations envisaged the formulation of a program to address the land issues of such displaced Muslims. The progress report indicates that 6,391 plots of land have been alienated by the Land Commissioner General and 1,993 allotments have been alienated to facilitate the resettlement of Muslim families<sup>102</sup>.

The end date is December 2014, which gives the GoSL just under 8 months to fulfil the recommendation. But as referred to previously, the grievances of the Muslims appear to be still pending, and according to the International Displacement Monitoring Centre, although some Muslims are registered as having returned, "in reality they are thought to be still living in their places of refuge in Puttalam or alternating between Puttalam and the north for want of adequate assistance"<sup>103</sup>.

In relation to Sinhalese families that were evicted from the Northern Province<sup>104</sup>, the progress report indicates that 4,414 families have now returned, whilst 3,714 families had been evicted<sup>105</sup>. No time frame for completion has been indicated.

Designing a focal agency to study the special nature of problems faced by displaced families is another recommendation. The LLRC envisaged the identification of former threatened villages, and collection of information

<sup>101</sup> Recommendation No. 9.144.

<sup>102</sup> National Plan of Action supra, at p. 28.

<sup>103</sup> Supra, International Displacement Monitoring Centre, at 76.

<sup>&</sup>lt;sup>104</sup> Recommendation No. 9.145.

<sup>105</sup> National Plan of Action supra, at p. 29.

relating to land issues. The progress report indicates that a committee has been set up with the participation of four relevant ministries, to study these problems faced by displaced families. However, the first meeting had been held only on 21.1.2014, as well as a workshop on 18.2.2014 in four districts, and therefore no report has been submitted as yet, although the progress report states that the report will be submitted shortly<sup>106</sup>. As reported by the International Displacement Monitoring Centre, Sri Lanka 'has no comprehensive legislation or policy on IDP's"<sup>107</sup>, and the policy published by the Ministry of Resettlement in 2013 needs to be brought in line with international standards.

In relation to the National Land Commission (NLC), the LLRC recommended that action to establish the Commission be expedited, in compliance with the 13th Amendment to the Constitution<sup>108</sup>. Specifically, the LLRC has envisaged including the National Land Commission in the terms of reference of the PSC with a view to receiving recommendations. In this connection recommendation No. 9.152 is also of great relevance. The LLRC recommended that the GoSL arrives at "a bipartisan understanding that restitution of land is a national issue and will not be used as a tool by political parties to gain narrow political advantage". Progress on this particular recommendation is listed as 'ongoing'.

This recommendation is also linked to Recommendation No. 9.151 which recommends the development of a land use

<sup>106</sup> Id.

<sup>107</sup> Supra, International Displacement Monitoring Centre, at 76.

<sup>&</sup>lt;sup>108</sup>13<sup>th</sup> Amendment to the 1978 Constitution of the Democratic Socialist Republic of Sri Lanka.

plan. This is with the objective of guiding "the district administration in land conservation and alienation in order to ensure protection of environment and bio-diversity, sustainable economic development, leisure and recreational standards, religious, cultural and archaeological sites with a view to improving the quality of life of the present and future generations". The progress report indicates that a national level expert group has been appointed to advise on land use plan preparation. Meanwhile, Rs. 400 million, has been allocated in the 2014 budget for implementation of land related LLRC recommendations, while Rs. 800 million had been allocated in 2013 to improve land title and ownership. June 2015 is the target completion date for this recommendation.

## 4. Institutions Set Up to Deal with Land Rights

As discussed previously, one of the institutions that were to be set up to deal with land rights and resettlement was the 4th Land Commission, as per the National Plan of Action (note that the LLRC has not recommended the setting up of a Land Commission). However, as at the time of writing, the Commission has not been established, although the official website of the National Plan of Action states that the setting up of the Commission is being finalised.

The activities (activity 9.124(2)) envisaged under LLRC Recommendation No. 9.124, states as follows:- "Appoint a 4th Land Commission with a TOR similar to the previous three (i.e. the LC's of 1927, 1936 and 1985) to recommend policy to address issues" 109. It is significant that the LLRC

<sup>&</sup>lt;sup>109</sup> National Plan of Action, available at http://www.llrcaction.gov.lk/en/npoa/land-return-and-resettlement/240-9-124-ensure-that-any-citizen-of-sri-lanka-has-the-right-to.html, accessed on 8 July 2014.

did not recommend the appointment of a 4<sup>th</sup> Land Commission. It is the National Plan of Action, under activities listed for implementing Recommendation No. 9.124<sup>110</sup>, that has introduced the appointment of the 4<sup>th</sup> Land commission<sup>111</sup>.

The other important obligation that arises, vis-à-vis appointing specific institutions to deal with state policy on land, is the Constitutional requirement<sup>112</sup> to establish the National Land Commission, the establishment of which is also recommended by the LLRC<sup>113</sup>. Neither of these institutions has been established as at the date of writing.

One important distinction between the National Land Commission (per the Constitution and per the LLRC recommendation) and the Fourth Land Commission (referred to by the National Plan of Action), is that the establishment

in any part of the country, in accordance with its laws and regulations, and reside in any area of his/her choice without any restrictions or limitations. (2) Land policy of the Government is not an instrument to effect unnatural changes in the demographic pattern of a given Province. (3) Distribution of State land continues as provided for in the Constitution.", Recommendation 9.124, LLRC Recommendations

<sup>&</sup>quot;In Activity 9.124(2) states as follows:- "Appoint a 4th Land Commission with a TOR similar to the previous three (i.e. the LC's of 1927, 1936 and 1985) to recommend policy to address issues", National Plan of Action, available at http://www.llrcaction.gov.lk/en/npoa/land-return-and-resettlement/240-9-124-ensure-that-any-citizen-of-sri-lanka-has-the-right-to.html?highlight=WyJmb3IiLCI0dGgiLCJsYW 5kIiwiY29tbWlzc2lvbiIsImZvciA0dGgiLCJm b3IgNHRoIGxhbmQiLCI0dGggbGFuZCIsIjR0aCBsYW5kIGNvbW1pc3Npb24iLCJsYW5kIGNvbW1pc3Npb24iXQ==.

<sup>&</sup>lt;sup>112</sup>Per the 13th Amendment to the 1978 Constitution.

<sup>113</sup> Recommendation 9.150

of the National Land Commission is a Constitutional imperative, in terms of the Thirteenth Amendment to the Constitution<sup>114</sup>.

The National Land Commission (NLC) is to deal with the formulation of national policy in relation to the use of state land, and, most importantly, is to include representatives from each of the Provincial Councils in Sri Lanka<sup>115</sup>. In exercising the powers devolved on the Provincial Councils by the Thirteenth Amendment, such powers will be exercised by the Councils 'having due regard' to the national policy formulated by the National Land Commission<sup>116</sup>. At the same time, the policy is to be only on technical aspects, and not on political or communal aspects<sup>117</sup>, although technical aspects include socioeconomic factors that are relevant to natural resources management<sup>118</sup>. Therefore the appointment of an ad hoc 4th Land Commission will certainly fall far short of the type of inclusive and representative policy formulation that a National Land Commission would be able to accomplish.

Recommendation 9.150 of the LLRC recommendations deals with the appointment of the National Land Commission, and recommends its expedited establishment, per the 13<sup>th</sup>Amendment, whilst also noting that when 'proposing' such land policy, the Commission should consider the question of equitable distribution of land<sup>119</sup>. It states as follows:-

<sup>&</sup>lt;sup>114</sup> Article 3.1, Appendix 2, 13th Amendment to the Constitution.

<sup>115</sup> Id.

<sup>&</sup>lt;sup>116</sup> Article 3.4, Appendix 2, 13th Amendment to the Constitution.

<sup>&</sup>lt;sup>117</sup> Article 3.3, Appendix 2, 13th Amendment to the Constitution.

<sup>&</sup>lt;sup>118</sup> Article 3.2, Appendix 2, 13th Amendment to the Constitution.

<sup>119</sup> Recommendation No. 9.150, LLRC Recommendations.

"Expedite action on the establishment of a National Land Commission (NLC) in order to propose appropriate future national land policy guidelines as required under the 13th Amendment" 120.

It has been criticised that by using the term 'propose', the LLRC is in fact misinterpreting the wider powers given to the National Land Commission by the Constitution, to 'formulate' the national policy, (and confines it to merely 'proposing' guidelines for the equitable distribution of land)<sup>121</sup>.

In fact, the recommendation does refer to the fact that the NLC is empowered to formulate the national land policy, but appears to also refer to the NLC "proposing" guidelines based on equitable considerations, for the distribution of land. This then lends credence to the argument that the devolution of powers to the provinces, by their inclusion as representatives in the NLC, would be undermined, if the NLC can only propose guidelines, whereas the Centre would presumably formulate the policy itself. At the very least, it

<sup>120</sup> Recommendation 9.150, LLRC Recommendations.

that the Government should expedite action on the establishment of a NLC in order to propose appropriate future national land policy guidelines. In formulating land policy the proposed NLC should include Guidelines for the equitable distribution of State land. The Commission regrets to note that although this is a requirement under the 13th Amendment, and a draft Bill has been framed, successive Governments have failed to get it passed through the Parliament." (our emphasis). See "Fourth Land Commission And 13th Amendment", Austin Fernando, The Sunday Leader, 16 March 2014, available at http://www.thesundayleader.lk/2014/03/16/fourth-land-commission-and-13th-amendment/, accessed on 7 July 2014.

can lead to confusion and ambiguity as to the real role of the NLC, despite its constitutionally endowed powers. As Austin Fernando points out in an article in the Sunday Leader, the NLC, if appointed, should and would have been a living organisation, constitutionally empowered to formulate national policy relating to use of state land, for posterity, as opposed to a commission on land (i.e. a fourth land commission) which would come into operation on a specific mandate, deliver a report which may or may not be made public, and thereafter, cease to exist<sup>122</sup>. In this light, the establishing of the NLC assumes far greater importance than that of the fourth Land Commission, in prioritising the recommendations of the LLRC.

It is noteworthy, that whilst Recommendation 9.15 of the LLRC is to expedite the establishment of the NLC, the activity envisaged in the National Plan of Action for that particular recommendation is as follows:- "Include the proposal to establish a NLC in the TOR of the PSC with a view to receiving recommendations" (my emphasis). The moot point then is whether the GoSL (as per its National Plan of Action) sees the appointing of the NLC per the LLRC's recommendation, only for the NLC to make 'recommendations', or whether the NLC is to be established as per the 13th Amendment, replete with all the powers envisioned in the Constitution, to formulate a national policy for use of state land. The key performance indicator for the activity simply states "Proposal included in TOR of PSC" 123. There is no time line set out for implementation.

<sup>122</sup> Fernando, Austin, id.

<sup>&</sup>lt;sup>123</sup>National Plan of Action, available at http://www.llrcaction.gov.lk/en/npoa/land-return-and-resettlement/260-9-150-expedite-action-on-the-establishment-of-a-national-land-commission-nlc-in-order-to-propose-appropriate-future-national-land-policy-guidelines-as-required-under-the-13th-amendment.html.

Under the activities envisaged for Recommendation 9.132 (which recommends conducting training programs for members of various committees), the National Plan of Action states as follows:- "The proposed 4th Land Commission to take cognizance of the recommendation 9.126124, 9.128125, 9.129126, 9.131127 to 9.136128 and consider the feasibility of

<sup>128</sup>Organize and hold a well-publicized 'Community Consultation Meeting' in each District Secretariat area prior to the launch of the First Committee investigation process. Establish a mechanism to rapidly consider constructive suggestions made through this process", Recommendation 9.136, LLRC Recommendations.

<sup>&</sup>lt;sup>124</sup> Assure people through a publicity effort that the Land Policy and the Associated Programme, seeks to make available land to all returning IDPs as expeditiously as possible and is not a substitute for recourse to the Courts of Law where people are in possession of valid legal proof of their claim to the land in question", Recommendation 9.126, LLRC Recommendations.

<sup>&</sup>lt;sup>125</sup> "Provide the needed human and financial resources for Land Policy and the Associated Programme.", Recommendation 9.128, LLRC Recommendations

of the Land Policy and the Associated Programme by respective Government Agents and monitor implementation quality at the national level by the Land Commissioner General", Recommendation 9.129, LLRC Recommendations. Although this recommendation carries the same activity as 9.124 (i.e. 4th Land Commission to consider the feasibility of this recommendation), the National Plan of Action also states that the activity is completed, although the 4th Land Commission is not even appointed. <sup>127th</sup>Organize a well-planned media seminar on the Land Policy and the Associated Programme to enable the Media to project an accurate and clear view of the Programme", Recommendation 9.131, LLRC Recommendation. The activity is listed as the 4th Land Commission to consider the feasibility of this among other recommendations, but the activity is also listed as completed, although the 4th land Commission was never appointed.

Sri Lanka: State of Human Rights 2014

the implementation of such recommendations"<sup>129</sup>. This activity is listed as completed, although the 4<sup>th</sup> Land Commission was never appointed.

In conclusion, the insertion of a 4th Land Commission in the National Plan of Action, which was never envisaged by the LLRC, would appear to be problematic, if such a Commission would be as an alternative to the appointing of the National Land Commission. It would also be problematic if the National Land Commission is established, but is stripped of its Constitutional powers, and can only propose guidelines or make recommendations.

In any event, several other committees and groups have been convened to deal with various recommendations by the LLRC, the reports of some of which are still pending.

<sup>&</sup>lt;sup>129</sup>See also the activities envisaged under Recommendation 9.134 ("Confine the participation of security forces officers to expediting the release of maximum extents of lands being utilized for security purposes", which activity is incidentally listed as completed), and 9.133 (Launch a well-designed, communication campaign in simple Tamil and Sinhala language to help displaced persons come forward to benefit from the Land Policy and the Associated Programme", which activity is also incidentally listed as completed), which carries an identical activity under the National Plan of Action (i.e. for the 4th Land Commission to consider the feasibility of implementing the recommendation), available at http:// www.llrcaction.gov.lk/en/llrc-action-plan/land-return-and-resettlement/ 248-9-134-confine-the-participation-of-security-forces-officers-toexpediting-the-release-of-maximum-extents-of-lands-being-utilized-forsecurity-purposes.ht ml?highlight= WyJmb3IiLCI0dGg iLCJsYW5kIiw biIsImZvciA0dGgiLCJmb3IgNHRoIGxhbm iY29tbWlzc2lv QiLCI0dGggbGFuZCIsIjR0aCBsYW5kIGNvbW1pc3Npb24iLCJsYW5kIGNvbW1pc3Npb24iXQ==, accessed on 9 July 2014.

# 5. Recommendations and Conclusions

The LLRC recommendations, and the National Plan of Action based on those recommendations, show that considerable steps need to be taken by the GoSL to meaningfully meet the needs of land, resettlement and return of internally displaced persons affected by the conflict. The following recommendations are made on the results and progress reported by the GoSL itself on the LLRC recommendations, and the results on the ground where available.

- Release the results of the study conducted by the Ministry of Lands and Land Development and the Presidential Secretariat, to ascertain whether current practises infringe on the alienation of state lands. The alienation of state lands is a serious issue of concern, especially where alienation is for development purposes whilst internally displaced persons are still awaiting distribution of lands.
- 2. Appoint the National Land Commission in terms of the 13th Amendment to the Constitution (as well as the recommendation made by the LLRC in so far as such recommendation is in harmony with the Constitutional provisions), along with all the constitutional endowments envisaged for the said Commission, including the inclusion of provincial council representatives from all provincial councils in Sri Lanka, and the power to formulate national policy in relation to the use of state land.
- Appoint the fourth land commission. However it is cautioned that the implementation of this activity in the National Plan of Action, would only lead to

meaningful and effective implementation of the LLRC recommendations (and for independent resolution of disputes related to land), if its establishment is strictly in conjunction with the establishment of the National Land Commission in terms of the Constitution (with all its constitutional vested powers), and not as an alternative to the National Land Commission.

- 4. Formulate and publish a plan on national land use. In this regard it would also be recommended to revisit older guidelines such as the land manual, to bring these guidelines on land use in line with Sri Lanka's domestic and international legal obligations.
- 5. Resolve the issues faced by northern Muslims, and those who choose to remain in Puttalam, in registering as residents in the areas of their choice. The right of displaced persons to voluntarily return to their original lands, or to choose to live in any part of the island that they choose must be meaningfully recognised and they must be allowed to register as residents in the area of their choice.
- 6. Ensure that statistics of those who have returned to their original lands are correct and reflect the ground situation. Where persons who have not in fact returned to their original lands but are listed in official statistics as having returned, the results can have grave consequences on all studies which rely on such statistics. It is essential therefore that all official statistics reflect the true state of return and resettlement of IDP's.
- 7. The Prescription Ordinance be amended in order to prevent legitimizing of secondary occupations and forced evictions. The Prescription Ordinance is an archaic piece of legislation and it is essential that it be

amended in order to meet modern needs of the law including dealing with issues where people were forced to abandon property due to conflict or natural disasters for example. In this regard the LLRC recommendation of an urgent amendment is therefore significant.

- 8. Ensure that state land is not alienated except for IDP's, particularly in relation to Sampur, which has now been declared a development zone under the Board of Investment Law. With development taking place in Sri Lanka at a rapid pace, it is important to recognise the LLRC recommendations in relation to state land, to ensure that the GoSL and/or any of its agent institutions, prioritises the resettlement IDP's over alienating state lands for development purposes, especially if the development purposes are of comparatively secondary importance, such as establishing tourist resorts.
- Release private lands, currently occupied by the military forces, or being acquired without due process, for a 'military purpose', particularly in Valikamam North, Mullikulam (Mannar), ThiruMurugandi (Killinochchi), and Sampur (Trincomalee), to the original owners after due inquiry.
  - a. Determination of the necessary and unavoidable need to acquire private land, should be strictly according to objective criteria, and in terms of the legal provisions surrounding such acquisitions.
  - b. Where acquisition is necessary and unavoidable, pay adequate compensation to the owners of these lands after due inquiry in terms of the law, and/ or provide alternative lands of equal value with the consent of such land owners.

- c. Given the number of cases that are already pending before the Courts of law in relation to these lands, it is essential that the military forces release lands currently occupied by them<sup>130</sup>, and also refrain from acquiring large tracts of private land unless such acquisitions are absolutely essential, and for a 'public purpose' within the meaning assigned to that term by law.
- 10. Independent investigations be carried out into resettlement in the Palaly East area in order to ensure that the original owners are not being dispossessed in the drive of resettlement of displaced persons.
- Release the report of the committee established to study the special nature of problems faced by displaced communities.
- 12. Formulate comprehensive legislation to guide the treatment and addressing of issues faced by internally displaced persons. The lack of legislation in Sri Lanka to deal with internally displaced persons and their needs is a serious lacuna in the law, and the formulation of such laws can only assist in the reconciliation process.
- 13. Update the policy framework formulated by the Ministry of Rehabilitation to be in line with international frameworks on displaced persons.
- 14. Arrive at a bi-partisan, national understanding of the importance of land as a national issue.

<sup>&</sup>lt;sup>130</sup>See also in this regard, LLRC recommendation No. 9.134.

# THE RECONCILIATION REPORT (LLRC) AND THE RELEVANCE OF THE RIGHT TO RESTITUTION

Rasika Mendis\*

#### 1. Introduction

Key events leading to the LLRC

Five years following the ending of the conflict in May 2009, there is divergent opinion among the populace concerning the process of post-conflict reconciliation. Much of the debate centres on the 'indicators', or determinants of reconciliation; the question of what constitutes a meaningful process of reconciliation that is relevant to Sri Lanka. Some contend that it is a matter of addressing the harmful consequences of the 30 year long conflict. Others contend that reconciliation must necessarily entail a 'deeper process' that addresses, not just the harmful effects and grievances arising from the conflict, but also the historical and political grievances of the Tamil population, which in popular opinion, gave rise to the conflict in the first place. The complexity of the situation is compounded by the fact that one party to the conflict, the Liberation Tamil Tigers of

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Eelam (LTTE) has been completely eliminated from perceivable existence. The LTTE, prior to their self-appointed role as the sole representative of the Tamil population, had eliminated all political opposition to this position. It thereafter waged a 'terrorist operation' against the State of Sri Lanka, which would come to be known as one of the most brutal, involving suicide bombers and the conscription of child soldiers. However, expert opinion is that the Tamil population nevertheless had an affinity to the LTTE and a sense of pride in its ability to oppose a Sinhala dominated State structure, where consecutive governments have done little to recognize and address their grievances, whether real, perceived or exaggerated. K.M de Silva writes in 2012:1

"Memories of the more positive gestures of the LTTE are likely to remain fresh in the minds of the Tamil people for a long time and, more to the point, would affect the government's attempts at reconciliation — whether this is through policies or gestures. How long those positive memories about the LTTE and its role in the Sri Lankan polity would stay in the minds of the Tamils would depend on their receptivity to the Sri Lankan government's reconciliation measures (emphasis added)."

The conflict between the Government of Sri Lanka (GOSL) and the LTTE ended in May 2009 following the launch of military intervention, which the Sri Lankan Armed Forces (SLAF) referred to as a 'humanitarian intervention'. The offensive was escalated in July 2006 after the LTTE blocked

<sup>&</sup>lt;sup>1</sup> K.M de Silva, Sri Lanka and the Defeat of the LTTE, Vijitha Yapa Publications, October 2012, p.246

the Marvil Aru irrigation system, one of the many violations of the uneasy Cease Fire Agreement (CFA) that was operational then. Water supply to Sinhalese farmers in the border villages of the Eastern Province (the East) was cutoff by this action, creating a 'humanitarian crisis', in the words of the GOSL. By early 2007 much of the East had been 'liberated' from the LTTE. The costs of the liberation included the displacement of persons exceeding 400,000 (both in the Northern and Eastern provinces), and the destruction of land, housing and infrastructure. A large number of non-combatants were caught in the cross-fire. Their plight during the last stages of the war were championed by the Tamil diaspora in their appeal to the international community to investigate the GOSL for 'war crimes', in the immediate aftermath of the conflict. Civilian lives were lost by the heavy artillery of the advancing army, and many others, especially those who tried to escape had been killed by the LTTE. The remaining civilians poured out of the Mullaitivu jungles into army territory, approximately 300,000 of them, now displaced and unable to return home, creating a humanitarian crisis of dire proportions.

