SRI LANKA: STATE OF HUMAN RIGHTS 2017

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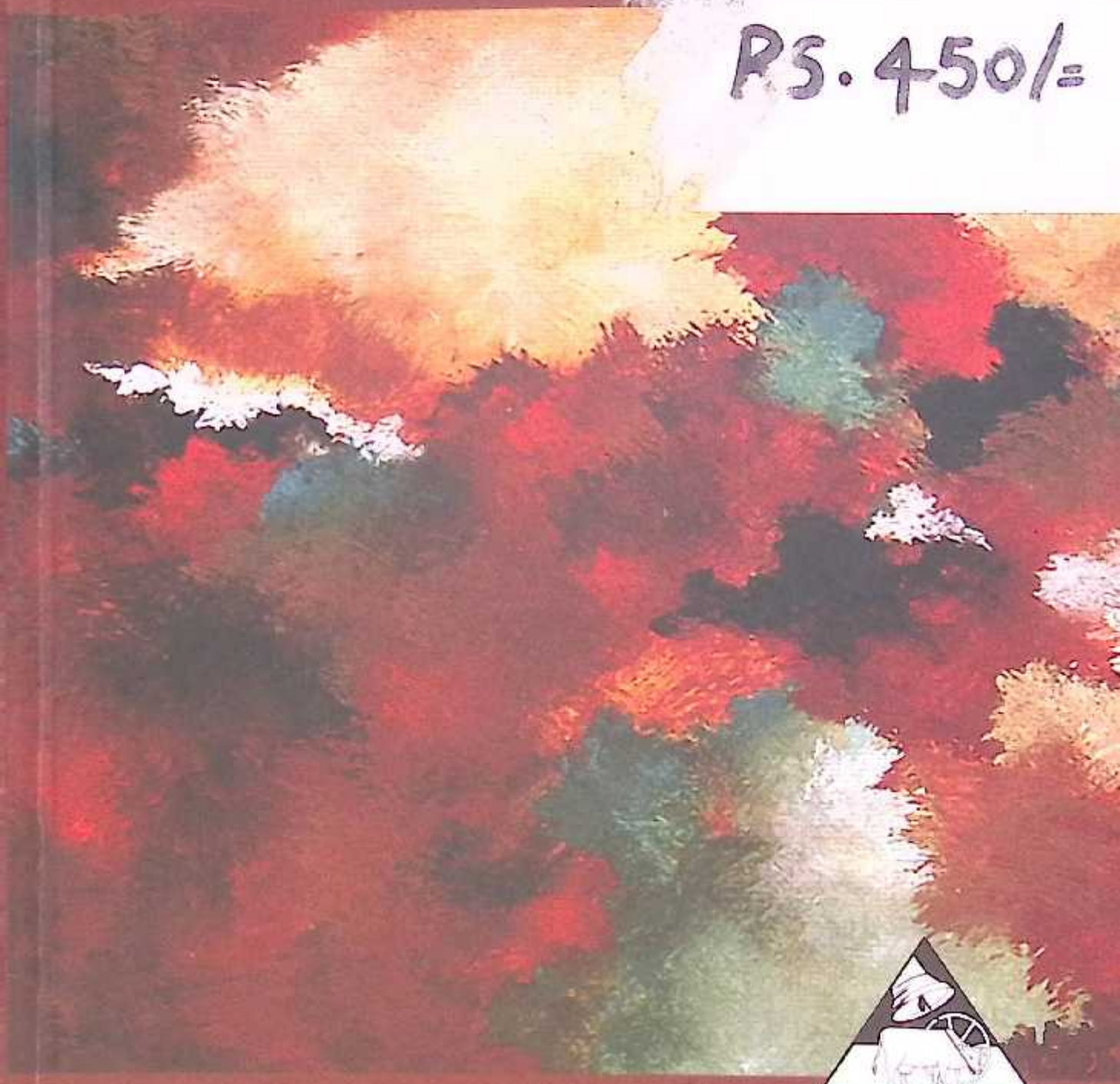

LAW & SOCIETY TRUST

SRI LANKA:
STATE OF HUMAN RIGHTS
2017

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CONTRIBUTORS

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REVIEWERS

Overview of The State of Human Rights in 2016

Dr Mario Gomez

Judicial Interpretation of Fundamental Rights

Dr Sumudu Atapattu

Constitutional Reform

Prof. Camena Guneratne

Status of Persons with Disabilities in Sri Lanka

Dr Dinesha Samararatne

From Protection to Deregulation: Whither Labour Laws in Sri Lanka?

Dr Naazima Kamardeen

The Human Rights Commission of Sri Lanka – 2016 in Review

Mr. V T Thamilmaran

The Right to Information in Sri Lanka

Sabrina Esufally

RESOURCE TEAM

Editor

Dr Dinesha Samararatne

Coordinator

Dilhara Pathirana

Resource Support

Dinushika Dissanayake

Harshani Connel

Prasanna Gajaweera

Janaki Dharmasena

Cover Design

Harshani Connel

ABBREVIATIONS & ACRONYMS

AG	Attorney-General
APRC	All Party Representative Committee
CAT	The Convention against Torture, Cruel, Inhuman Degrading Treatment or Punishment
CBR	Community Based Rehabilitation (CBR)
CEB	Ceylon Electricity Board
CEDAW	Convention for the Elimination of All Forms of Discrimination Against Women
CIABOC	Commission to Investigate Allegations of Bribery or Corruption
CLD	Centre for Law and Democracy
CMC	General Workers' Union
CRPD	Convention on the Rights of Persons with Disabilities
CSOs	Civil Society Organisations
CTA	Counter Terrorism Act
CTF	Consultation Task Force on Reconciliation Mechanisms
DPOs	Disabled People's Organisations
EFF	Extended Fund Facility
EPZs	Export Processing Zones
ESCR	Economic, Social and Cultural Rights
ETCA	Economic and Technical Cooperation Agreement
FOI	Freedom of Information
FR	Fundamental Rights
GMOA	Government Medical Officers' Association

HRCSL	Human Rights Commission of Sri Lanka
ICCPR	International Covenant on Civil & Political Rights
ICG	International Crisis Group
IGP	Inspector General of Police
ILO	International Labour Organization
IMF	International Monetary Fund
JVP	*Janatha Vimukthi Peramuna*
LAC	Legal Aid Commission
LGBTQ	Lesbian, Gay, Bisexual, Transgender and Queer
MPs	Member of Parliament
NCPD	National Council for Persons with Disabilities
NGOs	Non-Governmental Organisation
NHREP	National Human Resources and Employment policy
NHRIs	National Human Rights Institutions
OIC	Officer-in-Charge
OMP	Office on Missing Persons
PA	People's Alliance
PRCCR	Public Representations Committee on Constitutional Reform
PTA	Prevention of Terrorism Act
PwD	Person with Disabilities
RTI	Right to Information
SC	Supreme Court
SID	Special Identity Cards
SLBC	Sri Lanka Broadcasting Corporation

SLFP	Sri Lanka Freedom Party
SLT	Sri Lanka Telecommunications
SOR	Scheme of Recruitment
TEWA	Termination of Employment of Workmen Act
TNA	Tamil National Alliance
TRCSL	Telecommunications Regulatory Commission of Sri Lanka
UDA	Urban Development Authority
UDHR	Universal Declaration of Human Rights
UNHRC	United Nations Human Rights Council
UPFA	United People's Freedom Alliance
WwDS	Women with Disabilities

INTRODUCTION

The *State of Human Rights* for the year 2016 offers seven chapters that present critical reflections on significant developments related to human rights protection and promotion during the year. This volume carries the regular chapters which present an overview of the state of human rights (chapter 1) and an assessment of judicial interpretation of fundamental rights during the year (chapter 2) respectively. The other chapters present thematic analyses of the following – constitutional reform (chapter 3), the rights of persons with disability (chapter 4), labour law (chapter 5) the Human Rights Commission (chapter 6) and the right to information (chapter 7).