The international community pursued its call for investigation into Sri Lanka's war crimes and crimes against humanity (including those committed by the LTTE). The Darusman Committee (comprising a panel of three experts) appointed by the Secretary General of the United Nations in 2010 produced a damning report outlining "credible allegations" of war crimes committed by the GOSL and the LTTE in the last stage of the war. The panel has been criticised for its overt bias and its unsubstantiated assumption that the GOSL engaged in the systematic killing of Tamils

in an effort to 'exterminate' a substantial portion of the Tamil population.<sup>2</sup> In response to the widespread allegations by the international community, the President of Sri Lanka, Mahinda Rajapakse commissioned the Lessons Learnt and Reconciliation Commission Report (LLRC) in 2010.<sup>3</sup> The LLRC report was completed in November 2011. The LLRC remains the sole point of reference for the promotion of post armed conflict accountability and reconciliation in Sri Lanka. While there is controversy attached to the formulation of this report,<sup>4</sup> it is nevertheless referred to extensively, in the analysis of whether Sri Lanka's road to reconciliation and restoration is equitable, transparent and is effective to remedy the adverse consequences of a long conflict.

## The LLRC Report

As stated by the GOSL, the scheme of the LLRC report is premised on the precepts of 'restorative justice', though there is no specific elaboration of this approach in the report itself. Among the notable features of the LLRC report that is conductive to a scheme of restorative justice, is the report's endorsement and commitment to 'restitution' of persons

<sup>&</sup>lt;sup>2</sup> Gunatilleke G, Truth and Accountability: The Last Stages of the War in Sri Lanka - An Analysis and evaluation of the Report of the UN Secretary General's (UNSG) Panel of Experts on Accountability in Sri Lanka, 2012, Marga Institute Publications, pp. 7 - 18

<sup>&</sup>lt;sup>3</sup> Government of Sri Lanka, Report of the Commission of Inquiry on Lessons and Reconciliation (LLRC report), 2011

<sup>&</sup>lt;sup>4</sup> Some of the controversy, as outlined in the report itself includes – the refusal of key international human rights agencies (Amnesty International, Human Rights Watch, and the International Crisis Group) to give evidence before the Commission, and the unavailability of persons who would provide the Commission credible testimonies of their experiences during the conflict (in the absence of protection for witnesses).

The Reconciliation Report (LLRC) and the Relevance of the Right to Restitution affected by conflict. The LLRC report is mandated to investigate and recommend:

"The methodology by which 'restitution' to any person affected by these events or their dependents or their heirs may be effected; and the institutional, administrative and legislative means by which these events may be avoided in the future... and to promote further national unity and reconciliation among all communities... (emphasis added)"

An essential pre-requisitie to the implementation of the LLRC report has been identified as the 'uncovering of truth'.6 As mentioned, the report's approach was in response to the Darusman panel, which also calls for the truth to prevail in the aftermath of the conflict. However, the core objective of the panel is to ensure that perpetrators of gross human rights violations and 'war crimes' are held accountable and brought to justice. It is focused on the GOSL's lack of accountability in this regard, and that any level of meaningful restoration is not possible without such accountability. The GOSL has consistently maintained that its military intervention was carried out at all times with due regard to proportionality and takes the view that it is not liable for, or guilty of war crimes. In the view of the GOSL, the LLRC comprises a more comprehensive approach to reconciliation, which goes beyond a process of conviction and retribution. Its main focus, as captured by commentaries on the LLRC -'is a durable process of reconciliation in which there is forgiveness and a conscious relegation of the past to a chapter

<sup>&</sup>lt;sup>5</sup>LLRC report, note 3, Chapter 1, p. 5

<sup>&</sup>lt;sup>6</sup> See Gunatilleke G, note 2, for a comprehensive analysis of the approach and scheme of the LLRC

of history that is closed, a process of forgiveness and closure in which the government states all communities must participate'. Hence, the LLRC's objective to uncover the truth is for the purposes of restoration; for the 'undoing' of the grievances and for the restitution of those affected by the conflict.

The GOSL must therefore demonstrate, in all matters of 'truth and reconciliation' uncovered by the LLRC report, that it is indeed committed to achieving the purposes of restoration and justice. The scope of the LLRC in its inquiry into 'truth' is outlined by its mandate. The mandate includes an inquiry into - the incidents that took place between the period of February 21, 2002 and May 19, 2009, namely the events that led to the failure of the CFA and the events that followed leading up to the end of the conflict (LLRC; 1.5);8 and to reflect on the suffering brought on by the conflict and 'learn from the recent history lessons that would ensure that there would be no recurrence of internecine conflict in the future' (LLRC; 1.6). Hence, the process of reconciliation as recommended by the LLRC has as its central focus the grievances and the suffering arising from the final stages of the conflict following the failure of the CFA.9

# The current status and the scope of the report

This chapter attempts to examine whether the approach to reconciliation embodied in the LLRC report has been

<sup>&</sup>lt;sup>7</sup> Gunatilleke, G. note 2, pp. 30 - 31

<sup>&</sup>lt;sup>8</sup> The Chapter will identify the relevant sections of the LLRC report in the body of the report itself, as in the following example - (LLRC;1.5)

<sup>&</sup>lt;sup>9</sup> However, the Commission is provided a degree of flexibility to consider the 'causes underlying the grievances of the different communities that has its genesis prior to this time period'.

adequately implemented and realized in the aftermath of the conflict. It will focus on the concept of 'restitution' as a key element of the restorative justice that is envisaged by the report. The concept of restitution is foundational for addressing post-conflict 'loss' or, in terms of the LLRC, post conflict grievances, and to achieve a sense of normalcy and restoration to pre-conflict harmony and well-being. It is increasingly endorsed by the international community as an independent human right, namely the 'right to restitution' (see section 2). For purposes of clarity and detail, the Chapter will limit its focus to Housing, Land and Property Restitution (HLPR). That is, while restitution requires the means to holistic restoration of lives, communities, livelihoods, and security, among other things, the paper will refer to the restitution of Housing, Property and Land (HLP), as an essential 'indicator' of whether the objects of the LLRC report is being realised. Specific mention is made to events and progress in 2013, as a point of reference in the reconciliation process. It is not within the scope of this chapter to engage in a discussion of the relative merits and demerits of the approach of the LLRC as compared to the approach advocated by the Darusman report and subsequently by the international community.

It is to be noted however, that the international community has been persistent in its call for an investigation into alleged violations of international law during the last phase of the war (both by the GOSL and the LTTE). Resolution 19/2 adopted by the United National Human Rights Council (UNHRC) in March 2012 draws attention to the inadequacy of the LLRC with regards the proposed investigation. It calls upon the GOSL to 'fulfill its relevant legal obligations and commitment to initiate credible and independent actions to ensure justice, equity, accountability and reconciliation for

all Sri Lankans', and to 'present a comprehensive action plan detailing the steps to implementing the recommendations made in the Commission's report and to address alleged violations of international law'. <sup>10</sup> As is apparent, the thrust of the resolution is on vindicating alleged violations of international law, though the resolution also pointedly supports an action plan for the implementation of the LLRC. A National Action Plan (NPA) for implementation of the LLRC recommendations was formulated by the GOSL in 2012 in response to resolution 19/2. The NPA currently incorporates 145 of the 285 recommendations contained in the LLRC. <sup>11</sup>

A review of the reconciliation process captured by the UNHRC in early 2013 declared that little progress had been made in terms of accountability for violation of international law, and called for an independent and credible inquiry. The report of the High Commissioner for Human Rights, pursuant to her visit to Sri Lanka in August 2013, and with reference to the recommendations made in resolution 22/1 of March 2013, declared that none of the steps recommended by the international community had been followed by the GOSL. The recommendations pertain to technical advice concerning enforced and involuntary disappearances and the development of truth commissions and reparations policies, among other things. 12 While acknowledging the GOSL's

<sup>&</sup>lt;sup>10</sup> United Nations Human Rights Council, Resolution on Promoting Reconciliation and Accountability in Sri Lanka (A/HRC/RES/19/2), 2012

<sup>11</sup> The original NPA incorporated 92 of the LLRC report commendations; another 53 were subsequently incorporated in August 2013. Some of the other recommendations are said to fall within the scope of the National Plan of Action for the Protection and Promotion of Human Rights, though progress of this plan is not available in the public domain.

<sup>&</sup>lt;sup>12</sup> United Nations, Promoting reconciliation and accountability in Sri Lanka, Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/25/23, 2014, para 3

achievements in reconstruction and rehabilitation of the post conflict context and the 'resettlement' of affected communities, the UNHRC report recommends 'further steps in demilitarization', 'military disengagement from activities that are meant to be civilian', the 'resolution of land disputes' and 'community participation in all aspects of construction and development'. These areas of concern are intrinsic to the realization of the right to restitution and to the objectives of a 'rights based' process of post-conflict development. The chapter will discuss the status of these recommendations by the UNHCR, with reference to the corresponding recommendations of the LLRC, and the status of their implementation during 2013.

#### 2. International Framework of Standards for HLPR

The following is an outline of the international standards that are relevant to a discussion of the right to restitution, and its integral importance to a process of reconciliation based on the precepts of restorative justice. Based on literature that attempts to define reconciliation, the parameters of its operation are essentially complex and context specific.<sup>14</sup> Hence, the form and substance of reconciliation that is relevant in the transitional context of Sri Lanka will be drastically divergent from contexts that have experienced 'similar' conflicts.

Based on a study of its definitions, reconciliation fundamentally implies 'a societal process that involves mutual acknowledgment of past suffering and the changing of destructive attitudes and behaviour into constructive

<sup>13</sup> United Nations, note 12, para 75

<sup>&</sup>lt;sup>14</sup> International Institute for Democracy and Electoral Assistance (IDEA), Reconciliation After Violent Conflict – A Handbook, 2003, pp. 40 and 111

relationships toward sustainable peace...'15 Hence, it envisages both a 'process' and an 'outcome', where the process involves an acknowledgement of past suffering with a view to transforming the causal factors that led to confrontation and conflict. Restorative justice, in the scheme and process of reconciliation, has a primary focus on 'victims', or those aggrieved by conflict, with a view to identifying the scope of their grievances and the causes of their loss and victimization. The overall aim is to redress identified grievances in a 'process' that attempts to 'restore' the affected individual or community to circumstances of peace and normalcy.<sup>16</sup>

# The Right to Restitution

As mentioned above, among the key features of the LLRC report that supports a scheme of restorative justice, is its mandated objective of 'restitution'. Restitution derives from the laws of victims' which embody a wide-range of measure to 'redress' wrongs committed during conflict, -including violations of human rights, criminal acts and other causes that are detrimental to persons and property. The concept of reparations has evolved over time to encompass postwar transitional needs, and include - restitution, compensation, rehabilitation, symbolic gestures and futuristic measures. Restitution, is recognized as a foremost form of reparations in view that – it relates to essential "belongings", such as the return of property, the restoration of liberty, citizenship and other legal rights, the return to place of

<sup>&</sup>lt;sup>15</sup> SIDA, Reconciliation Theory and Practice for Development Cooperation: A Handbook, 2003, p. 3

<sup>16</sup> IDEA, note 15, p. 111

<sup>&</sup>lt;sup>17</sup> United Nations, The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparations, 2006, A/RES/60/147

The Reconciliation Report (LLRC) and the Relevance of the Right to Restitution residence and the restoration of employment'. Reparations, including restitution are fundamental to transitional justice that is 'restorative' in nature, as the essence of reparations is to vindicate conflict based violations of human rights,

and thereby the 'grievances' of the victims, or those affected

by conflict.

The laws of reparation has its roots in international law governing conflicts across national borders, but in the recent past, has been made increasingly relevant to 'internal conflicts' within borders and consequently to internal displacement. A significant development in this regard is the setting of international standards, namely the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons, referred to as the "Pinheiro Principles" (hereinafter 'principles'). 19 These principles embody standards recongised as indispensable to the voluntary 'right to return' of persons displaced by both international and internal conflict (and reasons associated with conflict). With respect to internal displacement, the right to return is not just to the general area of original residence, but also to their homes and lands (or alternative lands, if they choose to). The basis of the Pinheiro Principles is that without a corresponding programme of HLPR, the 'voluntary right to return in safety and dignity' is not possible. That is, if there are no measures to regularize land ownership or possession, address post-conflict land issues, and restore loss of housing and other property, there cannot be sustained

<sup>&</sup>lt;sup>18</sup> IDEA, note 14, p. 145

<sup>&</sup>lt;sup>19</sup> United Nations, United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons, 2005, E/CN.4/Sub.2/2005/17, principle 10

return and reintegration, which by right all displaced persons are entitled to.

Further, the principles recognize the right to restitution as a distinct human right that is intrinsic to post-conflict return and the ending of displacement. Principle 2 endorses this right –

"All refugees and displaced persons have the right to have restored to them any housing, land and /or property of which they were arbitrarily or unlawfully deprived, or to be compensated (for the same)... (If it) is factually impossible to restore (the same) as determined by an independent, impartial tribunal. States shall demonstrably prioritise the right to restitution as the preferred remedy for displacement and as a key element of restorative justice. The right to restitution exists as a distinct right and is prejudiced neither by the actual return nor non return of... displaced persons entitled to HLPR (edited with emphasis added)"<sup>20</sup>

The right to restitution derives its legitimacy and rationale from other key human rights recognized by the international community, referred to as 'overarching principles', namely—the right to non-discrimination, the right to equality between men and women, the right to be protected from displacement, the right to privacy and respect for the home, the right to peaceful enjoyment of possessions, the right to adequate housing, and the right to freedom of movement.<sup>21</sup> The right to adequate housing is significant to a scheme of HLPR and

<sup>&</sup>lt;sup>20</sup> Pinheiro Principles, note 19, principle 2

<sup>&</sup>lt;sup>21</sup> Pinheiro Principles, Note 19, Principle 3 - 9

The Reconciliation Report (LLRC) and the Relevance of the Right to Restitution requires a focused consideration of what 'adequacy' would entail in the post-conflict context. Integral to this right, as to land restitution (see section 2.2) is 'security of tenure', or the right not to be arbitrarily deprived of one's house and land. Given its integral importance to a wide-range of human rights,

- the right to a livelihood, the right to housing, and freedom of movement, to name a few, - concerns affecting land tenure require special attention in a programme of HLPR.

## A programme of HLPR

A rights-based programme of HLPR needs to demonstrate integration and practical application of the human rights outlined above in its implementation. The framework of rights and standards are derived from learning in other jurisdictions, but must be essentially programmed according to the needs of the context. In this respect national policy and national legislation are fundamental considerations. Outlined below are some of the key standards, as contained in the Pinheiro Principles that are relevant to issues identified as impacting HLPR in Sri Lanka (see section 3 for an outline of prominent issues):

- The need for timely, transparent and equitable procedures and mechanisms to procedures to enforce HLPR claims. This requirement pre-supposes the space for an affected party to make a claim, and the existence of efficient and efficacious procedures to process claims for housing, land and property affected by conflict (principle 12.1, 13.1 and 13.2);
- The paramount importance of national institutions and processes, and the requirement to capacitate and resource institutions to meet the administrative and procedural demands of implementing HLPR (principles 12.1, 12.3, 12.4);

- Adequate participation of individuals and communities, with specific regard to groups perceived as marginalized and vulnerable (including women, children and the disabled), and to ensure that all procedures, institutions and mechanisms do not have the effect, overt or tacit, of discriminating against these groups (principles 12.2, 13.2, 14);
- Systematic procedures and systems for processing HLPR claims and for the regularization of documents, security of tenure and housing assistance/compensation, that complies with international human rights and humanitarian law (principles 13.1, 14);
- Implement an effective compensation scheme as an integral component of the restitution process, which displaced persons should have access as of right, which may be monetary or in kind (principle 21).
- Due regard to the rule of law, especially with respect to empowering local/national authorities and public agencies entrusted with the enforcement of HLPR decisions and judgments, as to ensure that relevant authorities/officials are legally obligated to respect, enforce and implement decisions and judgments concerning HLPR (principles 20).

# Compensation

With respect to the principle on compensation, it is to be noted that the Principles specifically provide that, 'in order to comply with the principles of restorative justice, the remedy of compensation should only be used when the remedy of restitution is not factually possible'. Hence, the principles differentiate between restitution, which is the direct restoration of HLPR related losses, and the payment of compensation, in the event that direct restoration is not

The Reconciliation Report (LLRC) and the Relevance of the Right to Restitution

possible. The interpretation of what is not factually possible to restore is to be done by an independent and impartial entity.<sup>22</sup> Moreover, a scheme of compensation that is linked to HLPR requires a careful assessment of the losses suffered during conflict and prioritization of losses for their progressive redressal.<sup>23</sup>

The LLRC report devotes an entire chapter to "Restitution and Compensatory Relief" (LLRC, Chapter 7). The intention and purpose of the LLRC is appreciated, though the wording of the chapter requires better clarity with respect to international standards. LLRC Section 7.1 reads —

"...It is well recognized that while restitution enjoys primacy as a legal principle other forms of relief such as compensation and monetary relief is commonly sought. The Commission has considered, in particular, the role of compensatory relief in facilitating resettlement<sup>24</sup> and reconciliation, the structures in place and the current status of payment. The Commission's recommendations seek to ensure that those who are eligible for payments have access to it within a reasonable time frame (emphasis added)."

<sup>&</sup>lt;sup>22</sup> Pinheiro Principles, note 19, principle 21

<sup>&</sup>lt;sup>23</sup> See; Mendis R. N. Recommendations for a National Policy on Housing, Land and Property Restitution Policy in Sri Lanka, 2009, COHRE Publication – this report categorises conflict related losses as a means of defining the scope and content of a comprehensive restitution/compensation policy, following the liberation of the East in 2007.

<sup>&</sup>lt;sup>24</sup> The term 'resettlement' is commonly used to refer both to the return and re-integration of displaced persons, whereas the technical terms for these two processes is – return and restitution. The term is also used in the 'National Involuntary Resettlement Policy of 2001' to refer to a process of relocation following development induced displacement (see discussion in section 3 – land restitution)

The LLRC's reference to 'compensatory relief' allows room for a multiplicity of interpretations. Especially in view that returnees have been entitled to humanitarian relief in the way of 'assistance, or relief packages' in the immediate aftermath of the conflict, to mitigate the rigors of returning to their land in the face of loss and deprivation arising from loss. Compensation schemes, as envisaged by international standard, are intended to be adequate and sufficient to redress losses that have implications for the long term, where direct restoration of those losses is not possible. In instances where displaced persons have not had access to either restitution or compensation, the fact that they have received 'some form of assistance or relief' may be interpreted as compensation in light of the wording of the LLRC (see discussion in section 3 – vulnerability, and table 03).<sup>25</sup>

#### Political Consensus

It is important to note that while a programme of HLPR is intrinsically rule based and envisages specific procedures and mechanisms, it is not synonymous to a process of reconciliation. It has been observed that there is at times a tendency to view HLPR as the solution to addressing all illeffects of conflict.<sup>26</sup> The success of a programme of HLPR will be inextricably linked to larger political structures, processes and post-conflict governance. HLPR cannot by itself be expected to address all the objects of reconciliation through its effort to redress loss and achieve normalcy. Hence, it is necessary to consider, among other things, commitment to the reconciliation process, rule of law and due process in the aftermath of conflict. The LLRC is specific

<sup>&</sup>lt;sup>25</sup> See NPA updates on recommendations 9.155, 9.157, 9.159

<sup>&</sup>lt;sup>26</sup> See; Ballard, M.J., Post-Conflict Property Restitution: Flawed Legal and Theoretical Foundations, 2010

in this regard and calls for political consensus and a 'consensual way forward', with commitment and cooperation among all communities and political parties towards reconciliation.<sup>27</sup> It is expected that the Fourth Land Commission referred to in the LLRC and NPA (who is yet to be appointed), will be able to address, among other things, the political contentions attached to post-conflict land regularization.

While HLPR cannot be viewed as synonymous to reconciliation, it most often constitutes a significant component of the post-conflict project for recovery and development. Hence, it is an essential indicator of the commitment to the reconciliation process, and its progressive fulfillment.

# 3. Current Status of the Right to Restitution

The GOSL is not without commitment to restoring the North and East to a state of normalcy, evinced by the substantial progress it has made with respect to the NPA. However, it is not always that progress matches the intent of the LLRC recommendation, and hence the objects of restitution and restorative justice. The following section will attempt to capture the extent to which the right to restitution is being realized, the nature of the political commitment, and whether salient precepts of governance, namely the rule of law are an integral feature of the HLPR programme.

#### 3.1 Militarisation

Continued militarization of the North and East is a contradiction to the government's purported plan to restore the North to normalcy. It is a direct violation of the concept of restitution, which requires restoration of normalcy in all

<sup>&</sup>lt;sup>27</sup> LLRC report, note 3, sections 8.140, 8.142 and 8.146

aspects of post-displacement life. Militarisation is dealt with substantially in the LLRC report. Paragraph 8.7 touches on the impact of military involvement on HLPR – 'the continued occupation and use of private land and property for small businesses and farming is conducted, military involvement in the selection of beneficiaries for housing assistance, and continued influence in other matters that are essentially 'civilian' in scope, especially with regards the return and resettlement of formerly displaced persons'. It is contended that if HLPR is to be an indicator and test of whether the reconciliation process is in anyway successful, it will require in parallel, a significant de-militarisation of the North and East.

The UNHRC in its twenty fifth session report, released in February 2014, indicates the failure of the GOSL to disassociate the military from the ambit of civilian affairs, and its failure to establish a time-frame within which the process of de-militarisation would be effected. Hence, militarisation is a feature still very prominent to the discourse on reconciliation in Sri Lanka.<sup>28</sup> The UNHRC outlines the government's position concerning militarization; that military strength has been reduced by approximately 30 per cent in the Northern Province since 2009 and by 26 per cent in the Eastern Province, where the vast majority of checkpoints have been removed. It further states that as of January 2014 a total of 20,011 acres of private land and 5,740 acres of State land had been released in the Northern Province.<sup>29</sup>

<sup>&</sup>lt;sup>28</sup> United Nations Human Rights Council, Promoting reconciliation and accountability in Sri Lanka, February 2014, A/HRC/25/23, p. 3

<sup>&</sup>lt;sup>29</sup> United Nations, note 28, p. 5

The GOSL' update outlined above is encouraging, though reports by civil society organisations covering incidents in 2013 indicate, that while the strength of the military may have been reduced, their integration in civilian life and authority over decisions affecting land regularization and 'resettlement' is still very pervasive.30 For instance, while areas demarcated as HSZs ceased to exist with the lifting of the emergency regulations in 2011, in effect large portions of the affected lands remain under the tacit control of the military. Hence, access to these lands, and the prospect of reintegration is limited to those who were displaced by the demarcations of these zones. The purported 'take over' of approximately 6400 acres of private land in the Valikamam North, in the former HSZs of Palali and Kankasanthurai (KKS) for a military cantonment has caused tremendous hardship to 2000 families who are unable to return to their lands.31 The lack of transparency and justification for the purported acquisition of these lands and the continued reluctance of the authorities to enable return of the displaced to these lands, have compelled affected individuals to petition the Court of Appeal and Supreme Court for the vindication of their rights. The problem is compounded by the degeneration of some of the lands in question and the destruction of boundaries, with the result that it is difficult to identify private lands from State land. However, the general consensus is that the majority of lands marked for the expansion of the Palali airport and the Kankansanthurai harbor in the Palali HSZ area, are private lands.32 The

<sup>&</sup>lt;sup>30</sup> Centre for Policy Alternatives (CPA), Politics, Policies And Practices With Land Acquisitions And Related Issues In The North and East of Sri Lanka, 2013, p. 40

<sup>31</sup> CPA, note 30 p. 45

<sup>&</sup>lt;sup>32</sup> The Palali HSZ was expanded in the 1990s following the LTTE attacks on the Palali base, to cover Palali Air Base, Thelippalai (Valikamam) hospital, and the Kankasanthurai naval port and cement plant.

developments outlined above contradict the intentions of the GOSL expressed in 2010 to 'resettle' 18,000 families in the Palali HSZ, the biggest zone in Jaffna. It was also intended to increase the paddy harvest in these areas from its 130,000 metric tons to 240,000 metric tons, once the demining process was finalized.

The developments in Valikamam North and specifically in Palali resonate the developments in the Eastern Province following its liberation in 2007. Approximately 4000 persons remain displaced and in transitional shelters and other uncertain conditions, as a result of a Special Economic Zone (SEZ) that was declared in 2006 in the areas of Sampoor in Trincomalee.33 The complexities inherent in the return of displaced persons were further exacerbated by the superimposition of a HSZ in May 2007, in the area of the SEZ. In view of the ongoing 'emergency', declared under the Public Security Ordinance the imposition of the HSZ justified the inability of those displaced to return to their lands. However, the prevalent consensus was that the military necessity for a HSZ following the liberation of the East, did not justify the superimposition of a HSZ. It was seen as a forcible means for the GOSL to pave the way for the implementation of an Integrated Development Plan for a metro urban area in the district of Trincomalee.34 While HSZs ceased to exist in 2011 with the lifting of the emergency regulations, the lands covered by the Sampoor HSZ were declared by gazette extraordinary in 2012 as a Special Zone for Heavy Industries under the Board of Investment (BOI) Act. The three year development plan for the Special Zone was made public in 2013, and will include, among other

<sup>33</sup> Extraordinary Gazette Notification No.1467/03, October 2006

<sup>34</sup> Mendis R. N, note 23, p. 21

things, a deep water jetty, a ship building and repair facility and other support industries. The project for which approximately 820 acres of land has been allocated is expected to generate around 10,000 jobs and is intended to contribute to township development and enhancement of infrastructure. In the meantime, plans to return and/or compensate approximately 4000 persons displaced by the original HSZ since 2006 remain uncertain. While there is a declared intent to formally acquire lands allocated for a coal power plant, there is no mention of whether the lands used for the subsequent Special Zone will be formally acquired under the Land Acquisition Act (LAA) of 1950, or whether those who have lost their lands will receive compensation.<sup>35</sup>

It would seem then, that the GOSL has deliberately followed through with its 'development agenda' in postwar East, at the expense of a significantly large number of persons. These persons have been denied the right to return, and are reduced to speculating on the plight of their lands. They currently live in transitional shelters in Kattaparichan and have been constrained, as in the case of those displaced from Valikammam North, to challenge the GOSL's development initiatives and vindicate their rights in the Supreme Court of Sri Lanka. Hence, the effects of continued militarization are apparent in post-war development, including in the use of HSZs and the de-facto expulsion of legitimate owners of land. In other instances, the military has been complicit in the eviction of persons from lands that have been ear-marked for the settlement of persons from other ethnic communities (see discussions in section 3.2).

<sup>35</sup> CPA, note 31, pp. 50 - 53

The continued occupation of private lands in both the North and East contradicts the learning and recommendations of the LLRC (see table 01). It is a (negative) reflection of the GOSL's commitment to HLPR as an integral component of the reconciliation process. LLRC recommendations 9.171 and 9.227 outline the LLRC's position regarding the demilitarisation of land use and land acquisition, among other things (see table 01).

#### Table 01: National Action Plan (NPA) update, May 2014: Militarisation

9.134 - Confine the participation Completed of security forces officers to expediting the release of maximum extents of lands being utilized for security purposes.

as well as small extents of private land currently utilized for security in which time frame.

9.142 - Review the 2 existing HSZs The former HSZ in the North in Palaly and Trincomalec-Sampur, have ceased to exist. Palaly cantonment is now the only area some security purposes, with a view to release restrictions remain although more land while keeping national civilians have unrestricted security needs in perspective. access to Palaly airport and KKS Complete the provision of harbour. Similarly, the Sampoor alternate lands and or payment of area in the East which was a compensation within a specific former HSZ is now declared a Development Zone under the Board of investment...

> ☐ To date, 20,011 acres of private land and 5,740 acres of state land have been released in North and East as follows:

the involvement of the Security with government officials at the

LLRC 9.171; The Commission No further action required. Civilian recommends the phasing out of administration is fully functional Forces in civilian activities and use of private lands by the Security Forces with reasonable time lines being given.

the Northern Province reverts to civilian administration in matters relating to the day-to-day life of the people, and in particular with regard to matters pertaining to economic activities such as agriculture, fisheries, land etc. The military presence must progressively recede to the background to enable the people to return to normal civilian life and enjoy the benefits of peace.

district, divisional and grassroots levels appointed and discharging their functions. The involvement of security forces in resettlement and reconstruction activities in the immediate aftermath of the conflict proved crucial but this is being gradually phased out. Security Forces presence in the North has been considerably reduced (by 30% from 2009 to October 2013). The present strength of security forces in the Jaffna peninsula is approximately 15,000. Gradual reduction of security forces presence is continuing.

The NPA position, as of May 2014, that civilian administration has been fully established and functional at all levels of administration, does not necessarily address the 'phasing out of military involvement in civilian activities' as recommended by the LLRC. What is important is the level of authority and influence that civilian authorities are vested with, and that they are not in any way undermined by military presence or political influence. Further, there is no indication of measures to release private lands that are occupied by the military on an ongoing basis.

The LLRC in recommendation 9.227 requires the gradual phasing out of military involvement in everyday life as a pre-requisite to achieving a status of 'normalcy' that is indispensable for a process of reconciliation. As it is apparent, the military continues to exert its influence, even though the context has transitioned from a humanitarian relief and recovery phase to full scale development.

It is observed in expert writing that the current 'militarisation' of civilian authority politics is very much a 'post-war phenomenon'. Historical assessment of the strength and influence of the Sri Lankan military indicates that the military over time has been subject to a gradual 'Sinhala-isation', where its current ethnic composition is almost exclusively Sinhalese. This is attributed to successive Sinhala politicians in post-colonial Sri Lanka using the military in nationalist politics36 and more recently due to the struggle against Tamil separatist insurgents or the LTTE. The strength of the army was increased since the 1980s, due to the leftist insurgency in the South in the late 1980s and has reached an unprecedented proportion between 2005 and 2009 in the final phase of the State's battle against the LTTE.37 It is note-worthy that for much of the turbulent times since the 1980s (and through the 1990s) the military remained subordinate to civilian authority, where the civilian executive was able to take decisions concerning military's strategy and operation.

The overt militarization that is apparent in the post-war context is attributed largely to changes at the top, where the Defense Secretary reports directly to the President.<sup>38</sup> In the absence of a deputy minister for defense, it is contended that the Cabinet, since 1984, has had no direct influence on military policy and strategy during the course of the war since 2000.<sup>39</sup> This concentration of military power in

<sup>36</sup> KM de Silva, note 1, pp. 91 and 232

<sup>&</sup>lt;sup>37</sup> KM de Silva, note 1, pp. 235 - 236

<sup>&</sup>lt;sup>38</sup> The Defense Secretary during the last phase of the conflict and up to date is the brother of the President, Mr. Gothabaya Rajapakse; the President is the Minister of Defense and the Chief of the collective armed forces.

<sup>39</sup> KM de Silva, note 1, p. 235

individuals and the post-war amalgamation of other ministries within the purview of defense have extended the purview of a military made popular by the victorious defeat of the LTTE. Institutional expansion of defense and popular support of the military (by the Sinhalese majority) is a buffer to criticism and allegations of overt militarization of the post war rehabilitation and development effort.

Five years after the conflict, the militarization of post-war development and rehabilitation is unwarranted and excessive. Military intervention in the immediate aftermath of the war may have been justified in view of the humanitarian crisis that had ensued following the exodus of 300,000 displaced persons from the Vanni,40 and to ensure that latent elements of the LTTE do not re-emerge in the aftermath of the conflict. Some military intervention may still be justified in certain instances, such as where a breach of the peace is anticipated, or to subdue subversive elements. Overt presence of the military in everyday civil life and its integration into post-conflict transition and development is an intrusion of the 'normalcy' that is required for the realization of the right to restitution. The international standard is that civilian institutions are reestablished and resourced adequately, with parallel legal, procedural and administrative procedures that can meet the demands of an effective process of HLPR. Further, overt militarization would undermine any measures towards the 'political consensus' that is identified by the LLRC as intrinsic to its scheme of restorative justice and reconciliation (see section 2)

<sup>&</sup>lt;sup>40</sup> The last phase of the war in the Mullaitivu district of the Northern Province, saw the exodus of approximately 300,000 persons who had been trapped in the war zone emerge into military controlled areas.

#### 3.2 Land restitution

Contentions associated with land are inevitably far reaching and multi-faceted in the after-math the of conflict. Hence, land restitution is a matter of some political volatility and wrought with implications for post-war reconciliation. As noted by experts, it is a formidable task to 'restore' land that has been subject to a 30 year conflict, which comprises as much as one-third of the total land mass and two-thirds of the coast line. The extent of this land was predominantly dominated by the LTTE with little State control. Land restitution necessarily entails an exploration of the dynamics that have impacted land both during the conflict and in its aftermath.

Adverse impacts on land following the conflict are extensive, and include – large scale degeneration, dis-use and destruction of land (to the point where land boundaries are unrecognisable), the *de-facto* acquisition and re-allocation of land by armed groups (including the LTTE), the break-down or retardation of institutional intervention in the regularization of land, and extensive militarization of land with little access for cultivation. With regard to land-related losses', which include, among other things, losses resulting from secondary occupation of land, loss of land documentation, loss of housing and other property, and the continued inability to access both private and State lands, and thereby the loss of livelihoods, income, security and well-being.

As much as the GOSL is acknowledged for returning and restoring displaced persons to their original homes and livelihoods, the discussion below indicates that there still is much that is unaddressed in the regularisation of land.

#### Land circular No. 01/2013

A significant development in 2013 is the formulation of land circular No.01/2013 (hereinafter 01-13),41 which was largely accepted as a promising administrative attempt to expedite outstanding land restitution and land redistribution. The circular applies to resolving issues impacting State land in the post-conflict zone. It is intended as a 'guideline' for the implementation of a policy decision taken by the Cabinet of Ministers for the 'regularisation of land management activities in the Northern and Eastern Provinces'. As per the NPA there has been substantial progress on the resolution of conflict related land issues and the re-integration of displaced persons to their lands. It is notable that in the North alone 155,001 applications have been received by the Land Commissioner's Department, for the allocation of 'new land' and for the 'regularisation of lands' (where the land is being returned to an original owner). Similarly, a total of 15,439 applications have been received in the East. Further, displaced persons have been informed, as per the NPA, of the 'alternatives' available to them with regards the areas open for resettlement, in addition to a host of other initiatives including a 'well designed communication campaign' for the purposes of the policy, (see table 2). In consideration of the complex procedure and specialized competence required for the realization of land restitution, these developments are indeed significant since the inception of the land circular in January 2013.

The circular however, cannot override or undermine legislative provision for the regulation of land, and in this

<sup>&</sup>lt;sup>41</sup> Land Commissioner General's Department, Accelerated Programme for Solving Post-Conflict State Land Issues in the Northern and Eastern Provinces, Circular No. 01/2013

regard, the application of the circular is unclear in certain respects. The foremost concern is the lack of definition for 'landless persons' and 'lost lands'.

With respect to 'landless persons', the circular advocates the 'kachcheri procedure' outlined in the Land Development Ordinance (LDO) of 1935, as the principal means by which land is to be distributed. The LDO does not define a landless person, however. The Kachcheri procedure, according to the LDO is for the distribution of land to persons who have been 'selected according to the discretion of the Government Agent' (GA), by a grant or permit. Hence, the assumption is that State lands are allocated and alienated to 'landless persons' for a purpose specified by legislation. The contention is whether those who have lost their permits and grants fall into the category of 'landless persons' and whether they must now be 're-selected' based on the discretion of the relevant officials. According to the LDO, cancellation of grants and permits may only be effected if the authorities are able to demonstrate, pursuant to the due process outlined in the Ordinance that the grant of permit holder has not complied with the terms of the alienation. Where the grant or permit holder has had to vacate the land due to the exigencies of war, and the envisaged due process is not practically applicable, the question is whether the grant or permit has then in effect been cancelled. In such cases, it is probable that many of these persons lost their documentation in the process of displacement, and were also unable to make the necessary annual payments as required. Do these instances then render these persons landless?

The policy position (as per section 2.2.1.1) is not to allocate 'new lands' to landless persons until land problems of

'affected persons' are first resolved. Again, the divide between 'landless' and 'affected' needs clearer definition, as in practical reality there may be some overlap. For instance, it is recorded in September 2013 that 250 to 300 families who have returned to Kokkuthuduwai, in the Mullaitivu District are unable to cultivate their lands as their permits have been cancelled due to non-payment of taxes and lack of proper title documentation.42 A majority of them have lost their original land documents during displacement. They were initially displaced in 1984, but have maintained links with their lands ever since. In 1990 they were allowed to visit their lands in the locality of Munderayankulam, where they found Sinhalese farmers cultivating their lands. Following their return in 2012, from a displacement camp in Vavuniya, they have been allowed to return to their lands, but have been denied access to their 'cultivation lands'. In August 2013, these farmers were informed by the authorities that their land permits are no longer valid and hence they have no sanction to cultivate their original lands. This is despite the fact that 90% of these persons are reliant on cultivation as the sole source of their livelihood. In such instances, it is urgent and necessary to understand whether these persons fall within the scope of 'landless persons', who will not have recourse to an immediate solution and will have to contend with 'new lands', or whether there loss will be redressed in terms of what is due to 'affected persons'?

With regards to 'lost lands', this status is attributed to the following reasons – where land is demarcated for development activities by government institutions or the

<sup>&</sup>lt;sup>42</sup> State Facilitated Colonisation of Northern Sri Lanka (2013), Groundviews - Sept. 13, 2013 - http://groundviews.org/2013/09/19/state-facilitated-colonization-of-northern-sri-lanka-2013/ - accessed August 05, 2014

armed forces, or where people have permanently settled on the lands in question (section 2.2.1.1 of 01-13). The policy position in these circumstances, where the land cannot be 'practically claimed again' (by the land owner), is for relevant authorities to identify suitable alternative lands in the area from which persons have been displaced or evicted (depending on the circumstances). According to the scheme of the circular, it seems that alternative (State) land may be given for both private and State land that have been 'acquired' (either explicitly or implicitly), which is deemed 'lost' (for the reasons specified) and therefore cannot be reclaimed.

Given the importance given to 01-13 by the LLRC in matters of land restitution (see table 02), it is necessary to ascertain whether lands can in-fact be 'lost' in the manner envisaged by the circular. This policy position is in contravention of established law regulating the 'take over' or acquisition of State lands. In-fact, other than for the reclamation of State land which is illegally occupied, there is very little provision in law for the deliberate acquisition of State land. The conditions under which a grant or permit may be 'revoked or cancelled' are specified in the scheme of the LDO. Legislative provisions of this nature ensure that persons, to whom State land is allocated, are not thereafter arbitrarily

<sup>&</sup>lt;sup>43</sup> The provisions of the State Lands (Recovery of Possession) Act No. 7 of 1979 provide the principal means by which State land is recovered from unauthorized possession, without the issues of a permit or grant

<sup>&</sup>lt;sup>44</sup> The Provisions of Chapter VIII of the LDO provides for the terms and conditions under which permits and grants may be cancelled, whereby the land reverts back to the State.

The Reconciliation Report (LLRC) and the Relevance of the Right to Restitution deprived of their security of tenure, property and livelihoods though they do not hold absolute ownership of the land.<sup>45</sup>

Reported incidents where persons are deprived of their lands following return are numerous; it would be a contravention of established policy, as evident in land legislation, if in all these instances, land is deemed 'lost' and affected persons have no other alternative but to transfer their 'lot in life' to an alternative location. For instance, in the location of Menik Farm in Cheddikulam, 10,000 acres is now in military control. Among those evicted are those who have land documents dating back to the time of the British. The lands are required to expand the military camp, which means that in terms of the circular, these lands are now 'lost' (see below for a discussion of compensation for 'lost State land').

In another instance, a group of residents from Barathypuram, Vavuniya district, have been evicted from their lands to make way for a Muslim settlement. In this unique case of postwar land distribution and allocation, certain portions of land that were denied to the original residents prior to displacement have now been re-allocated to another ethnic group. The residents had settled in Vavuniya by clearing forest land, when their houses were burnt in the Tamil riots of 1977. The Forest Department had reclaimed 230 acres of lands that had been cleared. The 140 families affected by this reclamation, returned to the same lands following recurrent displacement. Until then the families had voted in Vavuniya and were the beneficiaries of the local Rural

<sup>&</sup>lt;sup>45</sup> Rights over State land are derived from the State; that is, land maybe occupied with full possessory rights, but the land may not be occupied as an owner with full title (absolute ownership) over the land. Therefore, the occupier has no rights of dispossession or alienation of the land.

Development Authority (RDA). The lands are now required for a Muslim settlement (though it was originally reclaimed by the Forest Department). The lack of land regularization by the authorities, and thereby the lack of security of tenure among these residents of Barathayapuram has resulted in undue confusion and hardship, though their residence and integration into the life and community in Vavuniya has been of long duration. It is pertinent to consider whether the lack of initiative for land regularization by the authorities prior to displacement, should cause detriment to those who have been in possession of State land for long years.

The instances outlined above, reflect a fraction of the complexities inherent in post-conflict land regularization. With respect to LLRC's recommendations for a 'well designed communications and publicity campaign' concerning circular 01-13 (see table 02), the definitional issues highlighted above concerning 'landless persons', 'affected persons', the definition of 'lost lands', are issues, among others that require clarity and better awareness, especially among those who have very little else to return to other than the lands they left behind.

Table 02: Extracts of key recommendations and NPA updates, as of May 2014, pertaining to 'Land Restitution'

have been resettled

9.104 - Grant the legal ownership ... Accordingly in the Northern of land to those [IDPs] who Province, 1,875 land requests were received in April 2014 (155,001 to date) under 03 categories in Circular 01-13, i.e. new land requests, regulating documents and other land problems. 1,465 have been resolved to date, making a total of 28,211 resolutions to date. In the Eastern Province, 863 land requests

were received in April (15,439 to date) and 337 have been resolved (2,130 resolutions to date).... 9.106 - Create awareness among IDPs awareness on Land Circular IDPs about policies [with regard No. 01-13 have been enhanced to the areas that are available for through 20 Divisional Secretariat people to resettle] and the level awareness programmes options available to them completed in Northern Province and 18 Divisional Secretariat level programmes completed in Eastern Province. Recommendations with specific Completed in the most part regard to circular 01-13; 9.129; supervise civil administration officers tasked with implementation of Land Policy and Associated Programme46... and monitor implementation quality... 9.133, 9.135, 9.136; - launch of a Re 9.135, 136 - reference is made well-designed communication to the update corresponding to campaign for the purposes of recommendation 9.106 the aforesaid policy, and well-'Community publicized Consultation Meeting' in each District Secretariat... 9.223 - Ensure that development Status is not clear activities are carried out in consultation and with the participation of the local people 9.150 - Expedite action on the Contingent on the Parliamentary establishment of a National Land Select Committee (PSC) Commission (NLC) in order to propose appropriate future national land policy guidelines as required under the 13th Amendment.

<sup>&</sup>lt;sup>46</sup> The phrase 'land policy and associated programme' is taken as referring to circular No. 01/2013

### Post-conflict development and land

Tensions between development projects and post-conflict land regularization have been indicated in the discussions above. There is no denying however, that the post-war context required extensive development interventions. The conflict had subjected infrastructure, land and all forms of property to dilapidation and disintegration. With respect to land, the LTTE did little to administer and develop the lands within its purview, and the GOSL had little access to engage in any meaningful development. It is noteworthy, that according to expert analysis, the development trajectory of the North and East prior to the conflict fell far short of the development that the rest of the country had access to. Historically, the North and East did not benefit from the vast wealth of resources available in the rest of the island, and did not benefit from key national industries, such as the plantation industry, and the coffee and rubber industries. A limited coconut industry was possible in limited extents of land.47 The GOSL was quick to identify the potential for growth and development in the aftermath of the conflict in both the North and East. The Nagenehira Navodhaya (Eastern Resurgence), the development plan for the East following its liberation in 2007, identified its arable lands and natural resources (including fisheries and minerals), untouched and picturesque coastal belt with access to a number of ports, its trainable workforce and potential for tourism as potential avenues for the advancement of the East. The North, under the Uthuru Vasantha (Northern Spring) development programme has seen unprecedented investment in large scale infrastructure development projects, notably the rebuilding and expansion of roads, water supply and irrigation, and

<sup>&</sup>lt;sup>47</sup> KM de Silva, note 2, p. 248

projects for the development of livestock and inland fisheries, to name a few. In addition, the province has witnessed an unprecedented influx of businesses, including large supermarket chains, construction initiatives and commercial banks. The development outlined above inevitably creates a demand for land (and a concurrent increase in the value of land), which must be met concurrently with the demands for land regularization.