In writing the Overview on the state of human rights for the year 2016 Sanjayan Rajasingham argues that the 'continued power and influence of the security sector' and 'the political calculus of coalition government' have to be acknowledged and dealt with in ensuring a sustainable transition from authoritarianism in Sri Lanka. In his analysis he points out that although positive developments in human rights took place in 2016, such as the ratification of the *International Convention for the Protection on Enforced Disappearance* and the provision for certificates of absence by legislative amendment, overall, progress has not been achieved. He points to the gap actively maintained by the Government between commitments made at the international level to improve respect for human rights through transitional justice including accountability on the one hand and the domestic rejection of the same on the other. Rajasingham illustrates this argument using the examples of the proposed Counter Terrorism

Act, the proposed amendment to the *Criminal Procedure Code* and the consultation processes for constitutional reform and mechanisms for reconciliation. He concludes his analysis with the observation that 'the promise of 2015 was dimmed in 2016.' He urges security sector reform and a 'powerful public advocacy campaign' as possible measures for gaining momentum for improving Sri Lanka's human rights record. Failure to do so, he warns, could 'eventually result in a return to authoritarianism in a few short years.'

The chapter on the Judicial Interpretation of Fundamental Rights in 2016 on the other hand offers a positive outlook on respect for human rights. In comparison to the trends discernible in the previous years, the jurisprudence of 2016 provides a more nuanced interpretation of the right to be free from torture, and the right to equality. For instance, in the case of *Manohari Pelaketiya* the judiciary refers to the *Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW)* in determining that sexual harassment in the workplace is a violation of the right to equality. Two decisions interpreting the rules of standing for fundamental rights petitions however have led to a state of confusion on the state of the law. In the *Noble* case the judiciary endorses a literal interpretation of the relevant provisions but nevertheless make a recommendation to the government. In the *Ceylon Electricity Board Accountants' Association* case, Court defends a literal interpretation of the rules in holding that a Trade Union cannot be permitted to file a petition. It must be noted however that the Court does leave the door open for a liberal approach to standing in public interest litigation. A significant improvement in the jurisprudence of 2016 is in relation to the compensation awards made by the Court.

In chapter 3 Harini Amarasuriya offers an analysis of the process of Constitutional Reform during 2016 with a special focus on the public

consultation conducted by the Public Representation Committee. Using the lens of citizenship and democracy she offers a critical analysis of the consultation process. Writing as a member of the Committee she points out that expanded protection for human rights was in fact one of the few themes under which widespread consensus was evident. She further notes that the consultations were approached by different groups seeking special treatment or protection based on their ethnic and/or religious identity. Amarasuriya also discusses the proposals for repealing the constitutional protection for personal laws and for judicial enforcement of economic and social rights. Through this analysis, Amarasuriya demonstrates how ethno-religious identities have been mobilised in Sri Lanka's experience of constitution making and how those trends have endured to date. The 'National question', she points out, has dominated all debates on constitutional reform at the cost of other complex problems of governance experienced by the people. In concluding her analysis she observes that public consultations for constitutional reforms in Sri Lanka in fact have 'revealed a deep sense of suspicion about the political system and political process' of the public and that these views have to be accounted for in any reform exercise that aspires to be 'transformative.' She recommends that the disconnect between the political representatives, their advisors and the polity be bridged in meaningful ways in bringing about such a transformation.

The *Convention on the Rights of Persons with Disabilities (CRPD)* was ratified by Sri Lanka in 2016. The fourth chapter by Azra Jiffry and Binendri Perera study the impact and implications of this ratification within the broader context of rights of persons with disabilities. Using the provisions of the CRPD, Jiffry and Perera argue that Sri Lanka has clearly fallen short in the areas of accessibility, freedom of expression, access to information, and the right to health. They discuss the progress made in the constitutional reform process

where rights of persons with disability was recognised and included in the proposals made by the Sub Committee on Fundamental Rights of the Constitutional Assembly. In contrast they suggest that the inclusion of a chapter on disability in drafting of the National Action Plan for Human Rights amounted to a window dressing. They further contextualise the rights of persons with disability in Sri Lanka by analysing the political, economic aspects as well as the high heterogeneity of the types of persons with disability in the country.

Ramindu Perera and Lakmali Hemachandra offer an assessment of Sri Lanka's Labour laws within the broader context of economic policies including policies for attracting investments during the year chapter five. They focus of legislative reforms, developments in policy in illustrating the push for 'economic liberalization of labour' in 2016. They further investigate the ground level experiences of workers of these macro level changes. They observe that 'the year 2016 can be identified as a year in which the political establishment's commitment to free trade and a liberalized investment regime was reaffirmed.' The authors highlight the ways in which these macro level reforms such as the *National Minimum Wages Act* impact on worker's rights, trade unionism as well as on the quality of life of workers. The authors further offer an insightful analysis of the informal or extra-legal practices related to labour and the ways in which worker's rights are compromised through such practices. Perera and Hemachandra conclude their analysis by noting that ongoing neo-liberal reforms 'promotes precariousness among workers, disempowering them and dispossessing them from their entitlement for a dignified life.'

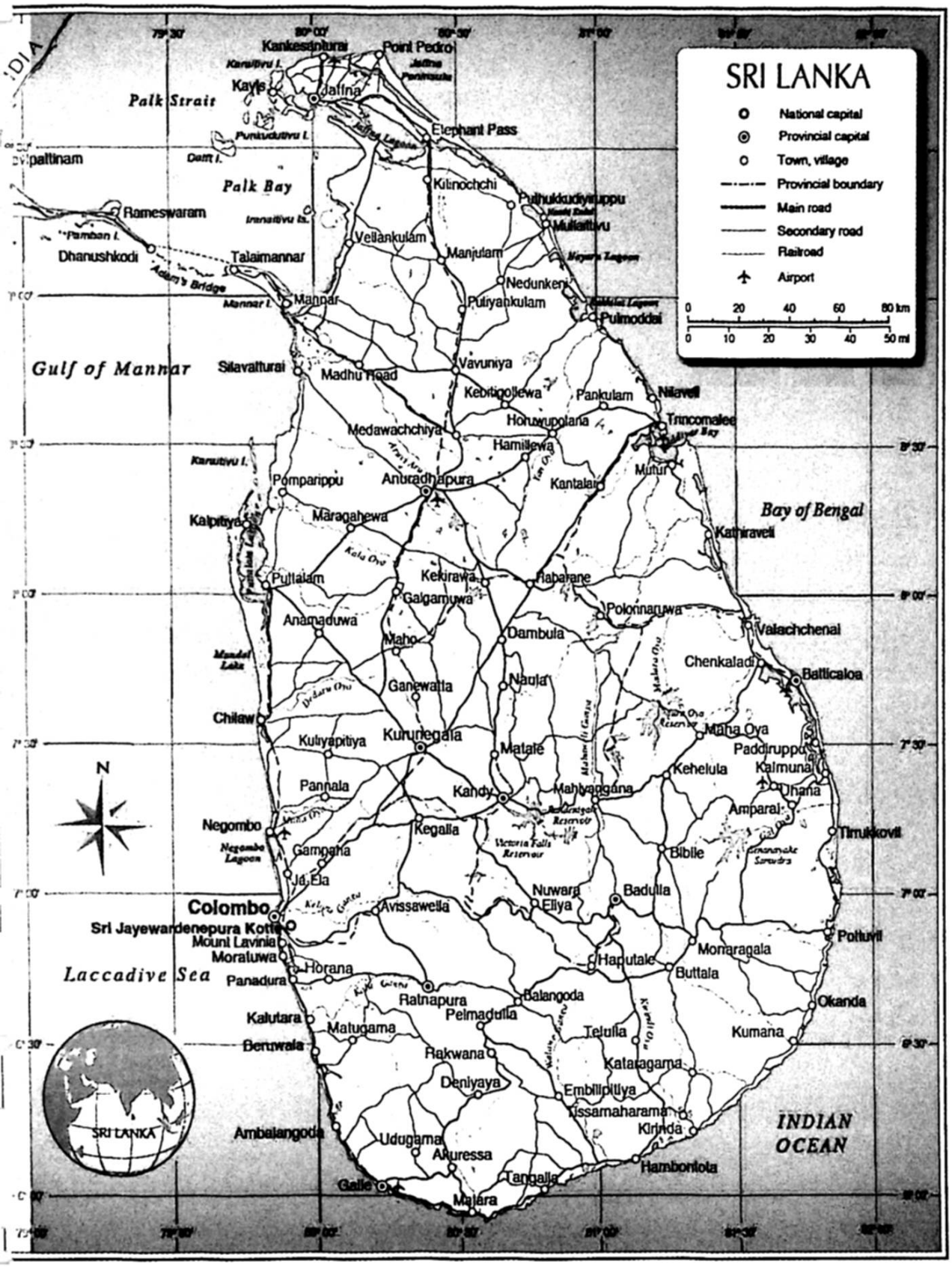
The work of the Human Rights Commission is analysed by Uween Jayasinghe in chapter six. Subsequent to the Nineteenth Amendment to the Constitution, new appointments were made to the Commission and its 'public legitimacy' has been restored in significant ways. In this chapter Jayasinghe assesses the work of the Commission through