As outlined above, there is a significant contention between priority for land regularisation in the aftermath of the war, and land allocation for large scale development purposes (see discussion on militarization). Amidst allegations of 'land grabbing' and the deliberate colonization of 'other ethnic groups' in predominantly Tamil areas,<sup>48</sup> the GOSL seems determined to carry out a programme of development that has far reaching implications for land distribution, allocation and the acquisition of lands for public purposes.

As at the end of 2013, the apparent priority to the needs of development continues undiminished. With respect to State lands, the circular 01-13 indicates a clear priority for the allocation of lands for development over and above the needs of those who wish to return to their lands and re-integrate into a state of normalcy. Section 2.2.1.1 of the circular reads:

"The cabinet has taken a policy decision not to alienate new lands to landless people until the land problems of the affected people in the conflict affected Divisional Secretariats are solved. But there is no barrier to alienate lands for government approved development projects. Information

<sup>48</sup> See CPA, note 30; and LLRC, note 3 section 6.104

provided by the landless people in the conflict affected divisional secretaries divisions should be collected and distribution of lands to those people should be postponed (emphasis added)."<sup>49</sup>

The above provision implies that State land may be allocated even where the land issues of 'affected persons' have not been resolved. This presents the danger of lands, to which persons are legitimately entitled to return to, being reallocated for development purposes. The circular does not provide for redress in the event such persons are deprived of their lands. Excepting that 'alternative lands' will be provided, as per 2.2.1.2, for persons who have 'lost their lands' due to development projects and other specified reasons. Unlike for the acquisition or 'take over' of private land, there is no legislative compensation scheme for the takeover of State land. The payment of compensation, where land reverts back to the State (for any of the reasons specified by Statute) is discretionary on the part of the GA. The circular indicates a 'compensation assessment conducted during the acquisition process of the lands' (section 2.2.1.2); however, better clarity is required in terms of what the scheme of compensation would entail for State land (on the basis of which alternative lands are allocated to affected parties).

With respect to private land, there has been a progressive regression of laws, regulation and policies pertaining to the acquisition of private land. In addition to the provisions of the LAA that specify the procedure to be adopted when acquiring land for a 'public purpose', the National Involuntary Resettlement Policy (NIRP) of 2001 was formulated to

<sup>49</sup> Land Circular, See note 43, section 2.2.1.1

mitigate the rigors of the 'top down' approach of the LAA.50 The NIRP envisages a process of negotiation based on the concept of 'involuntary consent' Those who are to be displaced by large development projects are consulted with regards potential and perceived losses, prior to their displacement from their homes and lands. This is in keeping with the provisions of the LAA, which require that a notice of acquisition be posted near the land in a conspicuous place, based on the assumption that the owner is currently residing on the land at the time of the acquisition. In the post-conflict context, this procedure would require that displaced persons have returned to their original lands prior to 'development induced displacement'. In the case of the Sampoor SEZ and the Valikamam HSZ area (discussed above), and in many other instances, the decisions to acquire the private lands have been prior to the return of those displaced from the lands. In-fact, displaced persons who have a legitimate right to return to their lands have been deliberately kept away, in what may by implication amount to an 'unlawful eviction' of persons from their lands. Hence, the losses suffered due to conflict are now compounded by the fact of development induced displacement.

Computing compensation in such instances presents many challenges; how does one compute the losses suffered from conflict induced displacement, and thereafter the losses that potentially accrue as a result of post-conflict development induced displacement? The compensation scheme of the resettlement policy 2001 is, at times, advocated as having

The National Involuntary Resettlement Policy –formulated with the facilitation of the ADB as a pre-requisite to funding the Southern Expressway in the late 1990s, which estimated the displacement of a large number of households from their lands

the scope for presenting a 'bottom up', participatory process for the negotiation of compensation scheme that can 'cover' all manner of losses that require consideration in such circumstances. However, the NIRP (as in the case of the LAA) is designed for the acquisition of land for the purpose of development, and is not designed to 'redress' the fact of conflict induced displacement. Restorative justice following displacement, and especially the right to restitution, requires that displaced persons are primarily allowed the right to return to their lands, unless such return is factually impossible (see section 02 for a discussion of the right to return). The losses arising from conflict affected displacement must first be addressed in order to place persons on a platform from which they are able to negotiate the terms of any other form of 'negotiated displacement'.

Conflict has the tendency to heighten conditions of vulnerability, to further marginalize and impoverish, especially those who have been subject to recurrent displacement. To use the fact of displacement to the advantage of land acquisition is highly regressive of the laws and policies that have been established and strengthened thus far. A strategy for post-conflict development cannot contradict the fundamental precepts of restorative justice, and at the same time purport to be designed for the advancement of conflict affected persons. The LLRC draws attention to this thinking in section 8.9:

"...The North and East ... (are) areas that have suffered greatly – both in terms of destruction caused by violence, and also due to lack of development, which had resulted in a regression of the economy and infrastructure... what (is) a paramount need for sensitivity, recognizing that the areas have suffered; not to plan macroeconomic projects ... as if they (are) normal areas. There (is) a need to recognize the suffering, and problems caused by the conflict, give them a hearing and acknowledge their grievances (edited)."51

It would require the specific formulation of recommendations to address the current and continuous contention between development and restorative justice in both the North and East. This may entail a strengthening of the NPA, or an amendment to the circular 01-13, that will reflect a process of reconciliation that first allows for the basic rights of displaced persons, and which does not fall short of the restorative justice envisaged by international standards (see section 02).

# 3.3 Vulnerability

Intrinsic to a scheme of restorative justice, is to understand the 'nature of loss' and the particular ways in which persons, households and communities are made vulnerable by the fact of displacement and conflict. Very often, displaced persons return to circumstances and conditions that are far removed from what they left behind or envisaged as 'normal conditions of return'.

Hence, there is a need for assessment of whether the specific 'suffering and consequences of the conflict' have been adequately redressed (as per LLRC; 8.9). The overarching consideration is whether the process of reconciliation is

<sup>&</sup>lt;sup>51</sup> These words are attributed to Mrs. Ferial Ashroff, before the LLRC at Colombo on 24th September 2010

effective to address the particular vulnerabilities arising from the conflict. These may be different in nature and scope to vulnerabilities experienced by communities and individuals in other parts of the country. Where there is vulnerability to impoverishment and other adverse circumstances, it is difficult to envisage progressive advancement of conflict affected individuals and communities. The development programme of the North and East (as discussed in section 3.2) may prove ineffective unless there are parallel processes to empower vulnerable persons and to redress conflict based losses. Pertinent in this regard, is whether there has been sufficient initiative to tailor the envisaged development towards the specific needs of those affected by conflict that remain vulnerable.

With respect to HLPR, it is necessary to identify aspects of vulnerability that deter individuals from accessing the restitution that they are entitled to. The LLRC report identifies a range of factors that contribute to exacerbating the plight of vulnerable groups in chapter 5 dealing with human rights. <sup>52</sup> Vulnerable groups are identified as — women, children, displaced persons and the disabled. The report calls upon government to meet the basic needs of these groups as a matter of priority (LLRC; 5.100), and to use the expertise of civil society groups and the support of community level groups to address a plethora of issues associated with vulnerable groups, including spiritual and emotional welfare (LLRC; 5.101). While it is beyond the scope of this chapter

<sup>&</sup>lt;sup>52</sup> Among the factors contributing to increased vulnerability of persons identified by the report, including the disintegration of families, loss of family members, violence against women, and the lack of social support, this chapter will limit itself to those vulnerabilities affecting the I-ILP restitution.

The Reconciliation Report (LLRC) and the Relevance of the Right to Restitution

to discuss the intricacies of vulnerability associated with conflict, it will attempt to highlight aspects of vulnerability that must be factored into a process of HLPR.

### Table 03: Extracts of key recommendations and NPA updates, as of May 2014, pertaining to 'Vulnerability and Institutions'

needs of women, especially generating become heads of households, by provision of particularly generating means to reduce provinces. immense economic hardships.

9.87 - Address the immediate Several livelihood and income projects widows who most often have implemented by ministries to their address the needs of women. women-headed livelihood and other income households in North and East

9.103 - Provide assistance to As at end April 2014, 58,122 fully mutual programmes such "Shramadana" must encouraged. provision should be made to agencies... provide infrastructure needs 
Currently, 22,473 fully damaged people have been resettled.

returnees to repair or build damaged houses have been permanent houses. Self-help constructed and 24,402 partly assistance damaged houses have been as renovated with the assistance of be Government, UN agencies, Adequate INGOs, NGOs and other

institutions and individuals houses during 2014 and 2015. both national and international to cater to housing needs of returning IDPs.

such as roads, schools and houses are being reconstructed and hospitals in the areas where 237 houses are being renovated. A significant proportion of houses have been built on "owner-driven" 9.165\* - Address housing needs basis. Government is further for returning IDPs on an urgent committed to reconstructing basis. Access all possible 11,082 fully damaged houses and sources of assistance from renovating 3,647 partly damaged

9.105 - Encourage civil society Field officers attached to M/Child development at the grassroots Ampara and Jaffna districts are

to engage in community Devpt. & Women's Affairs in

level to help IDP communities who are making a collective effort to reconstruct and rebuild their lives

9.155, 9.157, 9.159 - Review the role and capacity of Rehabilitation of Persons, Properties and Industries Authority (REPPIA) with a view to streamlining and augmenting its role and resources in undertaking post-conflict requirements [for compensatory relief

9.158 - Ensure that the responsibility for making entitlements available to individuals is undertaken by REPPIA.

engaged in promoting community contribution for the reconstruction and rehabilitation. Also, training for CBO women leaders has been conducted with the support of GIZ...

#### Completed.

- □ Role of REPPIA has been reviewed and strengthened. ?
- Rs 475M has been allocated in 2014 Budget to implement this recommendation. Funds which were allocated for REPPIA in 2013 Budget (Rs 204 M) for implementation of this recommendation were fully released by Treasury by November 2013. From 2010 to 2012, Rs 392 M was provided for the payment of compensations.

## Housing restitution

A foremost concern in the aftermath of war is whether female headed households<sup>53</sup> have adequate access to housing restitution implemented on the basis of the 'owner driven housing' model. This model requires that the beneficiary of housing assistance contributes to the construction of the house by way of labour and materials. The model has been

<sup>53</sup> The LLRC report estimates the total number of female headed households in the aftermath of war to be a total of 59,501. (LLRC; 5.103). Data sources from the Ministry of Child Development and Women's Affairs, the female headed households in the North and East are estimated to be 59,501, with 42,565 of them living in the Eastern Province and 16,936 in the Northern Province.

utilised throughout the duration of the conflict, first under the Unified Assistance Scheme (UAS) for low-income housing, and subsequently under the North East Housing Rehabilitation Programme (NEHRP) funded by the World Bank.54 The NEHRP established for the first time, a minimum standard for housing reconstruction, namely the 'core house' (a 500 square feet house). The core house was explicitly adopted by the Tsunami Housing Policy as a basic minimum, in the aftermath of the tsunami natural disaster in December 2004. Following the cessation of hostilities in 2009, the GOSL and implementing agencies were constrained to meet the housing shortfall in the face of acute funding shortages. In contrast to the aftermath of the tsunami, there was a dearth of donor commitment for funding. In response, agencies developed more cost effective housing models, smaller in size than the NEHRP standard, which could be developed incrementally by the beneficiary at a later stage. However, the 'core house' of 500 square feet remains the basic minimum irrespective of family size and need. All housing programmes were implemented as 'propoor housing', where selection criteria included consideration of income, female headed house-holds, disability and family size. Hence, a female headed household with four children would have a better chance of selection over a female headed house-hold with one child, though in reality the latter household is no less vulnerable. The reality however, was that the selection would necessarily have to consider households with the economic means to contribute to completing the house with respect to the 'owner driven arrangement'.

<sup>&</sup>lt;sup>54</sup> See for a discussion on housing standards and policy; Mendis R. N. (2012) The Right to Adequate Housing in the Vanni: A Question of Relevant Policy, LST Review Volume 22 Issue 297, pp. 16 - 26

A significant development with regards housing restitution is the Indian Housing Programme (IHP) that was initiated at the end of 2012. During 2013, approximately 10,000 of the 50,000 houses committed to by the Indian Government were completed, reducing the outstanding housing shortfall from 160,000 (in the immediate aftermath of the conflict), to 146,000 houses (after discounting housing commitments by other agencies included). The majority of the remaining 49,000 houses (as much as 43,000) would be built both on the owner driven model. The Indian housing model is a more advanced variation of the NEHRP standard. The outstanding need for housing as at the beginning of 2014 is approximately 89,000 houses. This is in addition to an outstanding need for approximately 40,000 houses in the Eastern Province.

While many returnees have pinned their hopes on the IHP, there have been many reports from the field, and concern expressed by many 'human rights' based agencies, that the IHP presents undue burdens on beneficiaries, especially on female headed households. 55 These concerns echo those that have been raised in connection with NEHRP housing, where households would get into severe debt and expend all their resources on building their house. 56 A number of ongoing studies attempt to establish the correlation between owner driven housing and the issues of 'indebtedness'. While it is usual for most households, whether poor or middle-income to experience some element of debt, the concern is that conflict affected persons have a greater propensity to be

<sup>&</sup>lt;sup>55</sup> Since the IHP was announced, many of the returnees preferred to enlist for an Indian house, which is markedly of a 'higher standard'; built on 550 square feet, utilises durable construction material, and is with a kitchen and a toilet.

<sup>&</sup>lt;sup>56</sup> See LLRC report, note 3, for testimonials of housing related debt

subject to indebtedness and vulnerability to impoverishment that is extreme and detrimental to their well-being. It is fair to assume that a female with small children or a disabled dependent, is compromised in terms of the employment opportunities that are available to her, and her ability to contribute to the building of a house. In these circumstances, a mandatory requirement to contribute to a 500 square foot house would only add to her burden. Hence, it is logical to explore alternatives to NEHRP standard (and now the IHP standard), where the type of house is matched to the size of the household and the need.

There is however, little policy guidance with respect to exploring alternative housing standards that meet the needs of different types of households. While the LLRC acknowledges the urgent need to address housing needs of IDPs and returnees (LLRC; 9.165), it does not indicate a mechanism to meet the outstanding shortfall in housing. Despite the immense learning of the past, agencies (NGOs, INGOs and UN) are constrained to formulate alternative standards, which have been identified as a viable way forward.<sup>57</sup> There are no established criteria at the national level, or specific policy formulations by which to promote 'adequate housing' for different types of house-holds. A range of alternative housing types to choose from would potentially ease the financial burden on the GOSL, and increase the scope for a larger group of vulnerable families to access adequate housing.58

<sup>&</sup>lt;sup>57</sup> As of March 2014, INGOs such as ZOA and Practical Action are in the planning stages of implementing housing models referred to as 'incremental housing'.

<sup>&</sup>lt;sup>58</sup> The REPPA in 2012 constructed 222 low income houses in Mullaitivu for single member families; see Note 56, p. 20

## Institutional support and the enabling environment

The discussions above are intrinsically connected to the question of institutional support. While there have been many institutions associated with addressing displacement and post-conflict housing, it is necessary to identify an institutional mechanism that is capacitated and empowered to make policy decision concerning housing and the large outlays of money associated with it. The LLRC identifies the Rehabilitation of Persons, Properties and Industries Authority (REPPIA) as the entity best mandated to 'implement government policy on compensatory relief for persons who have suffered loss/damage due to terrorist violence and operations of the government security forces'.59 REPPIA has formerly been instrumental in implementing the UAS for low income housing, and has the advantage of being an entity established by statute, and thereby accountable for its actions. However, while the NPA outlines the financial outlays given to REPPIA, there needs to be a clear link between a policy for post-conflict housing reconstruction and REPPIA's ability to implement such policy, including its capacity to address the particular needs of vulnerable and disadvantaged communities. It is pertinent to question whether REPPIA has the authority to mobilise alternative building standards and develop policy with respect to housing restitution. Also, what is the scope of involvement among other national agencies, such as the National Housing Development Authority (NHDA), with respect to post-conflict housing? These are relevant questions that relate to the scheme of the Pinheiro Principles and the paramount importance given to national institutions in taking HLPR forward.

<sup>59</sup> LLRC report, note 3, p. 244

Further, it is important to investigate other institutional support that is available to those categories of persons identified as vulnerable. The LLRC outlines several contextual and structural short-comings that is disabling of conflict affected women, including - structural discrimination have increased in former conflict areas due to the lack of participation of women, discriminatory policies and practices, heavy military presence, lack of authority to control their environment, limited access to basic needs combined with weak institutional protection mechanisms and breakdown of traditional support networks, norms and prejudices against women in the society and attitudes and behavior of power players, among others.

There is little, if at all, in the post-conflict context, in the way of social support and welfare mechanisms that has been mobilized, at the national level for the protection of women affected by war. While the LLRC requires that women's needs are met immediately, the NPA's interpretation of these needs in terms of livelihoods and income generating capacity maybe inadequate, especially in terms of the LLRC's findings concerning the contextual difficulties confronting women.

# 4. Conclusion & Recommendations

The LLRC report presents a framework for reconciliation, which is largely accepted as the point of reference by which post-conflict reconciliation in Sri Lanka must be evaluated. The concept of restitution is observed as a key element of the scheme of restorative justice embodied in the report. While this approach may not directly relate to the prerequirements of reconciliation advocated by the international community, the recommendations of the report have the

scope to address concerns relating to violations of international law, through its focus on restorative justice and restitution. The present chapter however, explores the status of HLPR, with reference to updates of the NPA and other reports and observations by non-government entities. In view that housing, land and property feature significantly in the both pre and post conflict politics, the status of HLPR in the scheme of reconciliation is a strong indicator of the progress and effective realization of reconciliation thus far.

A key feature of the post conflict context is the large scale development projects that have been initiated in the aftermath of war. Undoubtedly, these have had immense benefit to communities with respect to better infrastructure, roads, and services that will pre-position the North and East for economic growth and development. It has been observed however, that a majority disadvantaged by war have neither the capacity nor the opportunity to benefit from large scale development. Hence, the nexus between reconciliation and post-conflict development needs to be carefully managed and implemented. It is pertinent to consider a programmatic framework within which a process of reconciliation based on restorative justice can be integrated with a parallel process of development that has been planned for post-conflict rehabilitation and reconstruction.

Other features of the post-conflict context bearing on HLPR are the continued military presence and militarization of the post-conflict development and rehabilitation. This is a concern that is overarching to HLPR and the fundamental objects of reconciliation, namely – a restoration to 'normalcy'. Militarisation is all encompassing, with far

reaching implications for land restoration; this is apparent in the prioritization of development and resettlement, or colonization, above the requirements of land restitution, the disregard for rule based land allocation with the superimposition of 'power-based' decision making, land restitution, and lack of information concerning distribution and re-distribution of state land.

There is a significance lack of attention to institutional building with due regard to sustaining the positive gains of post-conflict HLPR thus far. While there is initiative to strengthen national institutional capacity to meet the immediate needs of HLPR, which is commendable, the demands of an HLPR programme will require significant skills and capacity development in the long term. Institutional building will require reference to policy that can progressively address institutional needs of the post-conflict context. This is especially apparent with respect to housing restitution, where there is a large dependency on the donor community and other agencies to direct decisions concerning housing standards and minimum levels of 'adequacy' that will meet the requirements of pro-poor housing.

With respect to the above, and the discussions of this chapter, the following recommendations have been identified as key to the realization of reconciliation process based on the precepts of restorative justice:

- Identify or develop a policy framework that prioritises a programme of action based on the precepts of restorative justice, including the right to restitution;
- Map out the conflict related losses which a programme of HLPR will 'redress', based on the priorities outlined in the above policy;

- Integrate community participation as a matter of due process in all aspects of meeting outstanding concerns relating to HLPR, as identified in the discussions of this report (but not limited to);
- Identify and address gaps in relevant land laws (e.g. compensation for the 'take over' of State land) and procedures (where land documents have been lost), which are detrimental to outstanding issues impacting land restitution in the post-conflict context;
- Map out 'vulnerabilities' that are particular to the context, in terms of lack of opportunity, social support and enabling initiatives, whereby restorative justice is defined through a lens of vulnerability and marginalization;
- A rights-based evaluation of sustainable institutional building that is relevant to post-conflict rehabilitation and reconciliation.

### **RELIGIOUS FREEDOM**

Kalana Senaratne\*

### 1. Introduction

Religious freedom has been severely restricted in recent times, and it is an explosive political and socio-cultural issue in post-war Sri Lanka. The situation pertaining to the protection and promotion of religious freedom worsened in 2013, and has exposed, in the most unfortunate terms, the deep religious (in addition to ethnic) schisms that underlie the Sri Lankan polity.

The overarching purpose of this chapter is to provide an account of the state of religious freedom in Sri Lanka, in 2013. It begins by discussing the broad constitutional and legal framework within which the topic of religious freedom needs to be discussed, referring also to some of the legal developments that have taken place in 2013 section 2. Thereafter, section 3 examines one of the major political developments of the year which has had the most direct impact on religious freedom – the phenomenon of militant

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Buddhist nationalism. Section 4 sets out some of the threats posed to the different religious communities in the country and the violence directed against religious practices and religious places of worship during this year. Section 5 places particular focus on the issue of religious freedom in the North and East of Sri Lanka, emphasizing the specific character of the problem and how it differs from the rest of the country.

In conclusion recommendations are made as to how these problems and challenges are to be addressed for the protection and promotion of religious freedom in Sri Lanka.

# 2. Background: Legal Framework, Judicial Precedent & Recent Developments

Sri Lanka is a multi-religious country, comprising people belonging to (or following) many religions, including the four major religions in the world: Buddhism, Christianity, Hinduism and Islam. 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%.1

Sri Lanka's multi-religious character is only an abstract fact, connoting the basic idea of the existence (or co-existence) of people belonging to different religions within one country. Within this supposed multi-religious set-up, Buddhism, followed by an overwhelming majority of the population, receives prominence, politically and constitutionally. Hence Article 9 of the Constitution, which provides:

<sup>&</sup>lt;sup>1</sup> Population by religion according to districts, 2012', available at: http://www.statistics.gov.lk/PopHouSat/CPH2011/index.php?file Name=pop43&gp=Activities&tpl=3

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 is a reflection of a dominant political aspiration of the majority Sinhala-Buddhist community in the country, one which received explicit and prominent expression in the previous constitution adopted in the 1972.<sup>2</sup> It is a curious provision in that it appears to encapsulate a contradiction of purposes: of giving prominence to one religion (i.e. Buddhism) while assuring other religions their rights as well. The impact of Article 9 (and of giving prominence to Buddhism), as experienced in 2013, is explained later in the chapter.

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 that:

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.

<sup>&</sup>lt;sup>2</sup> Section 6 of the 1972 Constitution introduced for the first time the idea of recognizing the prominence of Buddhism. For a historical study, see for instance Benjamin Schonthal, 'Buddhism and the Constitution: The Historiography and Postcolonial Politics of Section 6' in Asanga Welikala (ed), *The Sri Lankan Republic at 40*: Reflections on Constitutional History, Theory and Practice (Colombo: Centre for Policy Alternatives, 2012), pp. 201-218.

Sri Lanka: State of Human Rights 2014

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. The International Covenant on Civil and Political Rights (ICCPR), for instance, establishes the right to religious freedom in Article 18.3 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.

<sup>&</sup>lt;sup>3</sup> 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.

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 these key provisions, the broader legislative framework governing religious freedom in Sri Lanka includes, inter alia, numerous laws and legislative provisions pertaining to places of religious worship.<sup>4</sup> 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.<sup>5</sup> 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.

The year under review, 2013, did not bring about any significant addition to the legislative framework governing

<sup>&</sup>lt;sup>4</sup> For a brief note, see Centre for Policy Alternatives, 'Legal Framework Governing Places of Religious Worship in Sri Lanka', available at: http://www.cpalanka.org/brief-note-legal-framework-governing-places-of-religious-worship-in-sri-lanka/

<sup>&</sup>lt;sup>5</sup> The landmark judicial decisions will not be referred to in this chapter. However, for a detailed analysis, see Jayampathi Wickramaratne, Fundamental Rights in Sri Lanka (Pannipitiya: Stamford Lake, 2006, Second Edition), especially pp. 168-205.

Sri Lanka: State of Human Rights 2014

religious freedom in the country. Also, no significant judgment was delivered by the apex court pertaining to the right of religious freedom.

However, it was reported 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." As a first step in this regard, the Bill is said to provide for the establishment of a Buddhist Publications Regulatory Board which would have the necessary authority to regulate any publication which violates the philosophy and traditions of Buddhism.

While no further development was reported concerning this proposed Bill in 2013, it nevertheless poses several threats to promoting religious freedom and the freedom of opinion in the country.<sup>8</sup>

Firstly, given that religions, like political parties, are fragmented on various theoretical and other lines, there could be a serious threat posed to those who wish to adopt, follow, or advocate a certain strand of one particular religion, one which might be interpreted as being beyond the parameters of the 'original' teachings of that religion. For example, if

<sup>&</sup>lt;sup>6</sup> 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 <sup>7</sup> Ibid.

<sup>&</sup>lt;sup>8</sup> See, 'Press Release on new laws seeking action against publications that "defame the original teachings and traditions of the major religions", available at: http://www.cpalanka.org/press-release-on-new-laws-over-defamation-of-major-religions/

the 'Theravada' school of Buddhism is regarded as encompassing the original teachings and traditions of Buddhism, the rights of people advocating a different school of Buddhism (e.g. the 'Mahayana' school of Buddhism) could be considerably affected. Secondly, the proposed draft Bill would have serious implications on religious freedom, especially the freedom to engage in inquiry and critical commentary of religious teachings. Thirdly, and relatedly, such legislation also makes constructive or creative development and interpretation of religious teachings to suit contemporary society and current socio-cultural developments and practices, extremely difficult, if not impossible.

This, therefore, is a development that has the potential of further undermining the religious freedoms of people in Sri Lanka.

# 3. Impact of Militant Sinhala-Buddhist Nationalism

Another socio-political development that the country witnessed in 2013 was the rise to prominence of purportedly religion-inspired nationalism having an inherent militant dimension, resulting in the rise of what can be termed Sinhala-Buddhist militant nationalism. This is because the main actors in this grotesque spectacle have been groups which are predominantly comprised and/or led by Buddhist monks, namely: Bodu Bala Sena; Sinhala Ravaya; and Ravana Balaya.

## 3.1 Bodu Bala Sena (BBS)

The most prominent of these groups is the BBS. It is a group mainly comprising Buddhist monks, which quite vociferously (and violently) stands for the causes of Sinhala-Buddhist nationalism in the country. Its broader project involves: the protection of Buddhism, and Sinhala-Buddhism; taking action against what it considers to be the threat posed by the Muslim, as well as the Christian community (resulting, for example, in the call to boycott the use of 'Halal' products, as well as the call to increase the Sinhala-Buddhist population in the country); the protection of Sri Lanka's sovereignty and territorial integrity (thus opposing the 13th Amendment to the Constitution and/or greater devolution of power to the Tamil people).

It is a group which is widely believed to have the blessings of the present government. The Secretary to the Ministry of Defence, Mr. Gotabaya Rajapaksa, has been accused of being directly supportive of this group. It is significant that one of the principal founders of the BBS is Ven. Kirama Vimalajothi; a most well-known Buddhist monk in the country, and the founder (and director) of the Buddhist Cultural Centre, the leading centre for the publication and distribution of Buddhist scholarship. 10

### 3.2 Sinhala Ravaya

Sinhala Ravaya is also a Sinhala-Buddhist nationalist group which is composed of and/or led by Buddhist monks. Its stated aims are to: act as a defensive force of the Sinhalese

<sup>&</sup>lt;sup>9</sup>D.B.S. Jeyaraj, 'Defence Secretary Gotabaya Rajapaksa Openly Supportive of "Ethno Religious Fascist" Organization Bodu Bala Sena', available at: http://dbsjeyaraj.com/dbsj/archives/17939

<sup>&</sup>lt;sup>10</sup> The new office of the Buddhist Cultural Centre was declared open in 2011 by President Mahinda Rajapaksa. See, Uditha Kumarasinghe, 'Buddhist Cultural Centre: Grand opening today', available at: http://www.sundayobserver.lk/2011/05/15/fea06.asp. Also see, 'Opening of Sambuddhathva Jayanthi International Buddhist Centre', available at: http://target.lk/article.php?article=1644

and the Buddha Sasana; work towards the progress of the Sinhala-Buddhists and to protect the Sinhala-Buddhist identity.<sup>11</sup>

## 3.3 Ravana Balaya

Ravana Balaya is a similar organization led again by Buddhist monks. Its overarching project is similar to those of the above two groups. Very young monks have taken part, or been deployed, in numerous campaigns and public protests conducted by the Ravana Balaya. The group has carried out protest campaigns in the country against, for example: the UN High Commissioner for Human Rights; the Chief Minister of the Northern Provincial Council (NPC); the Sri Lankan cricket players [for taking part in the Indian Premier League (IPL) cricket tournament]; and called for the arrest of Bishop Rayappu Joseph, who is widely branded as a 'separatist' by Sinhala-Buddhist nationalists and political entities.

It is clear that these groups are promoting and are committed to promoting Sinhala-Buddhist nationalism in Sri Lanka. They undertake popular, as well as the not-so-popular, causes of Sinhala-Buddhist nationalism, with their *modus operandi* strongly reflecting their stance; they appear to be far more publicly vociferous about such causes; they are inspired by the famous Sinhala-Buddhist revivalists of the past, such as Anagarika Dharmapala; they are ready, willing and able to engage in physical confrontations with people and entities

<sup>11</sup> Available at: https://www.facebook.com/SinhalaRavaya/info

<sup>&</sup>lt;sup>12</sup> Dinouk Colombage, 'Ravana Balaya uses children in protest', available at: http://groundviews.org/2013/08/27/ravana-balaya-uses-children-in-protest/

they consider to be a threat; they are well organized and networked; they appear to command the moral support of dominant elements of the Buddhist Sasana (or the Sangha community) as well as of the politicians, especially of a Sinhala-Buddhist nationalist bent. In other words, these groups represent the underside of Sinhala-Buddhist nationalism.

The rise of these groups is a very complex and problematic development in post-war Sri Lanka. It is unnecessary here to delve deeper into the reasons for their prominence. Yet, this phenomenon is perhaps the most potent and significant threat to the protection and promotion of religious freedom in Sri Lanka today; a phenomenon that is deeply rooted in, and inspired by, the ideology of Sinhala-Buddhist nationalism.

# 4. Attacks on Religious Freedom (2013)

While attacks on religious freedom of people may not always be a consequence of a systematic policy, the rise of Sinhala-Buddhist groups referred to in the earlier section has heightened the widespread and systematic character of the attacks, which appear to be carried out on a clearly organized basis. This is evident when examining the rise in attacks that took place in 2013, in the form of violent attacks on religious places of worship and people, as well as the spread of anti-Muslim and anti-Christian rhetoric.

A number of comprehensive reports have been prepared, detailing attacks carried out in 2013; prepared, in particular, by the Sri Lanka Muslim Congress (SLMC), the National Christian Evangelical Alliance (NCEA), as well as civil society organizations such as the Centre for Policy

Alternatives (CPA).<sup>13</sup> These set out detailed lists of incidents of violence directed against religions and religious places of worship belonging to all communities

# 4.1 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 have seen a meteoric rise, with the SLMC Report stating that at least 241 anti-Muslim attacks have been carried out in 2013. These attacks take different forms. Reported incidents are broadly about direct attacks on Mosques and Muslim people. There is also a concerted campaign against the 'Halal' logo; a similar campaign against the Muslim dress code; accompanied, and undergirded by, hate speech directed at the Muslim community and the Islamic religion.

Some of the key incidents in this regard include:

- the setting on fire of the Talawakele Jamiul Anwar Madrasa by an unidentified group (6 Jan 2013)
- the third attack on the Anuradhapura Malwathuoya Mosque (9 Jan 2013)
- the attempt by 150 monks from the BBS and Sinhala Ravaya groups to storm the Jailani Mosque (26 Jan 2013)

<sup>&</sup>lt;sup>13</sup> See: 'Religious Violence in Sri Lanka, January 2013-December 2013: An update of "Muslims' Concerns" presented by the Sri Lanka Muslim Congre ss to the United Nations High Commissioner for Human Rights, August 2013' [hereinafter: 'SLMC Report'], available at: http://www.onetext.org/wp-content/uploads/2014/03/Annex-1-Religious-Violence-2013.pdf; NCEASL, 'Incidents of Violence and Intimidation of Christians 2013' [on file with author] [hereinafter: 'NCEASL Report']; CPA, 'Attacks on Places of Religious Worship in Post-War Sri Lanka' [hereinafter: 'CPA Report'], available at: http://f.cl.ly/items/3L2T1z0A1G1f3o0m2H3g/Attacks%20on%20Religious%20Places.pdf

- the attack on the Galle Hirumbura Mohideen Jumma Mosque (22 Feb 2013)
- the attack on the Kegalle Jumma Mosque on the Colombo-Kandy main road (28 Feb 2013)
- the attack on a warehouse belonging to Fashion Bug (a popular Muslim-owned textile store) (28 Mar 2013)
- Sinhala Ravaya attack on Muslim-owned shops and residences in Ratnapura, allegedly after mutual agreement between the group and the Ministry of Defence (3 Apr 2013)
- the attack on a Muslim-owned textile store named 'The Lucky Emporium' by a gang (16 Apr 2013)
- a temporary mosque at Grandpass area in Colombo is forced to relocate within one month by the Ravana Balaya group (9 June 2013)
- masked individuals stone the Mahiyangana Mosque, assault its trustee and break into the Mosque and throw a pig's head and flesh into the precincts (11 July 2013)
- Sinhala Ravaya monks storm into a temporarily constructed mosque in Grandpass claiming it is an illegal construction (17 July 2013)
- a Buddhist mob attacks the Grandpass mosque (10 Aug 2013)
- the Masjidhul As Shafee Mosque is stoned at night (18 Dec 2013).<sup>14</sup>

Apart from the above, the anti-Halal campaign has also been a prominent feature and slogan of Sinhala-Buddhist nationalist groups in 2013. The following are some of the incidents relating to this campaign:

 Minister Champika Ranawaka (of the JHU) states that Halal certification is only necessary for goods produced for Muslims, and not for goods consumed by others (22 Jan 2013)

<sup>14</sup> See generally: SLMC Report, ibid, p. 5-26.

- The BBS announces 2013 as the year of 'Halal eradication' (7 Feb 2013)
- Demonstrations are held by the Sinhala Ravaya group against Halal certification (9 Feb 2013)
- The Secretary General of BBS (Galagodaaththe Gnanasara Thero) gives an ultimatum to the government to ban Halal certification by 31 March (17 Feb 2013)<sup>15</sup>

The traditional dress code of the Muslims has also been sought to be banned. For example:

- Sinhala Ravaya organized a meeting under the topic of Prohibition of the terrorist burqa', and a poster campaign against the 'Fardha' with statements such as "Ban burqa in Sri Lanka" (11 Mar 2013) and;
- the BBS called for the ban of the Niqab (15 Jun 2013)<sup>16</sup>

This broader campaign involves the spread of hate speech directed at the Islam religion, the Muslim people, and their way of life. This follows the age-old and popular projection of the Muslim community as a serious threat to the Sinhalese; as is sought to be done today. Here, the sole responsibility of an impending clash between the Muslims and the Sinhalese is sought to be placed on the Muslim community.<sup>17</sup> The spread of hate speech took place in the following ways:

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>&</sup>lt;sup>17</sup> See Udaya Gammanpila, 'Avoiding a repeat of what happened 100 years ago?', available at: http://www.ceylontoday.lk/76-22299-news-detail-avoiding-a-repeat-of-what-happened-100-years-ago.html: "As someone who has studied the Sinhala — Muslim clashes in 1915, I strongly feel a repetition of that disaster is imminent. The promotion of Halal products, unauthorized mosques and organizing competitions to learn Islam for non-Muslim children are among the present day causes.

- the wall of Meera Makkam Mosque in Kandy town was defaced by an unidentified group. The walls had contained messages written in Sinhala threatening the Muslims and reminding them that this is a Sinhala country (31 Jan 2013).<sup>18</sup>
- notices and leaflets warning the Sinhalese not to consume food in Muslim hotels because it causes impotence in Sinhalese men (20 Jan 2013)
- the BBS states that all newly established mosques are 'bunkers of jihad' (22 Jan 2013)
- the BBS compares the Jamiyyathul Ulama to the LTTE and claims that the organization's actions are similar to those of the LTTE leader Prabhakaran (19 Feb 2013)
- the BBS complains that Muslims returning from Makka after Hajj are involved in spreading fundamentalism in the country (21 Feb 2013)
- posters appear in Kandy asking people not to frequent Muslim shops (14 Mar 2013)
- Rev. Sobitha allegedly delivers a speech against Muslims at the Pitipena Purana Rajamaha Vihara (17 Mar 2013)
- the BBS urges Sinhalese to protect the nation without allowing other races or religions to take over, calling further for Sinhalese families to have at least 5-6 children to ensure the greater growth of the Sinhala population (24 Mar 2013)
- the BBS General Secretary announces that Muslim doctors are working against the Sinhala Buddhist community and that the Sinhalese should therefore reject treatment from Muslim doctors (9 June 2013).

<sup>18</sup> See CPA Report, note 13 above, p. 52.

<sup>19</sup> See SLMC Report, note 13 above, p. 5-26.

The SLMC Report identifies as the key perpetrators of these attacks, political/social movements and politicians.<sup>20</sup> It is clear from the incidents listed in the reports, as well as some of the incidents listed above, that groups such as BBS, Sinhala Ravaya and Ravana Balaya have been in the forefront of this anti-Muslim campaign.

# 4.2 Attacks on Christian places of worship:

Christian places of worship have also been attacked in 2013. Most of the attacks against the Christian community have been on Evangelical Christians and their places of worship. The NCEA has listed over 100 incidents<sup>21</sup>, while the SLMC Report points to some 69 similar incidents, in 2013 alone. Some of these incidents are as follows:

- three Buddhist monks have reportedly entered the premises of the New Life Church in Ratnapura and damaged the name board of the church (29 Jan 2013)<sup>22</sup>
- 40 persons and a Hindu priest disrupt 60 Christians (Assembly of God church) gathered for prayers (6 Jan 2013)
- the BBS publicly threatens individual that rents space for prayer meetings of the Calvary Church (10 Feb 2013)
- a mob led by Buddhist monks disrupts worship service at the Gethsemane church (16 Mar 2013)
- prayer meeting at the Believers Fellowship church is disrupted by the BBS, worshippers assaulted and property damaged (24 Mar 2013)
- anti-Christian/Muslim rally organized by the Sinhala Ravaya group, with verbal attacks directed at the churches. Police advised closure of the Assemblies of God Church (4 May 2013)

<sup>&</sup>lt;sup>20</sup> *Ibid*, p. 1.

<sup>&</sup>lt;sup>21</sup> See generally, NCEASL Report, note 13 above.

<sup>&</sup>lt;sup>22</sup> See CPA report, note 13 above, p. 40.

- a violent mob attack is carried out on the Methodist Church of Sri Lanka (16 June 2013)
- Buddhist monks physically and verbally abuse the pastor of the New Life Church, with the church also being attacked by a mob (23 June 2013)
- stones are hurled at the Light House church (24 Dec 2013)<sup>23</sup>
- mobs disrupt service, beat up the pastor and threaten the congregation at the Jesus Good News Ministry, Wennapuwa (24 Feb 2013)
- Christian assaulted by Buddhist monks at Galkulama, Anuradhapura (13 Mar 2013)
- petrol bombs hurled at the premises occupied by the pastor and family, Samaritan Church, Ahangama, Galle (21 Dec 2013).<sup>24</sup>

It is also necessary to note here that the attacks on Christian churches need to be viewed in the backdrop of the issuance of a series of circulars<sup>25</sup> in a bid to 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. They have been used by complainants (mainly Buddhist monks) in an attempt to pressurize Christians to close prayer centres – with the police appearing to have been very active in these instances, far more than they have been in preventing religious based violence and/or in arresting

<sup>&</sup>lt;sup>23</sup> See SLMC Report, note 13 above, p. 28-32.

<sup>&</sup>lt;sup>24</sup> See generally, NCEASL Report, note 13 above.

<sup>&</sup>lt;sup>25</sup> See in particular, 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].

perpetrators of such violence. Local authorities have relied on these purported circulars to deny planning permission.<sup>26</sup>

This is again a reflection of the breakdown in 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 of the minority communities in the country.

#### 4.3 Attacks on Buddhist places of worship

Attacks on Buddhist places of worship have been reported in the past.<sup>27</sup> These have largely been acts of theft and vandalism. But Buddhist places of worship and Buddhist monks have also been the targets of violence in 2013; with certain Buddhist monks being physically threatened and attacked. One brutal incident in this regard was the murder, on 3 February 2013, of the Chief Incumbent of Egoda Uyana Sunanda Upananda temple Ven. Matigahatanne Wimalawansa Thera.<sup>28</sup> However there has been no concerted campaign of violence against the Buddhists by any other religious group in the country.

#### 4.4 Intra-religious violence

It is to be noted that intra-religious violence is also a factor that has had an impact on the protection of religious freedom. In particular, tensions between the many factions within the broader Muslim community has been evident: especially

<sup>&</sup>lt;sup>26</sup> There are a number of incidents wherein the Police and local authorities have ordered Christian places of worship to be closed down; see generally, NCEASL Report, note 13 above.

<sup>&</sup>lt;sup>27</sup> See generally, CPA report, note 13 above, p.p. 69-71.

<sup>&</sup>lt;sup>28</sup> *Ibid*, p. 73.

between Sunni Muslim groups and the more traditional groups/Sufis; between those who are considered to be preaching an orthodox version and those adopting a more moderate approach—with groups adopting the latter approach (such as the Tawjeed Jamad) reportedly coming under attack. Reports from 2012 make reference to incidents such as the burning of a supermarket in Uswatta (Galle district) following a clash between the Thawheed and Tariqa factions.<sup>29</sup>

#### 4.5 Continuing challenges

The above incidents narrate a very bleak story about the protection of religious freedom in the country. While all religious groups are indeed affected (i.e. including Buddhists), there appears to be a more concerted and well planned attack unleashed against the Muslim and Christian communities in the country. Furthermore, alleged 'unethical conversions' is also widely perceived to be a continuing or enduring threat by the Buddhists, as well as certain other religious groups.<sup>30</sup> This has led to attacks on Evangelical Churches, as discussed above.

To be noted here is that Buddhist groups have often referred to the Constitutional provisions guaranteeing the prominence of Buddhism, during its campaigns. For instance, the BBS stated in 2013 that Article 9 of the Constitution, guaranteeing the prominence of Buddhism, is limited to mere words on a piece of paper.<sup>31</sup> In other words, the inclusion of

<sup>29</sup> Ibid, p. 54.

<sup>30</sup> Ibid, p 91.

<sup>&</sup>lt;sup>31</sup> Colombo Page, 'Prominence given to Buddhism only limited to words in Sri Lanka's Constitution, Buddhist organizations claim', available at: http://www.colombopage.com/archive\_13A/May29\_1369831513 CH.php

Article 9 is often used to support and justify campaigns carried out by such Sinhala-Buddhist groups.

Unfortunately, legal action against such widespread attacks has been minimal. As some of the above mentioned incidents suggest, the police have adopted a position that seeks to protect certain Buddhist groups. With such perceived inability and 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 in the near future.

#### 5. Religious Freedom in the North and East

Issues of religious freedom in the North and East of Sri Lanka – the two contested provinces – take a specific character. While some of the challenges faced by the Tamil people of the North and East regarding religious freedom are similar to those faced by people in the rest of the country, the specificity of the North and East situation has much to do with the intention to adversely affect the idea of a collective identity and nationhood shared by the Tamil people in the North and East.

There are a number of cases reported in the past, wherein Hindu places of worship in particular have been affected by acts of robberies and vandalism, resulting in the destruction of property.<sup>32</sup> Hindu religious rituals and practices have been sought to be stopped in the past (for example, in the Shri Bhadra Kali Amman temple in Chilaw). In certain instances the groups promoting such violence were unidentified, but on other occasions they are alleged to have been Buddhist

<sup>&</sup>lt;sup>32</sup> CPA report, note 18 above, p 80-81.

groups, including Buddhist monks, and politicians.<sup>33</sup> In 2013, a Hindu temple located in Dambulla was reportedly demolished.<sup>34</sup>

But the question of religious freedom in the North and East needs to be appreciated from a more specific lens given the ethnic conflict and conflict-related tensions in the country. Problems pertaining to religious freedom in these areas need to be understood as affecting the nationality and nationhood claims raised especially by the Tamil people. It is, and is perceived as, an attack on the distinct Tamil identity. This is evident when appreciating the specific manner in which religious freedom gets violated, and constrained, in the North and East.