an analysis of selected key performance indicators such as the kinds of complaints processed etc as well the substantive interventions made by the Commission in 2016. This analysis points to the severe lack of resources and capacity at the Commission in dealing with the high number of complaints it receives. For instance while the Commission received 4 990 complaints in 2016, it could conclude only 127 of complaints. Of those 127 only 36 were concluded with a determination regarding the merits of the complaint while 91 were withdrawn or dismissed. The interventions made by the Commission in 2016 include public statements and submission with regard to proposed amendment to the Criminal Procedure Code, the establishment of the Office on Missing Persons and the proposed Counter Terrorism Act. The Commission further undertook its own investigations into reports of violations of human rights. Jayasinghe concludes his analysis by describing 2016 as an 'an year of revamping, restructuring and reforming' the Commission. He further notes that the viability of those attempts at reviving the Commission will depend to a large extent on the cooperation and engagement extended to the Commission by the state.

In the seventh and final chapter Sankhitha Guneratne writing on 'The Right to Information in Sri Lanka' provides an assessment of the right to information regime that was introduced in Sri Lanka in 2016. She presents a justification for the right and assesses its scope in Sri Lanka through a discussion on the relevant jurisprudence, constitutional reform and legislative policy. She offers critical insight into the drafting process, the determination of the constitutionality of the Bill and the actual implementation of *the Right to Information Act*. She concludes with the observation that *the Right to Information Act.* presents 'an inimitable opportunity' but that making the most of this opportunity requires that 'citizens must be allowed a taste' of the potential of the law and also that they can 'be the watchful protectors' of the right recognised in this law.

The analyses offered in the 2016 issue of this volume suggest that while considerable and commendable improvements have been made during the year in ensuring respect for human rights, structural obstacles continue to compromise and limit these achievements.

Dinesha Samararatne


SRI LANKA
National capital
Provincial capital
Town, village
Provincial boundary
Main road
Secondary road
Railroad
Airport
0 20 40 60 80 km
0 10 20 30 40 50 mi
Kankesanturai
Point Pedro
Kayts
Jaffna
Palk Strait
Elephant Pass
Palk Bay
Rameswaram
Dhanushkodi
Talaimannar
Adam's Bridge
Mannar
Gulf of Mannar
Kilinochchi
Vellankulam
Manjulam
Nedunkeni
Puliyankulam
Mullaittivu
Pulmoddai
Silavalturai
Madhu Road
Vavuniya
Kebitigollewa
Pankulam
Nilaveli
Trincomalee
Horuwupotana
Medawachchiya
Hamillewa
Anuradhapura
Kantalai
Muttur
Pomparippu
Kalpitiya
Maragahewa
Bay of Bengal
Kathiraveli
Puttalam
Kekirawa
Habarane
Galgamuwa
Polonnaruwa
Valachchenai
Anamaduwa
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Ganewatta
Naula
Maha Oya
Paddiruppu
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Horana
Panadura
Ratnapura
Balangoda
Okanda
Kalutara
Pelmadulla
Matugama
Telulla
Kumana
Beruwala
Rakwana
Kataragama
Deniyaya
Embilipitiya
Tissamaharama
Kirinda
INDIAN OCEAN
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SRI LANKA

I

OVERVIEW OF THE STATE OF HUMAN RIGHTS IN 2016

Sanjayan Rajasingham[*]

1. Introduction

Transitions are difficult. A troubled past can reach out to infect a promising future. Sri Lanka shifted from authoritarianism to republicanism in 2015, but the structures that sustained an authoritarian government remained in place. In 2016, these structures shaped the state of human rights. Their influence suggests that Sri Lanka has a long and difficult path ahead.

The previous edition of this publication argued that the Sri Lankan state did not have the capacity to prevent systemic rights abuses.[1] 2016 revealed two of the outstanding causes for this incapacity. The first is the continuing power and influence of the security sector – composed of the military, the intelligence community, and the police. Raised to prominence by the war and style of governance of the previous regime, it exerts a penetrating influence on the policy and practice of the current government.

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* LLB; Attorney-at-Law; Lecturer, Department of Law, Faculty of Arts, University of Jaffna.

1 Gehan Gunatilleke, "Overview of the State of Human Rights 2015" *State of Human Rights* (2015) Law and Society Trust.

The second cause is the political calculus of coalition government. Both sides of the unity government – whether the Sri Lanka Freedom Party (SLFP) led by President Maithripala Sirisena or the United National Party (UNP) led by Prime Minister Ranil Wickremesinghe – want to strengthen their hold on power. This gives each side perverse incentives to undermine the other, and to keep Mahinda Rajapaksa, now a Member of Parliament, politically active. These incentives tend to align against actions – such as transitional justice and security sector reform – that promote, protect and respect human rights.

This chapter begins with an analysis of these two causes of systemic human rights violations in 2016. It then considers some of the year's major human rights issues through the lens of that analysis. These include the proposals for a new constitution, draft counter-terrorism legislation and transitional justice. Finally, the conclusion suggests how Sri Lanka can address these two obstacles to human rights and a genuine democratic transition.

2. Two Threats to Human Rights

There are two reasons why progress on human rights stalled in 2016. The first is the power of the security sector; the second is the calculus of coalition government.

2.1 The power of the security sector

The security sector – namely the military, the intelligence community and the police – retain enormous power and influence. Following the war, the military was ideologically constructed as the saviour of the state.[2]

[2] Ahilan Kadirgamar, 'The Question of Militarisation in Post-war Sri Lanka' *Economic & Political Weekly*, Feb 16, 2013, Vol XLVIII, No 7, pp.42, 45.

It had an expanded role, maintaining public order,[3] conducting leadership training for university students and supporting development activity.[4] Moreover, the government used the military as an instrument of coercion to implement its development policy.[5] Despite a change of civilian leadership, many in the security sector remain loyal to the previous regime – and to Gotabaya Rajapakse in particular.[6]

The new government responded to this reality with caution. Fears that the security sector might destabilise the country if the government tries to reform its structure and powers has meant that progress is slow. These fears also explain some of Mr. Sirisena's actions in the past year. In October 2016, he delivered a speech criticising ongoing investigations into alleged corruption by the police and the Commission to Investigate Allegations of Bribery or Corruption (CIABOC) for being politically motivated. He also faulted the way military personnel were treated in the course of investigations and judicial proceedings.[7] It seems that he made this speech in response to a report that the military was unhappy with the direction of government policy.[8]

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3 This is under the *Public Security Ordinance* of 1947 s. p.12.

4 'Company to be formed by Army to undertake projects', *Daily Mirror,* 19 January 2014 <http://www.dailymirror.lk/news/16179-company-to-be-formed-by-army-to-undertake-projects.html>

5 'Army trying to relearn Weliweriya lesson in Wanathamulla: Ranil', *Daily Mirror* FT,28 February 2014 <http://www.ft.lk/2014/02/28/army-trying-to-relearn-weliweriya-lesson-in-wanathamulla-ranil/>

6 International Crisis Group "Sri Lanka's Transition to Nowhere," May 17, 2017, [ICG Report] 10.

7 "President warns investigative arms: Don't work to political agendas", Daily News, 13 October 2016 at http://dailynews.lk/2016/10/13/local/95811; "President slams Bribery Commission for 'hauling' Gota and navy chiefs to court", *Daily FT*,13 October 2016 at http://www.ft.lk/article/573581/President-slams-Bribery-Commission-for—hauling—Gota-and-navy-chiefs-to-court%C2%A0.

8 ICG Report, p. 10

Fear of repercussions from the security sector also probably explain the government's failure to make significant progress in *any* of the high-profile cases which implicate the military. These include the death of 27 inmates during a security operation to control a riot at Welikada prison; the killing of protestors by army personnel at Weliweriya in August 2016; the killing of five students in Trincomalee in January 2006 and of 17 aid workers of the non-governmental organisation ACF in Muttur in 2006.[9] The United Nations High Commissioner for Human Rights noted that this lack of decisive progress

> "...reflects a lack of capacity or willingness of the State to prosecute and punish perpetrators of serious offences when they are linked to security forces."[10]

The security sector, then, has caused the government to stall or obstruct measures that negatively implicate that sector. As noted below, this has had a significant impact on human rights in Sri Lanka.

2.2 *The political calculus of coalition government*

The SLFP and the UNP are part of a government of national unity. Each party has seats in Cabinet with the UNP holding key portfolios such as finance and economic affairs. While the Tamil National Alliance leads the opposition, there is also an informal grouping known as the 'Joint Opposition' which consists of MPs from the SLFP and other parties who remain loyal to Mr. Rajapaksa. These three forces continue to manoeuvre for political power and shape the government's human rights agenda.

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[9] 'Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka' HRC (10 February 2017) UN Doc A/HRC/34/20 [UNHCHR Report 2017] pp. 32-40.

[10] Ibid.p.41

Mr. Sirisena is keen to maintain control over the SLFP, cement his legacy and prevent Mr. Rajapaksa from returning to power. To do so he must demonstrate that he is an equal to Mr. Rajapaksa in the latter's areas of strength – national security and Sinhala-Buddhist credentials. Mr. Rajapaksa continues to base his opposition to Mr. Sirisena on these two factors and has been able to paint several key human rights initiatives – including the new constitution and transitional justice measures – as violations of Sri Lanka's sovereignty and the integrity of the Sinhala-Buddhist nation. Mr. Sirisena, to avoid looking weak on either front and lose popular and party-political backing, has back-pedalled on key commitments, shown deference to the security sector, and begun to use rhetoric reminiscent to that of Rajapaksa.[11]

The UNP's greatest liability among the Sinhala electorate is its image of being pro-West, anti-Sinhala and weak on national security. To counter this, it has been slow on human rights issues that implicate the military, and hesitant to take on human rights measures that are seen as pro-West.

It appears that both sides have an interest in keeping Mr. Rajapaksa politically active. The UNP sees this as a means of encourage internal divisions within the SLFP. For some in the SLFP a rapprochement between Mr. Sirisena and Mr. Rajapaksa is seen as the best way to beat the UNP at upcoming local government and provincial elections. As a result, both the UNP and the SLFP seem to have played a role in ensuring that the allegations against Mr. Rajapaksa are not pursued or investigated.[12]

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[11] "President slams some NGOs, media, traitorous forces," *Daily Mirror,* 27 October 2016 at http://www.dailymirror.lk/article/President-slams-some-NGOs-media-traitorous-forces-118241.html.

[12] "UNP-SLFP hand in glove on corruption: Opposition Leader" *Daily FT,* 26 January 2017 at http://www.ft.lk/article/593946/UNP-SLFP-hand-in-glove-on-corruption—Opposition-Leader.

This desire to strengthen the position of each party and the need to keep the security sector under check creates perverse incentives. Both sides are keen to appear pro-military and as a result they avoid initiatives that appear anti-military or involve security sector reform. Each side is also working to undermine the other. Further, since a Rajapaksa return is still a possibility, party members and bureaucrats have an incentive to hedge their bets and slow reforms or initiatives that adversely affect the Rajapaksas.

3. Key Failures in Human Rights

These two factors have had a decisive impact on human rights in the last year. This section will filter three human rights related initiatives of 2016 through the above analysis to explain the impact of these two factors on human rights.

3.1 Transitional justice

One of the positive developments in 2015 was the government's wide-ranging commitment, via a co-sponsored resolution at the United Nations Human Rights Council, to transitional justice measures. These included establishing an Office on Missing Persons, a Commission for Truth, Justice, Reconciliation and Non-recurrence, an Office for Reparations and a judicial mechanism with a special counsel to prosecute crimes committed during the war.[13] These measures are essential to ending impunity for human rights violations. However, transitional justice is easily misconstrued as both anti-military and anti-Sinhala. The influence of both the security sector and party-political

[13] Statement delivered by Mangala Samaraweera, Minister of Foreign Affairs of Sri Lanka at the 30th Session of the UN Human Rights Council, Geneva, on 14 September 2015, available at http://www.news.lk/fetures/item/9742-statement-by-mangala-samaraweera-at-the-30th-session-of-the-unhrc-geneva [last retrieved 12 October 2016].

calculations is evident in the government's approach to transitional justice.

One step forward, three steps back

2016 saw the government fail to make any significant progress on these commitments, though there were *some* positives. For example, in May 2016 the government ratified the International Convention for the Protection of All Persons from Enforced Disappearance and recognised the competence of the Committee on Enforced Disappearances. In August, Parliament approved an amendment to the Registration of Deaths Act providing for the issuance of "certificates of absence", fulfilling a key demand of families of the disappeared. In the same month, it passed a Bill to establish an Office on Missing Persons (OMP). While positive, these measures pale into insignificance in the light of the government's failures.

The OMP Act

The OMP Act is a case in point. First, the Bill was presented without any serious public consultation, especially with the families of the missing outside of Colombo.[14] This suggests that the government was more focused on having legislation passed, rather than ensuring that it met the needs of transitional justice.

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[14] "Sri Lanka: Consultations Lacking on Missing Persons' Office" Human Rights Watch, 27 May 2016 at https://www.hrw.org/news/2016/05/27/sri-lanka-consultations-lacking-missing-persons-office; "Sri Lanka's Office for Missing Persons: Critique by the Tamil Civil Society Forum" Sri Lanka Brief,23 May 2016) at http://srilankabrief.org/2016/05/sri-lankas-office-for-missing-persons-critique-by-the-tamil-civil-society-forum/; Consultation Task Force on Reconciliation Mechanisms "Final Report of the Consultation Task Force on Reconciliation Mechanisms: Executive Summary and Recommendations" [CTFRM Executive Summary] p. 87

These flaws in consultation spilled over into flaws of substance. The OMP's broad mandate is one example. The Act defines a missing person as one who went missing in the context of either "the conflict which took place in the Northern and Eastern Provinces or its aftermath" or "political unrest or civil disturbances" or a person who was subject to enforced disappearance as defined in the International Convention on Protection of all Persons from Enforced Disappearances" or "a member of the armed forces or police who is identified as 'missing in action".[15] Bringing both missing combatants and non-combatants under one body could be problematic and lead to delays.[16] Moreover, when a complaint is made to the Office that an individual is missing, it may not be possible to decide whether the complaint falls within the mandate of the OMP without further investigation. The Act should have included a provision requiring the Office to hold an investigation before it rejects a complaint on the basis that it is outside its mandate.[17]

Another flaw relates to the section on confidentiality. This could severely undermine the purpose of the OMP. It provides as follows:

> "Notwithstanding anything to the contrary in any written law, except in the performance of his duties under this Act, every member, officer, servant and consultant of the OMP shall preserve and aid in preserving confidentiality with regard to matters communicated to them in confidence. The provisions

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[15] *Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act, No. 14 of 2016 [OMP Act]* section.27.

[16] "Brief Note 'Office on Missing Persons: Outstanding Issues for Consideration to Strengthen Legislation and Post-Enactment Implementation" Centre for Policy Alternatives, July 2016, p. 8.

[17] Niran Anketell, *Commentary on the Bill Titled Office on Missing Persons,* South Asian Centre for Legal Studies, 2016, p. 8 [Commentary on OMP]

> of the Right to Information Act, No. 12 of 2016, shall not apply with regard to such information."[18]

This section qualifies, *inter alia*, provisions which require the OMP to inform relatives about the circumstances in which a person went missing and her fate.[19] It could potentially deny them their right to know the truth about the status of a missing person. A confidentiality requirement is meant to encourage perpetrators to come forward and testify to the status of a missing person without fear of repercussions. It should not, in the process, deny victims and their families of the right to truth.[20]

Finally, the links between the OMP Act and any future accountability mechanism are unclear. The Act states that when the OMP finds that an offence that warrants investigation has been committed, it has the discretion to decide whether to report this to the relevant law enforcement or prosecuting authority.[21] This is unacceptable. Moreover, the bases on which it may make its decision - "after consultation with the relatives of the missing person as it deems fit" and "in due consideration of the best interests of the victims, relatives and society" – are open to abuse. Further, section 13(2) of the OMP states that "the findings of the OMP shall not give rise to any criminal or civil liability". While perfectly acceptable if taken to mean that the findings of the OMP *on their own* cannot give rise to liability, this could be interpreted to rule out any future prosecutions based on OMP investigations. The provision, therefore, is redundant and should be deleted.[22]

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[18] OMP Act section15

[19] OMP Act section13 (1)(d).