Principally, there are continuing restrictions placed on people's ability to access religious places of worship such as churches in areas which are closed off by the military. Military encroachment on land, including the land belonging to churches, has been a serious concern. The presence of High Security Zones (HSZ) exacerbates the problem. For example, as the CPA report states, there are some 15 churches and 3 parishes within the Palaly HSZ which continue to be off-limits to civilians. Similarly, certain Muslim places of worship in the North and East have also come under the control of the Sri Lankan Army. Furthermore, religious freedom is curtailed

<sup>&</sup>lt;sup>33</sup> Government representatives, such as Minister Mervyn Silva, have been in the forefront of this campaign. See, for instance: Hiran Jayasinghe, 'Mervyn storms Munneswaram Festival, stops "sacrifice" ritual', available at: http://www.sundaytimes.lk/110918/News/nws\_15.html

<sup>&</sup>lt;sup>34</sup> Colombo Gazette, 'Dambulla Hindu Temple destroyed', available at: http://colombogazette.com/2013/10/29/dambulla-hindu-temple-destroyed/

<sup>35</sup> CPA Report, note 13 above, p. 45.

<sup>36</sup> Ibid, p. 62.

when such places of worship are prevented from carrying out any religious activity during the month of November (coinciding with the birth anniversary of the LTTE leader) or in May (which is a time of mourning for the Tamil people who lost their loved ones during the war).

Much of this is accompanied by the resurgence in Buddhist temples and other Buddhist-related symbols in the North and East.<sup>37</sup> These are meant to assert the (Sinhala) Buddhist identity in areas which the Tamil people consider to be their areas of historical habitation. There are reports that Buddhist temples and Buddha statues are being constructed, even close to Hindu Kovils.<sup>38</sup> Unsurprisingly, the Hindu community has expressed fear that their religious and cultural rights are being threatened in post-war Sri Lanka. Entire districts are allegedly transformed, or 'Sinhalized', as recent commentary points out.<sup>39</sup>

As the CPA notes, especially with regard to the North:

"The issue of post-war religious freedom in the North differs in many respects from the rest of the country and is linked to continued militarization and allegations of Sinhalisation in these areas... [...] there is a strong perception that the State and Sinhala actors are attempting to assert their control through multiple means including through religious symbols.

<sup>37</sup> Ibid, p. 46.

<sup>38</sup> Ibid, p. 85-87.

<sup>&</sup>lt;sup>39</sup> See, for example, Elijah Hoole, 'Erasing Identities: Tracing Sri Lanka's Post-War Journey through the Changing Realities of Trincomalee', available at: http://groundviews.org/2014/05/13/erasing-identities-tracing-srilankas-post-war-journey-through-the-changing-realities-of-trincomalee/

In this sense the threat is seen more as an attempt to undermine Tamil cultural and political identity and less in terms of a challenge to Hinduism."

#### 6. International Focus on Religious Freedom in Sri Lanka

The year 2013 saw, as an inevitable and necessary culmination of developments discussed above, greater international focus on religious freedom in Sri Lanka.<sup>40</sup>

The United Nations Human Rights Council (UNHRC), adopting its second consecutive resolution on Sri Lanka (Promoting reconciliation and accountability in Sri Lanka', A/HCR/22/L.1/Rev.1, of 19 March 2013), expressed concern at the "continuing reports of violations of human rights" including, *inter alia*, "discrimination on the basis of religion or belief."<sup>41</sup>

The focus on the religious freedom heightened this year, given the increased number of attacks and violence directed at religions and religious places of worship. As examined above, this was a matter that was of particular concern to the Muslim community, with their political representatives

<sup>&</sup>lt;sup>40</sup> States were alerted to the growing trend of religious intolerance in 2012. The US State Department, for example, noted: "In Sri Lanka, Buddhists launched sporadic violent attacks on Christian churches and continued to allege forced or deceitful conversions, which created societal tension. Growing intolerance of and discrimination against Muslims by some Buddhists increased." See: US State Department, 'International Religious Freedom Report for 2012: Executive Summary', available at: http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm#wrapper <sup>41</sup> Available at: http://daccess-dds-ny.un.org/doc/RESOLUTION/LTD/G13/122/61/PDF/G1312261.pdf?OpenElement

making efforts to promote greater awareness internationally, of the threats and challenges posed by Buddhist-groups.<sup>42</sup>

The 2013 resolution on Sri Lanka was interestingly adopted just a day after the UNHRC had adopted a resolution titled 'Freedom of religion or belief' (A/HRC/22/L.9, 18 March 2013). This resolution urged States to "step up their efforts to protect and promote freedom of thought, conscience and religion or belief", and to this end ensure, *inter alia*,

- (h)"... the right of all individuals to worship, assemble or teach in connection with a religion or belief and their right to establish and maintain places for these purposes, and the right of all individuals to seek, receive and impart information and ideas in these areas";... and
- (k) "[t]o take all necessary and appropriate action, in conformity with international human rights obligations, to combat hatred, discrimination, intolerance and acts of violence, intimidation and coercion motivated by intolerance based on religion or belief, as well as any advocacy of religious hatred that constitutes incitement to discrimination, hostility and violence, with particular regard to persons belonging to religious minorities in all parts of the world."

Damningly, events that followed in the country went to show that the Sri Lankan State has not been able to take effective measures, as expected and envisaged by the UNHRC resolution on religious freedom.

<sup>&</sup>lt;sup>42</sup> Hence the 'SLMC Report' (quoted above), prepared by Muslim-politicians and political representatives and addressed to the UNHRC.

#### 7. Conclusion

The year under review witnessed the escalation of violence directed at adherents of minority faiths and their places of worship, and the worsening of the situation concerning the protection and promotion of religious freedom in Sri Lanka. The State and the government, appear to have failed to ensure the greater protection of religious freedom of peoples and their constitutional rights, both in direct and tacit ways, as discussed above. In light of the above examination, this chapter suggests the following:

- i) The government is the key stakeholder in protecting and promoting religious freedom in the country. It has a responsibility to protect and promote the religious freedom of citizens, as well as the responsibility to protect its citizens from religion-inspired violence. Therefore, the government should be called upon to take swift action to arrest the culture of religious intolerance and impunity that is sweeping the country, and to hold credible investigations and prosecutions.<sup>43</sup>
- ii) The above call needs to be aligned with the call for a revamp of the current constitutional and legislative framework (e.g. the abolition of the 18th Amendment

<sup>&</sup>lt;sup>43</sup> 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 (No vember, 2011)', para 9.267, p. 384, available at: http://www.defence.lk/news/pdf/FINAL-LLRC-REPORT.pdf

to the Constitution), which will 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) Civil society groups and interested parties need to continue to highlight the need to abolish Article 9 of the Constitution which gives prominence to Buddhism. While this is not the 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.
- iv) Human rights and civil society institutions should carry out proper and credible documentation, of violations of religious freedom of people belonging to all religious denominations, including attacks on religions and religious places of worship. 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 international actors to create greater awareness of the problems pertaining to the protection of religious freedom in the country, and effect some change on the ground. Particular emphasis can be placed on multilateral forums such as the UNHRC, and special mandate holders such as the Special Rapporteur on Freedom of Religion and Belief. This is essential to exert

#### Sri Lanka: State of Human Rights 2014

- pressure on the government and relevant stakeholders who are directly and/or indirectly promoting violence and discrimination.
- vi) Identify and engage more visibly with progressive religious representatives (especially Buddhist monks). It is essential that civil society groups facilitate and engage in this discussion which should, in principle, be oriented towards an inward critical reflection of the politics and practices of their respective religious communities.
- vii) As a necessary part of the above process, civil society groups should also make greater effort to promote critical discussions between the more progressive religious figures and those who are seen to be responsible for inciting religious hatred within the country.

# FREEDOM OF EXPRESSION & THE MASS MEDIA: WEAK SUPPORT FOR DEMOCRACY BY NEWS MEDIA

Lakshman Gunasekara\*

#### 1. Introduction

This chapter reviews the conditions of freedom of expression (FoE) within Sri Lanka during the course of the year 2013. There is an overview of the current legal framework that guarantees FoE and, a survey of violations of citizens' rights of FoE – either as individuals or as groups or organisations. There is an attempt to identify trends either of improvement or deterioration of FoE and, also, to indicate positive action that may need to be taken to rectify violations of FoE.

The review includes a major focus on conditions for the practice and functioning of the news media in the country. This is because the news media is a most significant arena of the practice of freedom of expression and, is the key social communication structure that helps sustain representative democracy, the rule of law, good governance and social justice. Individual citizens and social interest

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Sri Lanka: State of Human Rights 2014

groups give expression on a mass scale to their ideas, aspirations, grievances and interests through the nationwide operational structure of the new media industry.

At the same time, citizens and interest groups rely on this same news media industry to consume a wide range of information that is useful, if not essential, for the functioning and progress of individual citizens, social groups, and the society as a whole. Such information includes information about each other as citizens and social groups, news of events in society and polity, government policy and action, development and economic issues, environment, health, security and disasters, and so forth.

This 'information exchange' dynamic of the news media industry, on the one hand, enables the country's citizens and social groups to learn about each other. On the other hand, this same dynamic enables political society—i.e. those elected to Government and those in Opposition monitoring government—to learn about issues and priorities of civil society, i.e. the citizenry, and especially, organised elements of the citizenry so that governance focuses better on meeting the needs of society and polity.

Furthermore, the 'information exchange' dynamic provided by the news media system enables a diverse Sri Lankan population to learn about more each other so that there could be common discourses nationwide contributing to greater social harmony and national stability. In a country which has been torn apart by a devastating civil war for nearly half of its post-colonial period, one cannot underestimate the crucial importance of such a 'social communication' dynamic of the news media system. The review undertaken in this Chapter will be done in accordance with this understanding of the specific value of freedom of expression and freedom of the media in Sri Lanka. In addition to presenting the situation of FoE violations and mitigating actions (if any), there is also an assessment of how much the news media system itself is contributing to building democracy and social harmony, especially in a context of post-war recovery.

### 2. Legal Framework of Freedom of Expression

The Freedom of Expression is both guaranteed and restricted by the following Constitutional provisions and laws of the country:-

- 01. The Constitution of the Republic, Article 14 (1) (a) guarantees "the freedom of speech and expression including publication".
- of the fundamental rights of Freedom of Expression and Association for the purpose of ensuring "racial and religious harmony" and also "in the interests of national security, public order and the protection of public health or morality". It must be noted that while there are government institutions (such as the Ministry of Defence, the Judiciary, the Ministry of Health) that have the competence to a priori define 'national security', 'public order' and 'public health', there are no government institutions vested with the power or competence to define what is meant by 'morality', other than what would be defined by a court of law in the event of litigation arising from an related issue. These freedoms are further restricted in relation to

- Parliamentary privilege, contempt of court, defamation or incitement to an offence.
- 03. The Constitution, Article 10, guarantees the "freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice."
- 04. The Constitution, Sixth Amendment, imposes a total ban on the advocacy of secession from the Sri Lankan State, even by peaceful means.
- 05. Section 120 of the Penal Code restricts public utterances that could be interpreted as 'sedition'.
- 06. The Sri Lanka Press Council law (1973) empowers a government-appointed body to define and punish publication of material construed as harmful to a range of government activity from defence and national security to financial regulation and economic management. This body's functioning was suspended earlier but has been reinstated by the current government without its full legally required complement of Council members i.e. those members who are nominated as representatives of working journalists organisations and media trade unions.
- 07. The Public Performances Ordinance (1912) empowers a Public Performances Board under the Ministry of Defence to regulate, by granting prior approval, all public performances or displays of an artistic nature.
- 08. The Public Security Ordinance (1947) enables the government to impose blanket censorship on any public expression and also to seize the assets of those deemed as undermining public security.
- 09. The Prevention of Terrorism Act (1981) imposes severe and broad restrictions on any statement that could be loosely construed as supportive of "terrorism" an offence

that is also very loosely defined – so loosely defined as to enable the practice of arrest and detention of anyone who publicly criticises the government. Journalist J. S. Tissainayagam, a noted critic, was earlier convicted to a prison sentence of several years for writing several published sentences that were construed as an offence under the PTA.

10. The Human Rights Commission of Sri Lanka, in its law, defines a 'human right' as that defined by the United Nations International Covenant on Civil & Political Rights and the International Covenant on Economic, Social & Cultural Rights.

The legal framework outlined above regulates, very broadly, most forms of public expression, whether it is by individuals, through the news media or through artistic and cultural activity, including entertainment.

### 3. Overview of Situation of Freedom of Expression

### 3.1. General Condition of Repression

This review is done with a perspective of the general condition of FoE as it has evolved over the preceding years within the larger context of the broader conditions of the Sri Lankan polity, in particular, the overall health of Sri Lankan democracy and the fundamental rights of citizens guaranteed by the polity. Hence, there is a continuity of perspective in line with the perspectives of previous annual SHR reports compiled by the Law & Society Trust. It is a perspective that sees a continued deterioration of human rights in the country, including that of Freedom of Expression.

Since the early 1980s and, in some small instances, even earlier, the country has been experiencing violations of

- (a) individuals' rights of freedom of expression,
- (b) institutional rights of publication and broadcast,
- (c) professional media workers' rights and,
- (d) of social group (e.g. ethnic minorities, women) rights of equality, security and cultural identity.

# The nature of the violations of FoE and the mass media are broadly:

- assassination of media professionals and other individuals noted for their public dissent from governmental policy, from prevailing popular opinions and, from non-governmental political opinion.
- abduction and 'disappearance' of media professionals and outspoken individuals,
- iii) arrests and detentions without formal charges by security agencies,
- iv) prosecution and conviction (imprisonment) of media professionals and individuals on flimsy grounds (best example is that of Journalist J. S. Tissainayagam),
- v) administrative harassment of publishing and broadcast institutions by a variety of means by government, such as imposing of unfair taxes on targeted companies, stringent probes of companies (and company directors) for alleged tax violations, imposing of high import duties on goods needed for printing, withholding of State sector advertising, etc.
- vi) temporary banning or closure of publications, broadcast channels or State seizure of publishing houses using 'nationalisation' laws.

The bulk of the above-mentioned violations have been perpetrated either by successive governments, or by suspected groups linked to successive governments. It is no coincidence that the volume of such violations has peaked at times when political and social violence has been worst. In the Sri Lankan post-colonial history, such peaking of violations occurred first during the parallel insurgencies: of the southern, anti-state, rural youth movement (the Janatha Vimukthi Peramuna or People's Liberation Front) alongside (but quite separate from) the northern, ethnic (Tamil) secessionist movement, at first by several Tamil guerrilla forces, and later, solely the Viduthalai Pulihal or Liberation Tigers of Thamil Eelam. The State's severe response to the JVP's second1 (and deadlier) insurgency in the 1987-91 period and, far more severe, and longer, State counter-insurgency war against the Tamil secessionist insurgency was the worst period of human rights violations in Sri Lanka's modern history at that time. Veteran FoE rights activist and journalist Seetha Ranjani has counted up to 114 journalists, writers, other artistes killed (in relation to their work) throughout Sri Lanka's modern history from the first such killing in 1981 to 2009.2

Individuals' FoE and media workers' rights violations peaked for a second time – after the first severe bout of repression during the 1980s and early 1990s - during the massive counter-insurgency State military campaign in 2005-2009 that crushed the LTTE. The Committee to Protect Journalists (New York, USA) counted 19 journalists killed in Sri Lanka from 1992 onwards.<sup>3</sup>

<sup>&</sup>lt;sup>1</sup> The JVP launched a short-lived insurgency in 1971 which was crushed by a much smaller scale (yet bloody) State counter-insurgency over a few months.

<sup>&</sup>lt;sup>2</sup> Martyrs of the Freedom of Expression in Sri Lanka—Seetha Ranjanee, (Free Media Movement, Colombo, 2011).

<sup>3</sup> http://cpj.org/killed/asia/sri-lanka.

At the same time, anti-government insurgent groups as well as political groups are also suspected to have been responsible for violations of rights of outspoken and dissenting individuals and journalists. The main suspect groups are the anti-government LTTE and JVP/DJV<sup>4</sup> and, the pro-government EPDP<sup>5</sup>. The number of violations by non-governmental actors is considerably less than those suspected to have been perpetrated by pro-government actors.

What is most noteworthy is that almost the entirety of the numerous violations of FoE and media rights over the decades have not been fully investigated with no perpetrators (whether governmental or non-governmental) being convicted of these crimes. This contrasts starkly with the diligent and swift police and judicial response against perpetrators of conventional crimes such as the murder of a senior judge who was very quickly caught and swiftly convicted and, also against numerous suspected DJV and LTTE cadres and their detention and their conviction or 'rehabilitation'.

This pattern of selective State response to rights violations over decades has served to create general conditions of impunity for those attacking critics of the government, including media professionals and, an environment of fear

<sup>&</sup>lt;sup>4</sup> DJV = Deshavimukthi Janathaa Vyaapaaraya (People's Movement for National Liberation); the DJV was the JVP's 'front' organization in the name of its second insurgency was carried out.

<sup>&</sup>lt;sup>5</sup> EPDP = Eelam People's Democratic Party, a Tamil secessionist militant group that, in the mid-1980s rejected the separatist goal and allied with the Sri Lankan State. Its head, Douglas Devananda, has served as a cabinet minister under successive governments while its armed cadres have fought the LTTE alongside the Sri Lankan forces; its cadres are often accused of extortion, kidnapping and assassinations.

that dissuades the free expression of dissent and work by media professionals and media companies to produce news that either critiques governmental actions or exposes mis-government, nepotism and corruption. Such a pattern of selective response by the State's law and order agencies clearly coincides with the regime of political repression, i.e.:

- (a) the victims of repression (be they media related or other critics and civilian opposition actors) do not, or rarely, receive redress; instead,
- (b) their repression comes at the hands of those very same State agencies using laws and administrative mechanisms for repressive purposes (e.g. censorship, the PTA, Public Security Ordinance, criminal laws etc.) or by actors whose actions benefit those in government or are close to government. At the same time,
- (c) those victims or supposed victims of crime/political violence who are either within government or the security agencies or who are linked to government political or security actors receive attention very quickly and vigorously from these same law and order agencies.

It is arguable, therefore, that the violation of FoE and media rights is, currently, intrinsic to the Sri Lankan polity and will remain so as long as there prevails the underlying conditions of authoritarian rule and impunity for violators who are close to those in State power. At the same time, due to this hostile atmosphere for dissent, many journalists who are known active critics of the government find it difficult to work<sup>6</sup>

<sup>&</sup>lt;sup>6</sup> A number of such senior journalists are currently marginalized by the media industry due to this with some compelled to migrate overseas or seek asylum. Some of these media workers are currently active in critical websites or in Sri Lanka related rights networks abroad.

within the mainstream news media industry due to the reluctance of media owners to employ them out of fear of blacklisting of their media outlets or other forms of administrative harassment (such as frequent questioning of their staff by security agencies, overtly intimidatory surveillance<sup>7</sup>, etc.).

#### 3.2. Blocking of internet websites

In 2013, too, there continued the practice of blocking of selected internet websites. The blocking of some websites, such as Lankaenews, Sri Lanka Mirror, Tamilnet, and SriLanka Guardian, that had begun earlier, continued in 2013. While the authorities, namely the Sri Lanka Telecommunications Regularity Commission and the Media Ministry have continued to deny any role in such a blocking, this has continued and, the fact that it is only the Regulatory Commission that can authoritatively act to either block or unblock, prompts Sri Lankans to believe that the enforcement of the blocking is done informally and, the owners of the blocked channels and websites, are reluctant to publicly acknowledge their self-inflicted constraints due to fear of the regime.

#### 3.3. Repressive conditions continue in 2013

By 2013, the year under review, the actual incidents of violations had declined considerably and, for example, there were no killings of anyone on issues of FoE or media rights. However, the persistent failure to identify and prosecute perpetrators of past violations of FoE and media rights

<sup>&</sup>lt;sup>7</sup> White vans have become a symbol of State repression and are known to be used to openly surveil such critical media workers and other dissenters to deliberately cause fear.

ensured that the general conditions of impunity, fear and intimidation remained unabated during 2013. No progress has been made, for example, in the investigation of the January 2010 abduction and disappearance of writer, cartoonist, and blogger Prageeth Ekneligoda, a known critic of the government of President Mahinda Rajapaksa. In spite of this being a high profile case that has drawn international attention and with government officials and parliamentarians making strident claims as to the whereabouts of Ekneligoda, the investigating agencies have failed either to inquire into these claims or to make any regular public announcements about progress.

Even though there were no killings of anyone in relation to FoE in 2013, there were yet several acts of violence against journalists, attacks on private media companies and arbitrary questioning and temporary arrests of media workers. These instances are listed in the following section. And no redress has been forthcoming in all these instances. The general atmosphere of intimidation that continued from past years was thus strengthened by these instances of violence. Additionally, there was also the continued violence in 2013 in other sectors of social life, such as:

- attacks on opposition politicians and activists, and civil society activists (e.g. activist-lawyers);
- the disruption of various democracy-oriented formal programmes by civic action groups<sup>8</sup> by mobs either claiming to be "patriots" or un-identifiable groups; and,

<sup>&</sup>lt;sup>8</sup> The National Peace Council, Transparency International Sri Lanka, and other civic or social action organizations continued to experience such disruptions to their programmes, especially activities outside Colombo such as in remote rural areas where such attacks or disruptions are not easily reported in the national media.

 the violence against or other kinds of disruption of, nongovernmental civilian protest actions (demonstrations, vigils) such as by university students, kin of 'disappeared', trade unions.

The fact that, for another year in succession, none of the perpetrators of these attacks or illegal disruptions were identified and prosecuted and, nor has there been any vigorously pursued investigations, serves to add to the environment of impunity, thereby further adding to the general conditions of fear and repression. The Committee to Protect Journalists (CPJ, USA) ranks Sri Lanka in the 4<sup>th</sup> worst place for journalists worldwide in 2013 precisely on the basis of this combination of killings and other violence against journalists together with the environment of impunity for this violence.<sup>9</sup>

Therefore, it can be indisputably concluded that 2013 constituted yet another year of repression of the news media and suppression of the right to FoE.

# 4. Notable Types of Violations in 2013<sup>10</sup>: Media as a Tool of Repression

While the number of actual attacks on news media persons was low in 2013 as compared with previous years, journalists, dissenting cultural workers and FoE campaigners continued to function in an atmosphere of intimidation due to the continuation of the general conditions of repression mentioned above.

<sup>&</sup>lt;sup>9</sup> Global Impunity Index 2014, Committee to Protect Journalists (CPJ, New York, 2014).

<sup>&</sup>lt;sup>10</sup> The consultant is indebted to the data gathering research work done by LST staffer Dilhara Pathirana for this section.

2013, however, was particularly marked by other aspects of the assault on the Freedom of Expression. This section focuses on two important such aspects that, while being characteristics of the general conditions of FoE and media repression even in the past, became prominent during 2013. These two significant dimensions of the attack on Freedom of Expression are:

- (a) the use of the news media itself as a tool of repression against FoE and the media; and,
- (b) the attacks on cultural rights and practices of ethnic and religious minorities and marginalised social groups, such as women.

While 'a' is discussed in this section, Section 5 below will discuss 'b'.

The use of the news media as a repressive tool had two noteworthy features in 2013:

- the use of and deployment of media organs and media workers by the government to further its repressive agenda by countering other media organs and media workers who are critical and more independent;
- the use of such media 'agents of repression' to vilify and undermine the credibility of non-media critics of the government (civic activists, politicians), especially critics focussing on rights issues.

#### 4.1. Media against media

2013 saw a most salient case of this phenomenon, namely, the case of the Channel 4 TV crew. At the same time, the case of the 'disappeared' critical columnist and blogger Prageeth Ekneligoda came into prominence in 2013 because both a senior government official as well as government

politicians were featured prominently in the State-owned media with provocative and misleading claims about Ekneligoda seemingly aimed at diverting attention away from his disappearance. Both these cases are discussed below as examples of the use of the news media itself to attack FoE and the rights of the news media as a whole.

## 4.1.1. The hounding of Callum Macrae of UK's Channel 4 TV

The focus of the Government on its efforts to ensure a successful hosting of the Commonwealth Heads of Government summit in November 2013 resulted in heightened sensitivity to media reportage of human rights conditions in Sri Lanka throughout the year. There was constant vilification by government politicians and allies of media workers both of Sri Lanka and abroad who focussed on rights issues and issues of social justice. The most prominent example of this was the campaign in the government-controlled media against Callum Macrae, the producer of the already famous Channel 4, UK, documentary video 'Sri Lanka's Killing Fields' which reported on the allegedly massive civilian casualties during the final phase of the Government's military campaign that crushed the ethnic Tamil separatist insurgent movement, the Liberation Tigers of Thamil Eelam (LTTE). Numerous articles in the press and on the internet, either published by Government of Sri Lanka-controlled media organs or contributed by known pro-government writers and radio and TV commentators, often went beyond basic journalistic ethics and sometimes defamation and libel laws in naming and criticising Macrea.

When Macrae arrived in Sri Lanka in November 2013 to report on the Commonwealth Summit he was already notorious and widely known in Sri Lanka. It is significant that the vast bulk of the vilification of Macrae was in the Sinhala and, to a lesser extent, the English language media (press, radio, TV) and done by known ethnic Sinhala commentators with records of strong ethno-nationalist advocacy. Given that Macrae's work focussed on the war in the North pertaining to the Tamil separatist insurgency and the civilian casualties reported were ethnic Tamils, this persistently hostile response by Sri Lankan Sinhala media workers and media organs clearly indicates that this "criticism" of Macrae was far more than a professional or moral critique of his journalistic practice and was more in the nature of hostile ethnic political behaviour by Sri Lankan media workers.

During his stay in Sri Lanka during the CHOGM, Macrae and his professional team came under constant hostile questioning by such local journalists and also were subject to harassing surveillance by the police authorities and also unidentified persons believed to be undercover police and other security agents. This strong attention resulted in the Sri Lankan media overall reporting on Macrae in a manner that was largely unfavourable to Macrae with almost no mainstream media attempting any balance by giving equal prominence to his own side of the story.

#### 4.1.2. The Prageeth Ekneligoda case

The way the government and the security and police authorities have been handling the famous case of disappeared journalist Prageeth Ekneligoda exemplifies the evasiveness and duplicity with which even the most severe cases of violations of FoE are being treated. In November 2011, former Attorney General and then Legal Adviser to the President, Mohan Peiris (currently Chief Justice of Sri Lanka), had told the UN Committee Against Torture (CAT) sittings in Geneva that he had been informed by State "intelligence" that Ekneligoda was living abroad. Subsequently summoned by the court hearing the Ekneligoda disappearance case in Sri Lanka, Mr. Peiris told the court on 6th June, 2012, that what he had told the UN in Geneva was based on "hearsay" information provided by an intelligence official and that he could not remember the source of this information. There is no evidence that either Mr. Peiris or the police investigators have subsequently attempted to clarify this mysterious aspect of "mis-information" at the highest levels about the whereabouts and very survival of a citizen and a journalist.

On June 7th, 2013, the Government's Puttalam District Parliamentarian, Arundika Fernando, told Parliament that Ekneligoda was living in France. In a subsequent clarifying statement on Friday, he claimed that he had met Ekneligoda together with exiled Sri Lankan journalist-activist Manjula Wediwardena. He claimed that the cartoonist had shaved his head and was in disguise. Featured in a programme on a private TV channel that same Friday, Fernando claimed he was a "good friend" of Wediwardena. In the MP's presence, the TV channel telephoned Mr. Wediwardena in France. "I do not know Mr. Fernando at all. I have never met him," Mr. Wediwardena replied. The French embassy in Colombo subsequently stated that there was "no evidence at all" to suggest that journalist Prageeth Ekneligoda, who

<sup>&</sup>lt;sup>11</sup> 'Former Attorney General testifies in Prageeth's case: and admits he misled the UN' report in *Sri Lanka Campaign for Peace & Justice* blog post 06-06-2012.

Freedom of Expression & the Mass Media: Weak Support for Democracy by News Media disappeared in Sri Lanka three years previously, was living in that country. 12

UNP Kalutara District MP, Ajith P. Perera, on June 17th, 2013, told Parliament that he was informed by the Ministry of Defence that there was evidence to prove Prageeth Ekneligoda had been abducted by an organized group.13 MP Perera, participating in the debate on the Parliamentary Scholarship Board (Repeal) Bill, said he was also informed by the ministry that the abductors of Ekneligoda have not been identified yet. The MP tabled a letter he had received from the Ministry of Defence and Urban Development. The letter, dated 12 June 2013, was signed by K.A. Ranjith, Additional Secretary (Parliament and Civil Affairs), on behalf of the Secretary to the Ministry of Defence and Urban Development. The MP quoted the Defence ministry letter as saying: "The Senior DIG Western Province reported that according to the details found so far from investigations, information has been found to believe that Prageeth Ekneligoda had been abducted by an organized group."14

At end 2013, despite such seemingly authoritative claims, there had been no progress whatsoever on the case. There was no report that the police investigators had thought fit to investigate either the claim by Presidential Legal Adviser (Mohan Peiris) or that by Government parliamentarian Fernando.

14 Ibid.

<sup>&</sup>lt;sup>12</sup> 'France says no evidence at all of Ekneligoda living there' – news report by Chris Kamalendran in Sunday Times newspaper, 09-06-2013.

<sup>13</sup> Freedom of Expression blog, 18-06-2013; Sunanda Deshapriya - blogger.

# 4.2. Media against social rights and justice campaigners: the misuse of State media

The phenomenon of pro-government media workers taking it on themselves to vilify dissenting media workers, social activists, artistes, and politicians is not unique to Sri Lanka. It is a typical political tactic employed by repressive regimes the world over who use the media as tools of repression. This tactic has been in existence in the State-owned media for decades but while previous governments' tenures saw milder versions of this phenomenon, it has been the last few years that has seen this tactic being used in the most sustained manner and deploying the most harsh content — content that could easily be construed as 'hate speech' campaigns targeting individuals. It is useful for the understanding of the nature of the attack on freedom of expression to discuss this phenomenon in this Chapter.

Newspapers in Sinhala and English controlled by the Government – i.e. state-owned publications – regularly run commentary columns by journalists which often name either other journalists known for their critical journalism or, well known (or, not so well known) opposition political activists or rights activists and criticise them using the harshest – if not vulgar – language to describe the character of these personalities or their behaviour or their past record in the most negative, if not derogatory, manner.

Indeed, there were instances of such commentary amounting to near-libellous or defamatory speech. State-owned and government-controlled radio and television channels run regular, if not daily, commentary programmes that similarly name such critics and dissenters, including media rights and human rights activists, and criticise them in the most offensive manner, denigrating their characters. It is most noteworthy that, very often, it is the same set of critical/dissenting individuals and organisations that are targeted by these commentators in both the State-owned print as well as broadcast media, indicating strongly that such campaigns of vilification are coordinated and well planned.

Continuing from previous years, some well-known political activists, rights advocates, including lawyers, such as Nimalka Fernando (specialist women's rights and minority rights activist-lawyer), Pakiasothy Saravanamuttu (scholar and rights activist), Sunanda Deshapriya, (critical journalist and FoE activist currently in exile), Jehan Perera (peace and ethnic rights advocate) and, Upul Jayasuriya (rights lawyer and current president of the Bar Association) are among those who were targeted in 2013. They were constantly subject to virtual abuse and near-defamation by commentators in the State-owned news media, especially in the press and radio.

While there are columns in the privately owned news media that also are critical of rights activists or rights advocacy organisations – usually labelled as "foreign-funded NGOs" or "NGO activists" – such criticism, as long as it is not libellous or defamatory or 'hate speech', may be deemed the rightful, subjective, opinion of a privately owned media organ. That is, in a pluralistic society, it is permissible, indeed essential, that there is (non-abusive) criticism from all sides of society against all sides in any human activity. And, a privately owned media organ may justifiably choose to 'represent' a single viewpoint. Such a bias, while legitimate as one viewpoint, may be damaging to the overall national

Sri Lanka: State of Human Rights 2014

social fabric if not counter-balanced by other viewpoints in an equally representative manner.

However, while that may be valid for the private sector, in the State-owned media, there cannot be any singular bias in favour of just one side of a public debate or discussion of human rights or of social or political or other public issues. The State-owned media, as public property, must be deployed in a manner that provides an equal platform for the widest possible range of views on any subject. The current behaviour on the part of sections of the State-owned news media is not only a violation of the rights of individual citizens but also a most serious violation of the national interest, in terms of the State's duties defined in the Constitution, and its correction is long overdue.

## 5. News Media against Ethnic 'Minorities' and as Promoter of Ethnic Domination

This section highlights the serious phenomenon of interethnic conflict as portrayed and re-produced at the level of social attitudes and community consciousness by the news media. This phenomenon has been noted and pointed out, albeit inadequately, since the early stages of the ethnic conflict, as a trend of behaviour in the traditional news media, namely, the press, radio and television.

On the one side, the national news media has consistently betrayed tendencies of emphasising one ethnic and religious identity as against other ethnic groups. The larger, and therefore more influential, section of the industry, is, in accordance with market size, the Sinhala language news media, and hence, the very structure of the news media industry itself supports such the *ideological prevalence* 

(i.e. a dominant discourse) of a pro-ethnic majority bias in the 'news map' that the media constantly presents to its audiences.

On the other hand, in the post-war period, the politics of an ethnic 'victory' over other ethnic groups, has been reproduced on mass industrial scale by the news media. This has only served to strengthen the 'ethnic dominance' conception of nationhood as the prevailing discourse that crowds out any other more balanced and nuanced discourse that could have encouraged social inter-relationship rather than discord.

### 5.1. Ethnic oppression and the news media

Since the early stages of the ethnic conflict in Sri Lanka, indeed, some years before the conflict matured into a fully-fledged internal war, there has been a critique of tendencies in the Sri Lankan news media to undermine some ethnic communities and promote conceptions of a 'dominant' majority ethnic group along with a mono-ethnic identity for the Sri Lankan republic. The very first such critique came from the Council for Communal Harmony through the Media (CCHM) in 1981-84, a project of the Marga Institute that monitored news media reportage of ethnic conflict related incidents and trends and analysed such reportage for unfair bias against or in favour of any single ethnic group. A regular publication issued by this in Sinhala, Tamil and English (e.g. 'Media Monitor', 'Maadhya Nireekshaka') identified such biases and campaigned for more balanced counter-narratives in the news coverage for specific incidents/ episodes. For a variety of reasons this had little effect on the news media of the time.

In the 1990s, the Centre for Policy Alternative's Media Research unit, headed by Dr. Arjuna Parakrama, undertook a similar but far more scholarly and detailed study of such news media biases. Circulating periodical publications (identically named as in the CCHM project) and also detailed scholarly reports, the CPA's Media unit performed the vital service of describing the continuation, at a maturing level, of the same ethnic biases in the news media as first pointed out in the early 1980s by the CCHM.

Scholarly analyses by the CPA went on to present a well-constructed 'model' of ethnically biased behaviour by the news media and its correlation with ethnic community consciousness and ethnic conflict.<sup>15</sup>

### 5.2. News media reporting ethnic violence in 2013

While these studies of media behaviour during the internal war have established the existence of such biases, in the post-war period it must be noted that such biased behaviour has continued, if not worsened.

In 2013, there has continued this under-treatment of events and trends that are harmful to the Tamil, Hindu, Christian, Moor and Islamic ethnic and religious groups. On the one hand, there has been a widening of ethnic-related attacks against the above-mentioned social groups, the degree of this violence and its exact nature (i.e. the identity of the perpetrators, types of attacks – destruction of shops, sacred sites, churches etc). On the other hand, the news media has singularly failed to inform its national audiences of the serious significance of this worsening trend and its specific

other similar interventions include a study published by the ICES, edited by Prof. G. H. Peiries: Studies of the Media in South Asia & Sri Lanka, and also published and un-published papers by this Consultant.

characteristics, an understanding of which might help Sri Lankans respond more constructively by either distancing themselves from such socially damaging violence or by actively rejecting such anti-minority behaviour.

The most notable anti-minority action in 2013 was the campaign against the general and wholesale practice of Islamic 'Halal' certification of food products in the Sri Lankan market. This campaign was launched by the Bodu Bala Sena (= Buddhist Power Force), the most active Buddhist-Sinhalese supremacist organisation that had suddenly mushroomed two years previously. Known for the public support it received from powerful government officials, the BBS launched its campaign against Halal certification in February 2013. The campaign ran for several months with the bulk of the media coverage being the statements and actions of the BBS and its allies. While some Islamic authorities, including the certification authority itself, were given some media space, it was always as a response to claims and allegations by the BSS, thereby affirming the defensive status of the minority Islamic religion against this onslaught on an important religious practice that had been observed on a mass industrial scale for decades without any previous controversy.16 Most significantly, the actual practitioners of the Halal certification, the entire Sri Lanka mainstream food processing industry, were not immediately interviewed, nor did their representatives come forward to clarify that Halal certification was being done not at the insistence of the Muslims but at the request of the industry for commercial reasons of reaching the widest possible consumer market.

<sup>&</sup>lt;sup>16</sup> Until the BBS raised the issue, most Sri Lankans were unaware that many food products in the market, including all popular meat products, were Halal certified.

Indeed, it is possible to argue that throughout the entire duration of the months-long Halal campaign, no media outlet reported in detail the industry role in Halal certification — a clarification that would certainly have reduced the onus on the Islamic community to explain industry-wide Halal certification. This professional lapse — arguably, more deliberate editorial policy than mere technical oversight<sup>17</sup> - has to be construed as a major failure on the part of the Sri Lankan news media to reduce rather than worsen interreligious and inter-ethnic tensions.

In 2013 too, the news media gave more space to the BBS's campaign against various Muslim shrines<sup>18</sup> rather than to the actual histories and cultural significance of these shrines from any secular point of view. Again, more accurate and comprehensive media coverage would have clarified the relative socio-cultural importance of these sites and reduced fears that such sites were damaging to non-Islamic religions.

In both the instance of the Halal campaign and also the campaign against some of the Islamic shrines, the actual campaigns later died down without either the Halal certification ended or the shrines demolished (as demanded in the BBS campaigns), but the news media singularly failed

<sup>&</sup>lt;sup>17</sup> On the one hand, there is the typically non-sympathetic bias against Muslims/Islam by the Sinhala community, including Sinhala journalists and mainstream news managers; on the other hand, media industry owners may have closed ranks to defend the overall business community from being embarrassed and targeted as "betrayers" of the (Sinhala) race by accepting Halal certification.

<sup>&</sup>lt;sup>18</sup> The most prominent one being the 10<sup>th</sup> century shrine of an Islamic saint in Kuragala which is partly in the area of ancient Buddhist monastic ruins. This site had long been registered and supervised (if inadequately) by the Department of Archeology.

to track such events and episodes. This failure has left the mass audiences unaware of the end results or whether even such campaigns were actually seeking outcomes rather than being mere propaganda for whipping up ethnic tensions. At the same time, the lack of balanced reportage has left the minority Islamic community even more convinced of its marginalisation and subsidiary status, thereby contributing to a worsening of inter-ethnic relations in a country that is just recovering from a devastating internal ethnic war.

## 5.3. Attacks on minority religions undermine religious freedom

The spate of forced intrusions and attacks on places of Christian worship in parts of rural Sri Lanka especially in 2013<sup>19</sup>, were also reported more from the point of view of the attackers – consistently Buddhist-Sinhalese in identity – rather than in the form of balanced reportage that gave equal prominence to the views and interests of the Christian (often Sinhalese themselves) victims who used those churches.

While the discussion above has focused on the news media's role on attacks on minority religions, the incidence of such attacks points to a general undermining of the freedom of religious expression in the country in 2013.

The National Christian Fellowship of Sri Lanka reports 105 incidents of attacks on their member churches throughout 2013.

<sup>&</sup>lt;sup>19</sup> All these places were located in areas that are part of predominantly ethnic Sinhala and Buddhist populated regions; there is no record of attacks on similar Christian religious places in predominantly Tamil or Muslim/ Moor areas which further lends credence to the conclusion that the anti-Islamic and anti-Christian attacks have popular backing and legitimacy among the Sinhala-Buddhist sections of the population rather than among the minorities.

Sri Lanka: State of Human Rights 2014

All these member churches are small churches – either in their own church buildings or, in 'house churches' – in rural areas and many of the attacks received little, if no, media reportage.

There is no record of any prosecution let alone conviction of the attackers. In almost every instance, the attacking groups behaved in a public manner and claimed justification on grounds of the majority religion of the locality, namely Buddhism, being "under threat" from the more recently established churches. Hence the failure of any prosecuting action once again creates conditions of impunity for anti-religious minority suppression and the forcible eradication or, at least, marginalisation, of non-Buddhist religions. This has only added to the on-going conditions of minority ethnic marginalisation and inter-ethnic conflict.

2013 may be seen as a year of worsening inter-religious tensions.

# 5.4. Media promotion of ideologies of supremacy and counter-supremacy

If this 'discord' is sustained by the traditional media, the internet-based or 'Web' media has, in most recent years, mushroomed as the principal platform that overtly and singularly enables consistently competitive and confrontational re-presentations of these contours of ethnocommunal domination and subjugation. The Web media, given its facility for free and individually initiated public expression, has enabled, on an unprecedented scale, both the articulation of ethnic rivalry and also the strengthened perception of ethnic co-existence in Sri Lanka as being one of rivalry for supremacy.

What this means is that, in terms of the Sinhala-Tamil ethnic conflict, it is increasingly perceived solely as a contest for ethnic hegemony over the island State. It is almost never seen today, at a popular level, as a social context in which inter-ethnic rivalry exists at a 'cultural identity' level while at the same time, socio-economic and political issues are also drivers that bring about joint mobilisations of some class layers of ethnic groups on the basis of common socio-economic and political interests — such as economic development, governance issues.

In terms of Sinhala-'Muslim' conflict, it is now increasingly perceived as a contest for supremacy between 'true' religions/ philosophies. This has provided fertile ground for the emergence of an explicit (Sinhala) Buddhist supremacism, in opposition to which there is an explicit Islamic supremacism and a Christian supremacism.<sup>20</sup>

Again, it is the news media and also the Web media that facilitates global discourses of rival religious 'supremacisms' that are drawn on by local interest groups to build localised parallel discourses. Indeed, supremacist ideologues on all sides in Sri Lanka tend, today, to portray this rivalry of 'supremacisms' as a reflection of the global battle against (their) 'Good' against (the religious others') Evil.

# 5.5. Web media and religious oppression

While the traditional news media has contributed to this interethnic rivalry, the sharpest edge of the discourse is in the

While the common terms applied across religions to this phenomenon are either 'fundamentalism' and 'extremism', the Consultant argues that such terms are inaccurate and, in terms of actual theology/philosophy, the rationale is of a 'supremacy' of one religion/philosophy over all others in the claim to 'Truth'.

explicit and crude 'hate speech' to be seen in You Tube and Facebook that is primarily of anti-Islam in nature. In 2013 such Web media-based hate speech exploded in volume directly linked to the tensions and animosities accompanying the actual street violence and attack on Islamic shrines and places of worship and Muslim-owned shops and residential areas.

Similarly, it is in the Web that some Islamic preachers have carried out sustained preaching campaigns targeting other religions attempting to denigrate them and ridicule their 'Truth'. While such preachers were hardly known beyond their immediate localities, the use of the Web has enabled the proliferation of their hostile messaging, fuelling the mass perception of contests between religions for 'Truth' supremacy.

# 5.6. Under reportage of violence against women and gender equality issues

In 2013, too, the news media continued to report cases of violence against women in terms of their 'sensation value' rather than as incidents of crime. Thus, spectacular cases of physical violence against women would receive media prominence. However, the vast number of such cases of violence is under-reported whereas various other petty crimes like household robbery, high value thefts etc., regularly receive greater prominence especially in the press.

# 6. News media industry weaknesses in upholding media rights

This survey will not be complete without a comment on the continuing failure of the news media industry to acknowledge its role in Sri Lankan democracy by making interventions to both defend violations of media rights and also to correct

Freedom of Expression & the Mass Media: Weak Support for Democracy by News Media industry practices that result in negative impacts on the fabric of democracy.

## 6.1. Lack of industry support against rights violations

While the conditions of impunity for attacks on media professionals and on media ventures remained in 2013, for example, with little progress on any such violation, the news media proprietorship, that is the industry, did not make any attempt to actively raise these issues in a public manner even though it directly involved industry interests.