[20] Commentary on OMP 17.

[21] OMP Act section12(i)

[22] Commentary on OMP 16.

While the Act remains positive despite these flaws, the real test remains for when it is operationalised. This can only happen once the OMP is assigned to a Minister who must then make the relevant order in the Gazette.[23] Its implementation will test the government's resolve to move on this issue.

Consultation Task Force on Reconciliation Mechanisms

The government's response to the Consultation Task Force on Reconciliation Mechanisms (CTF) was disappointing. Appointed by the Prime Minister in 2016, it included prominent members of civil society and was mandated to seek the views and comments of the public on transitional justice and reconciliation mechanisms. To ensure a consultative process the CTF worked through "zonal task forces" composed of members of the relevant community and conducted in the language of choice of participants. It received over 7600 submissions and put forward several positive proposals including the creation of a war crimes court composed of both international and national judges, a response to disappearances, reparations, a constitutional settlement to the ethnic conflict, and attention to psychosocial needs.

The CTF process was an opportunity for the government to build public support for transitional justice initiatives. Instead, it was ignored. There was no media strategy, nor was there a public information campaign to promote transitional justice mechanisms in Sri Lanka.[24] Ultimately, neither the President nor the Prime Minister publicly acknowledged the Final Report of the CTF. Mr. Wijedasa Rajapaksa, the Minister of Justice, criticised the report for proposing a

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[23] OMP Act section1 (2).

[24] "Statement by the former members of the Consultation Task Force on Reconciliation Mechanisms (CTF)" *Daily News* 15 March 2017, at http://dailynews.lk/2017/03/17/local/110736/ctf-reconciliation-mechanisms-fear-recommendations-will-not-be-used.

hybrid court to pursue prosecutions for war crimes and crimes against humanity and said that the government did not need to follow its recommendations.[25]

This response meant that a chance for a public conversation on transitional justice was wasted. The government's lukewarm attitude to the process may have resulted in the various instances where security and police personnel inhibited participation at zonal task force consultations. Disturbingly, these incidents occurred despite agreements with the security forces and the police to ensure the smooth functioning of the Task Force.[26]

Contradictions on Accountability

Of even greater concern are the government's contradictory statements on accountability. Despite co-sponsoring a resolution at the United Nations Human Rights Council that included a clear commitment to include foreign judges in any accountability mechanism, the government has now back-tracked In an interview with *The Hindu*, President Sirisena said, "As per our constitutional provisions, there is no possibility of foreign judges participating in our judicial process or conducting cases" suggesting that there would be no foreign judges at the inquiry.[27] Prime Minister Ranil Wickremesinghe also ruled out foreign judges when speaking to senior military officials.[28] Cabinet

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[25] 'I have no confidence in the CTF: Wijeyadasa,' *Daily Mirror,* 06 January 2017 at http://www.dailymirror.lk/article/I-have-no-confidence-in-the-CTF-Wijeyadasa-121817.html

[26] CTFRM Executive Summary p.7

[27] Meera Srinivasan 'Interview with Maithripala Sirisena', *The Hindu,* 11 November 2016 at http://www.thehindu.com/opinion/op-ed/Need-a-judicial-mechanism-that-has-confidence-of-Tamils%E2%80%99/article16293468.ece#!

[28] "Alleged war crimes: PM announces probe will be domestic, no foreign judges" *Sunday Times,* 29 May 2016 http://www.sundaytimes.lk/160529/columns/alleged-war-crimes-pm-announces-probe-will-be -domestic-no-foreign-judges-195284.html

Spokesman and Health Minister Rajitha Senaratne, a close ally of the President, echoed these views.[29] This is a serious regression which raises questions about the government's commitment to a genuine process of transitional justice.

No Transitional Justice?

The security sector and party-political considerations have clearly influenced the government's serious failures with respect to transitional justice. The two sections of the government are not pursuing these measures because this risks a backlash from the security forces and can strengthen the hand of the Joint Opposition.

3.2 Legislation governing the powers of the security sector

The enormous influence of the security sector was evident in how two pieces of legislation governing the powers of that sector were formulated. These were the draft Counter Terrorism Act (CTA) and the amendment to the Code of Criminal Procedure Act (CCPA).

The draft Counter Terrorism Act

One of Sri Lanka's key promises to the international community in 2015 was to repeal the Prevention of Terrorism Act of 1979 (PTA) and replace it with anti-terrorism legislation in line with contemporary international best practices.[30] Since the security of an individual is a

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[29] "Sri Lanka rejects call for foreign judges in domestic war crime probe," CeylonNews,4 January 2017 http://www.ceylonews.com/2017/01/sri-lanka-rejects-call-for-foreign-judges-in-domestic-war-crime-probe-video/

[30] Statement delivered by Mangala Samaraweera, Minister of Foreign Affairs of Sri Lanka at the 30th Session of the UN Human Rights Council, Geneva, on 14 September 2015, available at http://www.news.lk/fetures/item/9742-statement-by-mangala-samaraweera-at-the-30th-session-of-the-unhrc-geneva.

basic human right, the protection of individuals from the threat of terrorism is a basic obligation of any state. This must include preventing terrorist acts and bringing perpetrators to justice. However, there is also international consensus that the fight against terrorism must be undertaken while respecting the requirements of international law, including international human rights law.[31]

The premise of counter-terrorism legislation is that the exceptional threat of terrorism requires an exceptional response. Sadly, the debate surrounding Sri Lanka's new counter-terrorism legislation assumes that this extraordinary threat exists today. There was no significant debate about whether there was an *actual need* for a new counter-terrorism law, given that there is no longer a credible terrorist threat on the island.

There was significant protest, however, against the process surrounding the formulation of the draft and its substance. The process initially involved a draft prepared by the Law Commission after consultations. Though unpublished, it was received positively by those civil society representatives who obtained copies. This draft was then allegedly vetoed by security officials and lawyers from the Attorney General's department, and replaced with one prepared by a military and police-dominated committee.[32] This is a startling example of governmental deference to the security sector, coupled, no doubt, with the influence of regressive elements within the government.

The substance of the new draft, however, raises even more concerns. Three issues stand out: overbroad definitions of terrorism and related

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[31] General Assembly resolution 60/158, para. 1; Security Council resolutions 1456 (2003), annex, para. 6, and 1624 (2005), para. 4.

[32] ICG Report 10; Gehan Gunatilleke, "GSP+: A Revaluation of Benefits", *Bar Association Law Journal*, Vol.XXII, 2016, pp.112, 119.

offences; provisions that incentivise torture; and provisions on administrative detention.[33]

First, the draft CTA contains definitions of terrorism and related offences that are **overbroad**. The definition of terrorism is a compound one – to be liable an individual must commit one of the prohibited acts with the intention of achieving one of the prohibited effects. The list of prohibited effects includes illegally or unlawfully compelling the Government of Sri Lanka or that of any other sovereign nation to "reverse, vary or change a policy decision" and "committing any act of violent extremism towards achieving ideological domination."[34] The breadth and vagueness of these aims mean that legitimate democratic protests and processes could fall within the ambit of "terrorist" activity. This is contrary to the international standard for the definition of terrorism which has clear and limited intention requirements. For example, the United Nations Draft Comprehensive Convention on International Terrorism has the following definition:

> Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes:
>
> (a) Death or serious bodily injury to any person; or
>
> (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public

[33] United Nations Committee against Torture, *Concluding observations on the fifth periodic report of Sri Lanka*, 27 January 2017 CAT/C/LKA/CO/5 [UNCAT Report]p.22; With respect to the draft Act, the Committee raised concerns with respect to the scope of terrorism-related offences, the safeguards against arbitrary arrest and the judicial oversight of detention; UNHCHR Report 2017 p.45.

[34] CTA Part III, (i) (b).

transportation system, an infrastructure facility or to the environment; or

(c) Damage to property, places, facilities or systems referred to in paragraph 1 (b) of the present article resulting or likely to result in major economic loss;when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.[35]

This is a model for Sri Lanka to follow.