Throughout 2013, there has been no reported statement or public action either by the Newspaper Society of Sri Lanka nor by any grouping of the audio-visual media industry to seek redress for the long list of past violations against media ventures or media professionals, that is, their employees.

The movement for media rights and FoE in Sri Lanka is one that is almost entirely led by organisations of media professionals, mainly journalists' associations with almost no public interventions by the industry. While the Press Institute of Sri Lanka is jointly managed by journalists, news managers and press owners, the publicly profiled actions of the Institute rarely feature the owners. It is appreciated that there are individual industry owners who have contributed much towards this tripartite activity for the benefit of the news media, but more collective interventions are needed in support of actions by journalist organisations and their leaders undertaken at much risk to their lives and careers.

Indeed, it may be argued that the cause of media freedom and FoE, which directly benefits the news industry, is largely taken up by the media professionals with much sacrifice — including lives and careers – but with little support from a major beneficiary of such activism, namely, the industry ownership.

In the past, especially in the early post-colonial period, press barons had contributed much to raising media standards and supported journalists in their endeavours to fulfil professional roles, thereby benefiting Sri Lankan democracy. The industry today faces the challenge to revive this active role for the benefit of both industry and the fabric of democracy at a time when it is facing major threats.

At the same time, the critique in this Chapter of the lack of professionalism in the media and its negative impact on the Sri Lankan society and polity should also be a spur to the industry ownership to take action as an industry to raise standards of professional practices and to refine news policies in a manner that will contribute to social peace and genuine national unity.

### 7. Recommendations

### 7.1. To the Government:

- · End the culture of impunity
- Investigate all past and imminent violations of freedom of expression - properly and transparently investigate attacks on media institutes and media personnel; ensure perpetrators are prosecuted and convicted and compensation made where required
- Ensure a safe and enabling environment for journalists and rights activists
- Ensure accountability for all past violations
- Ensure that victims, their families and media organizations are updated about progress of investigations

 Stop the use of state media to vilify journalists and media organizations critical of the government (and other human rights defenders, opposition politicians, lawyers etc.) and make false allegations against them

 Repeal the Prevention of Terrorism Act (PTA) or bring it in line with international human rights standards

- Enact Right to Information and Victim and Witness protection legislation, in line with international standards and in consultation with media organizations and all other relevant stake holders
- De-activate the government controlled Press Council
- · Stop the practice of trying to control private media
- Extend an invitation for the UN Special Rapporteur on Freedom of Expression to visit Sri Lanka along with a team of other Special Procedures mandate holders
- Convert State controlled media into Public Service Media so that it genuinely serves the interest of the public in a politically non-partisan manner.

## 7.2. To the News Media Industry:

- Be more actively involved in safeguarding media and FoE rights
- Actively seek redress for violations against media companies/institutions and media professionals, especially their own professional employees; ensure protection and support for such affected employees
- Ensure professional and ethical standards are maintained constantly by their media staff and in the profiling of their publications and broadcast channels
- Ensure gender, ethnic and socio-cultural sensitivity in reportage content

- Enable unionising of journalists in their workplaces and membership of such professional associations by employees
- collaborate with media rights and FoE rights groups, including media professionals' bodies for better standards in the news media and for the protection of the news media

#### 7.3. General

- Internet-based media need to be streamlined and codified (a mix of self-regulation and state regulation) to ensure that Freedom of Expression on the internet is not abused by destructive elements such as for hate speech and sexual exploitation
- Programmes by the news media aimed at re-building intercommunity trust via the media and also in collaboration with civic action groups.

#### **SCHEDULE 1**

UN Conventions on Human Rights & International Conventions on Terrorism signed, ratified or acceded to by Sri Lanka as at 31st December 2013\*

(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

Convention on Biological Diversity

Acceded on 23 March 1994

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.

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 6September 2000

International Convention against the Taking of Hostages

Acceded on 6 September

International Convention for the Suppression of Acts of Nuclear Terrorism

Acceded on 14September 2005

International Convention for the Suppression of Financing of Terrorism

Ratified on 6 September

International Convention for the Suppression of Terrorist Bombings
Ratified on 23 March 1996

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, Boobytraps and Other Devices (Protocol 11 as amended on 03<sup>rd</sup> 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 4May 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 2013

No	Convention Name	Ratified Date	Present Status
C4	Night work (Women) Convention, 1919	08.01.1951	Denounced
C5	Minimum Age (Industry) Convention, 1919	27.09.1950	Denounced
C6	Night Work of Young Persons (Industry) Convention, 1919	26.10.1950	Denounced
7	Minimum Age (Sea) Convention, 1920	02.09.1950	Denounced
C8	Unemployment Indemnity (Shipwreck) Convention, 1920	25.04.1951	
C10	Minimum Age (Agriculture) Convention, 1921	29.11.1991	Denounced
C11	Rights of Association (Agriculture) Convention, 1921	25.08.1951	
C15	Minimum Age (Trimmers & Stockers) Convention, 1921	25.04.1951	Denounced
C16	Medical Examination of Young Persons (Sea) Convention, 1921	25.04.1950	

Sri Lanka: State of Human Rights 2014

No	Convention Name	Ratified Date	Present Status
C18	Workmen's Compensation (Occupational Diseases) Convention, 1925	17.05.1952	
C26	Minimum Wage Fixing Machinery Convention, 1928	09.06.1961	
C29	Forced Labour Convention, 1930	05.04.1950	
C41	Night Work (Women) Convention (Revised), 1934	02.09.1950	Denounced
C45	Underground Work (Women) Convention, 1935	20.12.1950	
C58	Minimum Age (Sea)Convention (Revised), 1936	18.05.1959	
C63	Convention concerning Statistics of Wages and Hours of Work, 1938	25.08.1952	Denounced
C80	Final Articles Revision Convention, 1946	00.09.1950	1
C81	Labour Inspection Convention, 1947	03.04.1950	
C87	Freedom of Association and Protection of the Right to Organise Convention, 1948	15.11.1995	
C89	Night Work (Women) Convention (Revised), 1948	31.03.1966	Denounced

No	Convention Name	Ratified Date	Present Status
C90	Night Work of Young Persons (Industry) Convention (Revised), 1948	18.05.1959	
C95	Protection of Wage Convention, 1949	27.10.1983	
C96	Pre-charging Employment Agencies Convention (Revised), 1949	30.04.1958	
C98	Rights to Organise and Collective Bargaining Convention, 1949	13.12.1972	
C99	Minimum Wage Fixing Machinery (Agriculture) Convention, 1951	05.04.1954	
C100	Equal Remuneration Convention, 1951	01.04.1993	
C103	Maternity Protection Convention (Revised), 1952	01.04.1993	
C105	Abolition of Forced Labour Convention, 1957	07.01.2003	
C106	Weekly Rest (Commerce and Offices)Convention, 1957	27.10.1983	
C108	Seafarers' Identity Documents Convention, 1958	24.04.1995	

Sri Lanka: State of Human Rights 2014

No	Convention Name	Ratified Date	Present Status
C110	Conditions of Employment of Plantation Workers Convention, 1958	24.04.1995	
C111	Discrimination (Employment and Occupation) Convention, 1958	27.11.1998	
C115	Radiation Protection Convention, 1960	18.06.1986	
C116	Final Articles Revision Convention, 1961	26.04.1974	
C131	Minimum Wage Fixing Convention, 1970	17.03.1975	
C135	Worker's Representatives Convention, 1971	16.11.1976	
C138	Minimum Age for Admission to Employment, 1973	11.02.2000	
C144	Tripartite Consultations to Promote the Implementation of ILO Convention, 1976		
C160	Labour Statistics Convention, 1985	01.04.1993	
C182	Worst Forms of Child Labour Convention, 1999	01.03.2001	

#### **SCHEDULE 111**

# Humanitarian Law Conventions Ratified by Sri Lanka as at 31st December 2013

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 2013

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), 1July 2002 (entered into force)

#### SCHEDULE V

Fundamental Rights (FR) Cases Decided during the year 2013

#### Article 11 - Freedom from Torture

Ganesan Nimalaruban's case - Filed as a Fundamental Rights case, but leave to proceed was refused and case dismissed -

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Peiris v Weerakoon Inspector of Police SC (FR) 278/2008 SC Minutes 25 October 2013.

# Article 12 (1) - Fundamental Right to Equality

Ranathungage v. Commissioner General of Labour SC (FR) Application No. 620/2010, SC Minutes 7.5. 2013.

Pirashanthan v. University of Peradeniya SC (FR) Application No.478/2009 SC Minutes 13 February 2013

Alles v Road Passenger Services Authority of the Western Province SC (FR) 448/2009 SC Minutes 22February 2013.

Jayawardana v. Principal, DS Senanayake College SC (FR) 231/2012 SC Minutes 18 December 2013.

Amavindi v. Principal DharmashokaVidyalaya SC (FR) 138/2013 SC Minutes 18 December 2013

Noon v. University Grants Commission SC(FR) 352/2010 SC Minutes 28 November 2013.

Pathinayaka v. Police Sergeant Bandara SC (FR) 367/2010 SC Minutes 3 May 2013.

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#### INDEX

### A

access to education
accountability

35, 38, 39, 40, 41, 42
3, 4, 5, 6, 7, 9, 10, 11, 22, 28, 30, 31, 59, 66, 84, 85, 120, 121, 124, 134, 188, 223
adequate housing
anti-Halal campaign
attacks on Muslims

35, 38, 39, 40, 41, 42
3, 4, 5, 6, 7, 9, 10, 11, 22, 28, 30, 31, 59, 66, 84, 85, 120, 121, 124, 134, 188, 223
177, 78, 79, 128, 159, 161
178
177, 215

### $\mathbf{B}$

balance of probability
Bodu Bala Sena
18, 173, 174, 215
Buddhist Nationalism
29, 168, 173, 175, 176

## C

119 Ceasefire Agreement Centre for Policy Alternatives (CPA). 256 6, 27, 28, 58, 65, 66, 208 Chief Justice 42 Child Rights Convention 39, 41, 59, 81, 82, 130, 156, children 159, 161, 170, 175, 179, 180 127 citizenship 20, 30, 67, 80, 86, 97, 135, 156, civil society 157, 176, 191, 192, 194, 203, 255 125, 166 community participation 34, 37, 43, 44, 64, 72, 74, 77, compensation 78, 90, 97, 102, 115, 126, 130,

131, 132, 137, 138, 147, 152, 153, 154, 158, 166, 222, 232 154, 160 conflict affected persons conflict induced displacement 153, 154 Constitutional Council 27 Convention on the Elimination of all forms of Discrimination against Women (CEDAW) 76, 226, 228 206 Callum Macrae 2, 3, 10, 20, 22, 23, 207 CHOGM D de-militarisation 103, 134 31, 125 demilitarization 99 de-mining 1, 6, 7, 9, 11, 12, 30, 47, 54, 57, development 59, 62, 64, 65, 69, 78, 79, 89, 87, 89, 90, 91, 92, 93, 97, 103, 105, 106, 113, 115, 117, 124, 125, 126, 127, 131, 133, 136, 137, 138, 139, 141, 143, 144, 145, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 160, 162, 164, 165, 167, 168, 172, 173, 176, 188, 194, 209, 219, 237, 254 development projects 54, 57, 160, 151, 152, 153, 164 109, 174 devolution Directive Principles of State Policy 41 disability 159 disabled 82, 130, 156, 161 discretionary powers 27 displaced persons 59, 60, 69, 70, 73, 80, 81, 82, 83, 92, 93, 112, 113, 114, 116,

	127, 128, 130, 131, 132, 134, 136, 141, 142, 143, 153, 154,	
displacement		
	155, 156, 247	
	60, 61, 70, 71, 79, 80, 81, 88,	
	89, 99, 100, 105, 119, 127, 128,	
	131, 134, 144, 145, 147, 148,	
	153, 154, 155, 162, 244, 248	
due process	6, 28, 35, 37, 38, 42, 115, 133,	
1	144, 166	
democracy	28, 65, 67, 125, 193, 195, 197,	
•	203, 221, 222	
DJV = Deshavimukthi Janathaa Vyaapaaraya (People's		
Movement for National Liberation); 200		
The state of the s		

E

**EPDP** 

135, 136 emergency regulations enforced and involuntary disappearances 2, 11, 15, 17, 124 16, 31, 32 enforced disappearances European Court of Human Rights. 47 Executive Presidency 27 31 extra judicial killings

200

Ľ

Г	
female headed households	81, 158, 160
fiscal policy	55, 58, 62
forced evictions	77, 79, 83, 95, 114
forcible evictions	70
freedom from torture	33, 44, 50, 239
freedom of movement	71, 128, 129
fundamental rights applica	tion 19, 27, 33, 39, 48, 49, 50,
8 11	51, 52, 53, 62

fundamental rights petitions 37, 40, 47, 53, 66, 67

## G

gross human rights

1, 2, 3, 11, 21, 121

gender equality issues

220

### н

Halal certification

178, 179, 215, 216

Halal' logo;

177

High Commissioner for Human Rights 4, 7, 15, 17, 31, 124,

175, 177, 246, 247, 248

housing

77, 78, 79, 82, 83, 88, 89, 117,

119, 123, 127, 128, 129, 130,

131, 134, 142

Human Rights Commission 10, 29, 37, 66, 191, 197

Human Rights Committee 47, 61

Human Rights Council

2, 7, 9, 10, 31, 62, 65, 84, 85,

123, 124

Human Rights Defenders 223

humanitarian crisis

119, 141

humanitarian law

4, 130

## Ι

impeachment

6, 27, 28, 65, 66

impunity,

96

Indian Housing Programme (IHP) 160

internally displaced persons 59, 60, 69, 70, 73, 80, 81, 113,

116

International Community

1, 8, 9, 13, 20, 21, 22, 23, 119,

120, 123, 124, 128, 163

International Covenant on Civil and Political Rights

(ICCPR) 76, 79, 170, 171

International Covenant on Economic, Social and Cultural

Rights (ICESCR) 76, 77

International Law 25, 44, 60, 61, 62, 67, 70, 76,

78, 79, 84, 123, 124, 127, 164,

170

International standards 105, 125, 127, 131, 155, 223

J

journalists 196, 197, 198, 199, 200, 203,

204, 206, 207, 208, 210, 211,

216, 221, 222, 223, 224

justice. 6, 13, 16, 19, 30, 31, 34, 45, 58,

85, 120, 121, 122, 123, 124, 125

Judiciary 2, 26, 27, 28, 29, 30, 33, 34, 43,

53, 55, 64, 64, 66, 67, 171, 155

L

Land Acquisition Act (LAA) 72, 75, 91, 99, 137, 254

land circular 88, 89, 90, 143, 149, 152

Land Commissioner General 91, 94, 104, 111, 109

land commission 84, 87, 88, 91, 93, 94, 104, 105,

106, 107, 108, 109, 110, 111,

112, 113, 133, 143, 149

Land Development Ordinance 91, 92, 144

land disputes 25, 94, 125

land grabbing 151

land issues 2, 31, 69, 71, 73, 75, 77, 79, 81,

83, 85, 86, 87, 88, 89, 91, 92,

93, 94, 95, 96, 97, 98, 99, 100,

101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112,

113, 114, 115

land ownership

73, 127

landless persons

144, 145, 148

legitimate expectation

34

livelihoods,

85, 89, 98, 123, 142, 147, 163

lost lands

89, 90, 91, 92, 98, 144, 145, 148

## M

Maastricht Guidelines

81

milk powder crisis

29

Ministry of Lands and Land Development 87, 93, 113

minority religions

18, 211

## N

National Action Plan for implem of LLRC 7, 15, 69, 73,

86, 87, 92, 93, 94, 95, 96, 97,

103, 104, 106, 107, 110, 111,

112, 113, 124

National Action Plan for the Protection and Promotion

of Human Rights

61, 85, 124, 138

National Christian Evangelical Alliance (NCEA) 176, 256

National Framework for Resettlement Policy 70, 71

National Housing Development Authority 162

National Involuntary Resettlement Policy 73, 131, 152, 153

national schools

38

P Parliamentary Nominations Council 27 Parliamentary Select canmentary 6, 28, 149 People's Alliance for Right to Land (PARL) 97, 98, 100 12, 18, 24, 29, 42, 43, 44, 46, police 47, 48, 49, 50, 51, 52, 54, 62 132, 133, 141 political consensus 46, 92, 95, 96, 111, 127, 128, possession, 148 162 post-conflict housing, 127 post-conflict land issues 137, 141 post-war development 94, 95, 96, 114 Prescription Ordinance principles of natural justice 34 73, 75, 89, 90, 91, 92, 95, 97, private lands 99, 101, 115, 116, 134, 135, 136, 138, 139, 142, 146, 152, 170, 193, 203 74 Private property rights Property Restitution for Refugees and Displaced Persons 82, 83, 84, 127, 128, 129, 131, ("Pinheiro Principles) 162 121 proportionality 72, 74, 91, 100, 116, 151, 152 public purpose Public Security Ordinance 12, 136, 196, 201 Prevention of Terrorism Act (1981) 169, 223, 254 Public Performances Board 196

## R

Rathupaswela 25

Public Security Ordinance 196, 201

Ravana Balaya. 173, 175, 178, 181

reconciliation.	2, 3, 4, 5, 7, 15, 23, 31, 41, 51, 61, 69, 70, 71, 73, 84, 89, 90,	
reconstruction	103	
rehabilitation	125, 139, 158, 159, 162, 164	
Tenaomtadon	44, 116, 117, 125, 126, 141, 158, 159, 162, 164, 166, 200	
religious oppression	219	
religious minorities	29, 189, 205	
	168, 176, 177, 186, 188, 191	
REPPIA	158, 162	
resettlement	165	
resettlement policy	70, 71, 73, 74, 131, 152, 153	
restorative justice	120, 123, 125, 126, 128, 130,	
Justice Justice	133, 141, 154, 155, 163, 164,	
	165, 166	
returnees	132, 160, 161	
right to a livelihood,	129	
right to education	34, 39, 41, 42	
right to equality	27, 33, 34, 35, 37, 38, 39, 40,	
3 1 ,	41, 42, 43, 45, 55, 56, 60, 63,	
	75, 128	
right to fair hearing	45	
right to housing	78, 129	
right to land	69, 76, 79, 83, 97, 98, 100	
right to restitution	88, 117, 118, 123, 125, 126, 127,	
	128, 133, 141, 154, 165	
right to return	127, 137, 153, 154	
right to vote	59, 61, 62, 63	
rule of law	26, 28, 30, 31, 32, 44, 55, 66,	
	130, 133, 193	
Rural Development Authority 147, 148		

S

secondary occupation 70, 84, 88, 95, 114, 142

Sinhala Ravaya 173, 174, 177, 178, 179, 181

Sinhala-Buddhist militant nationalism 173

Sinhala-Buddhist nationalism 176

Special Determinations 25, 32, 54, 62, 65, 66, 67, 171

Special Economic Zone (SEZ) 98, 100, 103, 136

Special Mediation Boards 94

Sri Lanka Muslim Congress 176, 177

standard of proof 46, 48, 49, 53

State land 72, 87, 88, 89, 90, 91, 96, 97,

107, 108, 109, 110, 113, 115,

135, 138, 142, 143, 144, 146,

147, 148, 151, 152, 165, 166

Sixth Amendment 196

Sri Lanka Press Council law 196

Т

Tangalle murder case 30

torture 33, 44, 45, 46, 48, 49, 50, 51,

52, 53, 54, 63, 208

Transitional Justice 30, 31

truth commissions 124, 127

Tsunami Housing Policy 159

U

United Nations Human Rights Council 2, 124, 134, 188

Universal Declaration of Human Rights 42, 61, 76, 79

Universal Periodic Review 62

UK's Channel 4 TV 205, 206

UN Committee against Torture (CAT) 208

 $\mathbf{v}$ 

victims 16, 37, 44, 81, 126, 127, 201,

217, 223, 237

violence against women

vulnerable groups

156, 220

81, 82, 156

W

war crimes 119, 121

women 24, 76, 79, 81, 82, 128, 130,

159

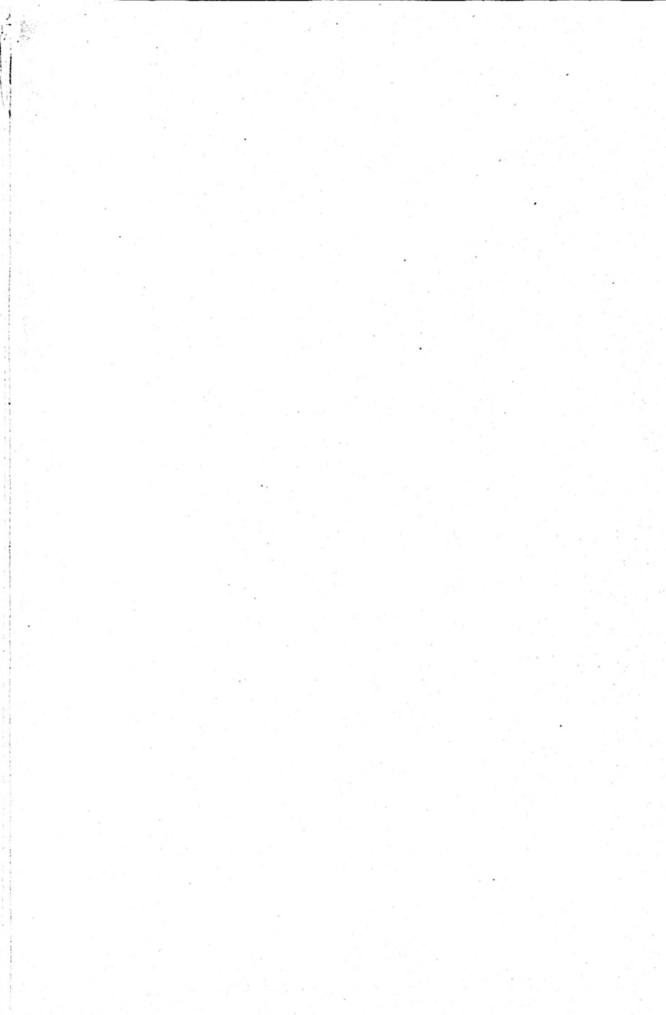
156, 157, 158, 163, 198, 205,

211, 220

World Bank

web media

218, 219, 220



This is a detailed account of the state of human rights in Sri Lanka focusing on the period January 2013 to December 2013.

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