The terrorism-related offences under the CTA are also too broad. For instance, one of these offences reads:

> "With the intention of causing harm to the unity, territorial integrity or sovereignty of Sri Lanka, or the peaceful coexistence of the people of Sri Lanka, by words either spoken or intended to be read by signs or by visible representations or otherwise, causes or intends to cause, the commission of acts of violence between different communities or racial and religious groups."[36]

This is a similar formulation to that of Section 2(1)(h) of the PTA which was used to prevent legitimate democratic criticism and to target political opponents.[37] The section captures even legitimate reporting on the violation of rights since it criminalises words that harm the "unity" of Sri Lanka and affect "peaceful coexistence". This is contrary to international standards on freedom of expression and national

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[35] United Nations Draft Comprehensive Convention on International Terrorism Art. 2(1) UN Doc A/59/894

[36] CTA Part III, "Terrorism Related Offences", (xvii).

[37] *State v. Tissainayagam* HC 4425/08, August 2009.

security which require that speech be punished only if it both incites imminent violence and has a direct and immediate link thereto.[38]

The inclusion of the offence of espionage, which criminalises various uses of "confidential information", is problematic for the same reasons.[39] Confidential information is defined broadly, including information which is likely to have an adverse impact on the security and the defences of Sri Lanka; information that is not in the public domain on places of detention; and information which is likely to have an adverse effect on public security and relating to the conduct of investigations into offences contained in the Act.[40] It would be easy, for instance, to fit investigative journalism of a government's abuse of power into one of these categories.

Finally, terrorism-related offences also include several offences which, while a threat to national security or defence interests, do not necessarily need to be dealt with using the exceptional powers of anti-terror legislation. These include committing robbery, extortion or theft of property of the state, including intellectual property, data or other information;[41] causing any harm in any way to any state owned, controlled or regulated critical automated system, digital data-base or processes;[42] and the possession of a firearm, without lawful authority, where the person has reasonable grounds to believe that such

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38 See ICCPR art.20(2) and ARTICLE 19, "Towards an interpretation of article 20 of the ICCPR: thresholds for the prohibition of incitement to hatred: work in progress", study prepared for the regional expert meeting on article 20 organized by the Office of the United Nations High Commissioner for Human Rights, held in Vienna on 8 and 9 February 2010. Available from www.ohchr.org/ Documents/Issues/Expression/ICCPR/ Vienna/CRP7Callamard.pdf

39 CTA Part III, "Other Offences", (i)

40 Ibid Part XI, (n) Definitions, "Confidential Information"

41 CTA Part III, xi

42 Ibid xiv

possession would have the effect of adversely affecting the security of the people of Sri Lanka[43]. Do these acts need to be included in specialised terrorism legislation which gives the executive extraordinary powers of arrest, detention and investigation? Or can they be dealt with under normal legal powers? This is particularly so given the wide definition afforded to terrorism in the draft.

The second main issue is that the draft **continues the incentivisation of torture** that is a feature of the PTA.Torture is prohibited by Article 7 of the ICCPR. The Human Rights Committee – the treaty-body tasked with interpreting the ICCPR – has made it clear that this provision requires states to take all measures required to safeguard those particularly vulnerable to torture, especially those in detention.[44] It also explicitly states that "the law must prohibit the use or admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment."[45]

Section 16 of the PTA, however, ignores these obligations and allows the use of statements made by a suspect to an officer not below the rank of Assistant Superintendent of Police as evidence against that suspect. The burden of proving that such confession is involuntary is on the party asserting the same – in most cases, the defendant.[46] The draft CTA contains a similar provision, with a small change – confessions made to an officer not below the rank of Superintendent of Police are

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[43] Ibid xvi

[44] United Nations Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* 10 March 1992, HRI/GEN/1/Rev.9 [GC 20] p.11, 20

[45] Ibid p.12

[46] PTA section16(2)

admissible.[47] Moreover, the burden of proving that the confession was voluntary is now on the prosecution, rather than on the defendant.[48]

The existence of this section in the PTA incentivises torture, since any statement made to the police can be used against the suspect. There are several cases where individuals have been convicted solely on the basis of "confessions" made to police officers – confessions which those individuals claim were obtained under duress.[49] A state's obligation to prevent torture requires it to take all relevant measures against it. The government's failure to resolve this issue is a matter of deep concern.

Third, the draft **worsens the regime of administrative detention** found under the PTA. Article 9 of the ICCPR covers the right to liberty and security of person with administrative detention falling within a deprivation of liberty.[50] General Comment 35 sets out the scope of ICCPR obligations with respect to administrative detention. It notes that administrative detention should be allowed if "a present, direct and imperative threat is invoked to justify the detention of persons considered to present such a threat."[51] Such detention must not last longer than absolutely necessary so that the overall length of possible detention is limited. There must also be prompt and regular review by a court or a tribunal and access to independent legal advice.[52]

None of these requirements are met under the existing system of administrative detention. Section 9 of the PTA allows for administrative

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47 CTA Part IX (ii)

48 PTA section16(2); CTA Draft 2016 Part IX (iv)

49 *State v. Tissainayagam* HC 4425/08 (August 2009)

50 United Nations Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of Person)*, 16 December 2014, CCPR/C/GC/35 [GC 35] p. 6

51 Ibid p. 15

52 Ibid 35 p. 15

detention of up to eighteen months based on a detention order issued by the Minister of Defence where he has reason to believe or suspect that any person is connected with any unlawful activity.[53] In practice such detention could extend for as long as fifteen years.[54] The CTA reduces the period of detention to a maximum of six months.[55] However it allows detention orders to be issued by a Deputy Inspector General of Police where there is an application by the officer-in-charge of the relevant police station and a recommendation for the same by the officer-in-charge of the relevant police division, for "reasons to be recorded".[56] Thus there is no need for a present, imperative and direct threat before an order is issued under either the PTA or the CTA.

Moreover, judicial oversight remains weak. Under the CTA a detained person need only be produced before a Magistrate within 72 hours of arrest.[57] While the CTA has better oversight mechanisms than the PTA, these are inadequate because there is no statutory test to be applied by oversight bodies, whether the Board of Review,[58] a Magistrate,[59] or other court of law[60] to decide if administrative detention was necessary. This increases the likelihood of arbitrary detention. It also restricts access to independent legal advice since the right of access to an attorney-at-law is only allowed after the recording

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53 PTA section 9 (1). This order cannot be challenged in any court per section10.

54 UNCAT Report p. 21. The Committee noted that in some cases suspects have been held for fifteen years without being indicted.

55 CTA Part IV (xxxiii)

56 Ibid xxx

57 Ibid xxi

58 Ibid xli -within two weeks of an application

59 Ibid xvi – on the completion of 90- days in detention

60 Ibid xlii

of the first statement or the expiry of 48 hours after the time of his arrest, whichever occurs first.[61]

The draft CTA increases the powers of the security sector. While this draft was withdrawn following protests from various quarters, the fact that it was initially accepted indicates that there are regressive elements in government and that the security sector has great influence.

Proposed Amendment to the Code of Criminal Procedure

In September 2016, the government released a draft bill to amend the law relating to the right of suspects to consult a lawyer at the earliest point after arrest. Article 9 of the ICCPR protects the right to liberty and security of person, including freedom from arbitrary arrest and detention. According to the Human Rights Committee this includes an obligation to "permit and facilitate access to counsel for detainees in criminal cases from the outset of their detention."[62] The Committee also provides that one of the safeguards essential to prevent torture, as well as to protect against arbitrary detention and infringement of personal security is "prompt and regular" access to lawyers. Furthermore, Article 14(3)(b) of the ICCPR provides that every person shall have the right 'to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.' The CCPR has observed that 'the right to communicate with counsel requires that the accused is granted prompt access to counsel."[63]

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61 Ibid xlv

62 GC 35 p.35.

63 United Nations Human Rights Committee, General comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial, 23 August 2007, CCPR/C/GC/32, at para. 34.

Section 32 of the CCPA provides that a person may be arrested without a warrant only if he or she has been concerned in the commission of any 'cognizable' or identifiable offence. A suspect may be kept in police custody only for as long as is reasonable, and in any event not for longer than 24 hours.[64] After this time the suspect is produced before a Magistrate and either released on bail or kept in remand custody. The provisions of the CCPA, therefore, do not have provisions that allow suspects prompt access to legal counsel. However, in 2012, the Inspector General of Police made rules under Section 55 of the Police Ordinance No. 16 of 1865[65] which recognised the right of a lawyer to represent his or her client at a police station and required the office-in-charge of such station to facilitate such representation. This effectively allowed suspects to have access to legal counsel at any time – including immediately after arrest and while in detention.

The draft amendment Bill, however, purported to introduce a new section, 37A, to the CCPA. The proposed section 37A(1) states:

*Any person who has been arrested and detained in police custody, shall have the right to retain and consult an Attorney-at-Law of his choice at his own expense, **after the recording of his statements in terms of the provisions of subsection (1) of section 110 and prior to being produced before a Magistrate.*** (emphasis added)

This section only allows access to legal counsel after a statement is recorded from a suspect. Suspects do not have access to Attorneys-at-Law between the time of arrest and until the conclusion of the recording of a statement. However, it is precisely in this interim period

[64] CCPA, section 37.

[65] Police (Appearance of Attorneys-at-Law at Police Stations) Rules 2012.

that torture, cruel and inhuman treatment occurs.[66] The United Nations Committee Against Torture, in its concluding observations on Sri Lanka, noted that the proposed amendment "would not eliminate the risk of detainees being tortured during police interrogations."[67]

Following a barrage of criticism, the amendment was withdrawn.[68] There are now new attempts to introduce a similar amendment. The episode suggests once again that there are regressive elements within the government working to strengthen the hand of the security sector.

3.3 The Constitution-making process

A new constitution was one of the key promises made by the new government.[69] 2016 saw the start of a constitution-making process. Following public consultations by the Public Representations Committee, a consensus resolution was passed for Parliament to convene as a Constitutional Assembly. A Steering Committee headed by the Prime Minister began work on a draft constitution, aided by six Sub-Committees which prepared reports on different areas. Each included members of Parliament from different political parties as well as expert advisors and their reports were released as planned in

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[66] "Public Statement by the Human Rights Commission of Sri Lanka" Human Rights Commission of Sri Lanka,22 June 2016 at http://hrcsl.lk/english/2016/06/23/public-statement-by-the-human-rights-commission-of-sri-lanka/

[67] United Nations Committee against Torture, Concluding Observations on the Fifth Periodic Report of Sri Lanka , 27 January 2017 CAT/C/LKA/CO/5, p.27

[68] "Cabinet approved proposal contravenes country's obligations – Lawyers" *The Nation,* 9 July 2016. http://nation.lk/online/2016/07/09/cabinet-approved-proposal-contravenes-countrys-obligations-lawyers.html

[69] "Sri Lanka government proposes new constitution to devolve power" *Reuters,* 10 January 2016. <http://www.reuters.com/article/sri-lanka-politics-idUSKCN0UO01Y20160110>

November 2016. This section will focus on the effect of the factors above on the report on Fundamental Rights.

Positive Recommendations

The reports of the Sub-Committees are merely recommendations to the Constitutional Assembly. However, they are an important consensus since they represent the spectrum of Parliamentary opinion on constitutional reform.

The report on Fundamental Rights is a step in the right direction. It recognises many rights that are not in the present constitution, including the right to life,[70] the right to consult an attorney-at-law from the time of arrest,[71] the right against enforced disappearance,[72] children's rights,[73] disability rights,[74]and the right to privacy.[75] It also includes remedies for violations by both state (whether executive, legislative, judicial or administrative) and non-state actors.[76] Three of the recommendations of the Sub-Committee deserve special mention.

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[70] The Steering Committee of the Constitutional Assembly, "Report of the Sub-Committee on Fundamental Rights" [Sub-Committee Report on Fundamental Rights] 1

[71] Ibid, p. 1

[72] Ibid, p. 3

[73] Ibid, p. 13

[74] Ibid, pp. 14, 15

[75] Ibid, p. 10

[76] Ibid, p. 17

The inclusion of Economic, Social and Cultural Rights (ESC rights)

As a signatory to the International Convention on Economic, Social and Cultural rights, Sri Lanka has an international legal obligation to respect ESC rights.[77] While these rights need to be *enforceable* – that is, made available through legislative and other means – whether they should also be *justiciable* – that is, open to enforcement by judicial order – is controversial. Many oppose judicial remedies, arguing that justiciable ESC rights are costly; allow institutionally incompetent judges to make resource allocation decisions; undermine the democratic process; and result in queue jumping and unacceptable trade-offs.[78] Those in favour of justiciable rights note that protecting civil and political rights also involves a cost;[79] that courts are already involved in cases involving resource allocation decisions;[80] and that there is jurisprudence that avoids the pitfalls of queue jumping and unacceptable trade-offs.[81] Overall, the arguments in favour seem to outweigh those against.

The ICESR itself does not take a position on the matter, requiring states to take "all appropriate means" to fulfil Convention obligations.[82] In General Comment No.3, the Committee on Economic, Social and

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[77] *International Covenant on Economic and Social Rights* (3 January 1976) 993 UNTS 3 [ICESCR] Art. 2(1). Sri Lanka ratified the ICESCR in 1980.

[78] Philip Alston and Ryan Goodman, *International Human Rights: Text and Materials,* Oxford University Press, 2013, pp. 297-301.

[79] Cass R. Sunstein, 'Confusing Rights: A Reply to Hocut' *The Independent Review,* 10(1), 2005, p. 133

[80] UN Committee on Economic Social and Cultural Rights, *CESCR General Comment No 9: The Domestic application of the Covenant* (1998), E/C12/1998/24,p.10.

[81] This involves using the principles of non-discrimination and reasonableness to review certain resource allocation decisions. Gehan D Gunatilleke, 'Judicial Activism Revisited: Reflecting on the Role of Judges in enforcing Economic, Social and Cultural Rights, *Junior Bar Law Review,* (2010) 1 at p.pp. 21, 36-40; *Government of the Republic of South Africa and Others v Grootboom and Others* [2001] (1) SA 46 (CC)

[82] Art. 2(1).

Cultural Rights – the treaty body tasked with interpreting the ICESR – strongly suggests that judicial remedies are an important aspect of the legal obligations of states.[83] What is clear, however, is that states parties to the ICESCR have two types of obligations – obligations of conduct and obligations of result. The former are immediate obligations not to discriminate and to 'take steps' that are deliberate, concrete and targeted to achieve the full realization of Covenant rights.[84] Under the obligations of result, states parties have non-derogable minimum core obligations to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights.[85]

Sri Lanka's existing legal framework does not recognise judicial remedies for ESC rights, though the judiciary *has* recognised them in several cases.[86] The report of the Sub-Committee on Fundamental Rights introduces a range of ESC rights that are justiciable including rights to healthcare, education, water, food and nutrition.[87] While

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[83] UN Committee on Economic Social and Cultural Rights, *CESCRGeneral Comment No 3: The Nature of States Parties' Obligations (Art. 2, Para 1, of the Covenant)* (1990), E/1991/23 [GC 3] p.5

[84] ICESCR Art 2(1); GC 3 pp.1, 2, 9

[85] GC 3 p. 10

[86] *Kavirathne and Others v. Commissioner General of Examinations and Others* SC (FR)29/2012 (Supreme Court Minutes 10 May 2012) [education]; *Environmental Foundation Limited v Mahaweli Development Authority* SC(FR) 459/2008 (Supreme Court Minutes 17 June 20100 [environmental justice]; *Isadeen v Director General Customs* SC(FR) 248/2011 (Supreme Court Minutes 17 December 2014)[implied recognition of the right to work via the right to equality]

[87] Sub-Committee Report on Fundamental Rights, pp. 11, 12

there is strong public support for justiciable socioeconomic rights,[88] their inclusion has sparked a vigorous debate.[89]

The language used in the report to enshrine some of these rights is stronger than that in comparative constitutions. For instance, the report recognises a right to "primary, secondary and tertiary education at the cost of the State" – going far beyond the right to education in the South African, Brazilian and Colombian constitutions.[90] However the report fails to differentiate between the minimum core obligations of the state and its general obligations when outlining the different ESC rights. For instance, the 'Right to Health' includes a general obligation "Every citizen has the right to enjoy the highest attainable standard of physical and mental health and to have access to preventive and curative health-care services through free health services provided by the State." It also frames the minimum core obligation in a negative: "No person may be denied emergency medical treatment." However, the right to education, food, water, for instance, do not use this formulation. Separating these different obligations can help courts to successfully navigated complex resource allocation cases, as it has in South Africa.[91] Sri Lanka's new constitution should adopt a similar approach.

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[88] See Public Representation Committee on Constitutional Reform, 'Report on Public Representations on Constitutional Reform' (2016), pp. 91-125

[89] See for instance M Gomez, C Hartnett and D Samararatne, 'Constitutionalizing Economic and Social Rights in Sri Lanka' CPA Working Papers on Constitutional Reform No. 7 (2016) [in favour]; A Welikala, 'The Case Against Constitutionalising Justiciable Socioeconomic Rights in Sri Lanka' CPA Working Papers on Constitutional Reform No. 12 (2017) [against]

[90] See M Gomez, C Hartnett and D Samararatne, 'Constitutionalizing Economic and Social Rights in Sri Lanka' CPA Working Papers on Constitutional Reform No. 7 (2016), p. 33.

[91] South African Constitution 1996, art.27

The Protection of Sexual Minorities

The report also addresses the rights of sexual minorities. International human rights law prohibits discrimination based on sexual orientation and gender identity.[92] However Sri Lanka's Penal Code criminalises "carnal knowledge against the order of nature" and "gross indecency" – generally accepted to refer to same-sex relations between consenting adults.[93] It also criminalises those who "cheat by impersonation" – a provision that has been used against transgender men and women.[94]

These provisions have resulted in arbitrary detention, harassment, violence and abuse by law enforcement authorities against members of the lesbian, gay, bisexual, transgender and queer (LGBTQ) community. They have also induced a "chilling effect", with crimes not being reported to the police for fear that once reported these same laws will be used against the reporter.[95] Despite Sri Lanka's claim that discrimination based on "sex" under Article 12(2) of the existing constitution includes discrimination based on sexual orientation and gender identity,[96] the abuse and violence continue. In the light of this, the inclusion of a broad equality clause that prohibits discrimination based on *inter alia* "gender, sex, sexual orientation, gender identity" is a welcome development.[97] There is still strong opposition to non-discrimination clauses that cover the LGBTQ community. For instance, there were reports that the cabinet rejected proposals

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92 ICCPR Arts 2(1); 26; *Toonen v Australia HRC Communication* No. 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994)

93 Penal Code of Sri Lanka ss,365, 365A

94 Ibid.,section 399

95 Human Rights Watch "All Five Fingers Are Not the Same: Discrimination on Grounds of Gender Identity and Sexual Orientation in Sri Lanka," HRW 2016.

96 United Nations Human Rights Committee, *Concluding Observations on the Fifth Periodic Report of Sri Lanka* (21 November 2014) CCPR/C/LKA/CO/5 p. 8

97 Sub-Committee Report on Fundamental Rights, p. 4

to include similar non-discrimination clauses in the new National Human Rights Action plan.[98]

Provisions with respect to Personal Laws

Sri Lanka is a plural legal system with multiple, discrete bodies of law operating on different persons. These are Kandyan law, *Thesawalamai* and Muslim law. They cover family law, succession and the transfer of property and contain several discriminatory provisions. For example, Kandyan law requires a woman to prove adultery and gross cruelty or incest to obtain a divorce while a man need only prove adultery.[99] *Thesawalamai* restricts a wife's right to contract: her husband may sell, mortgage and lease the wife's immovable property and may also have any transaction she enters into without his consent, declared void.[100] Muslim law has no minimum age of marriage, allowing child marriages.[101] Moreover, a woman's consent in a marriage may be communicated by a *wali* on her behalf, making it possible for her to be forced into one.[102]

These provisions are kept alive by Article 16 of the constitution which preserves all written and unwritten laws that were in place before the enactment of the constitution *even if those laws were inconsistent with the chapter on fundamental rights.*[103] The Human Rights Committee,

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98 "National HR Action Plan 2017-2021: Inclusive Nature and Integrity of the Process Questioned" *Sri Lanka Brief,* 4 February 2017 found at: <http://srilankabrief.org/2017/02/sri-lanka-national-hr-action-plan-2016-2021-inclusive-nature-and-integrity-of-the-process-questioned/>

99 *Marriage and Divorce (Kandyan)* Act 1952 section 32

100 *Manickavasager v. Kandasamy* (1986) 2 SLR 8 para 27

101 *Muslim Marriage and Divorce Act* 1951, section 23

102 HW Thambiah, *Principles of Ceylon Law,* HW Cave & Co Ltd ,1972, p.174

103 Constitution of the Democratic Socialist Republic of Sri Lanka (1978) art. 16

in its Concluding Observations on Sri Lanka's latest periodic report, proposed that Sri Lanka should undertake:

> "a comprehensive review of its domestic laws, including those that govern rights of succession with respect to land permits and grants, the disposal of immovable property and the absence of a minimum age of marriage under Muslim law..."

The Sub-Committee report proposes just such a review. While some members favoured the removal of any savings clause, one member suggested that Article 16(1) should be retained and followed by a provision that requires the President to set up a Commission to inquire into the personal laws and report to the President whether such laws are inconsistent with the constitution. The commission would then submit this report to Parliament.[104]

Some sections of the Muslim community welcomed these proposals while others rejected them.[105] Opposition to reform is strong, with some Muslim women activists who advocated reform facing threats and harassment.[106] The Jaffna Tamil community has also been resistant to changes to the *Thesawalamai*.[107] This resistance is probably because these laws are linked to the identity of these groups, an identity which

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[104] Sub-Committee Report on Fundamental Rights, p. 17

[105] "MMDA does not need reforms: ACJU Chairman" Daily News (22 March 2017) at http://dailynews.lk/2017/03/22/local/111190/mmda-does-not-need-reforms-acju-chairman; "Islamic principles of Justice and Human rights necessitate changes to the MMDA" *Groundviews* (05 February 2017) at http://groundviews.org/2017/05/02/islamic-principles-of-justice-and-human-rights-necessitate-changes-to-the-mmda/

[106] "Muslims Condemn Abuse and Threats against Women from within the Community for Advocating MMDA Reforms" *Colombo Telegraph* (18 November 2016) found at: <https://www.colombotelegraph.com/index.php/muslims-condemn-abuse-and-threats-against-women-from-within-the-community-for-advocating-mmda-reforms/>

[107] 'Change Thesawalamai Law says UNP MP' The *Daily Mirror*, 29 November 2010 <http://print.dailymirror.lk/news/front-page-news/28517.html>

seems to be under threat from the state.[108] If the government addressed this sense of being under threat, these groups would be more open to reform. This is how reform was effected in Singapore, for instance, where sharing power with the Muslim community made reform of their personal law possible. Another option is for the government to support progressive voices within the community. This was done in India to promote reform of the personal law of the Parsee community.[109]

Shortcomings and Deadlock

The constitution-making process has many positives. Yet it was weakened by the influence of the security sector. As noted by the United Nations High Commissioner on Human Rights, the Sub-Committee reports on law and order and national security do not sufficiently address the need for stronger civilian oversight of the military and for clarity about the functions of security and intelligence services.[110]

Moreover, the politics of coalition government has stalled the process. The interim report of the Steering Committee, due out in December, was delayed after both the SLFP and the *Janatha Vimukthi Peramuna* (JVP) requested more time to study the proposals. The political formation headed by former President Mahinda Rajapaksa, after agreeing to participate in the process, and reaching consensus on a

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[108] Kumaravadivel Guruparan, 'Customary law of stateless nations: some observations on the question of who can reform the *Thesawalamai*, the customary laws of the Tamils in Sri Lanka' *Jindal Global Law Review*, 7 (1), 2016p.49.

[109] Dinusha Panditaratne, 'Towards Gender Equity: Reforming Personal Laws within a Pluralist Framework' *New York University Review of Law and Social Change*, vol. 32, no. 83

[110] UNHCHR Report 2017,p.27

wide range of issues, decided to pull out of the Sub-Committees.[111] Members of the SLFP, moreover, declared that they were only in favour of amendments to the existing constitution and not in favour of a new constitution and a referendum[112].

These swift reversals come despite an earlier agreement between all political parties in Parliament to set up a Constitutional Assembly. They are caused by political manoeuvring. Scuttling the constitution-making process will strengthen the Joint Opposition. For Mr. Sirisena, any amendment to the constitution that does away with the Executive Presidency will leave him in a vulnerable position, unable to control the SLFP and maintain power. For the UNP, the political fall-out from a loss at a referendum would be significant. Thus, instead of a strong, sustained, united, publicity campaign on the need for a new constitution, the process is deadlocked.

4. Conclusion

2016 exposed the nature of the challenges Sri Lanka faces today. By the end of the year Sri Lanka had a deadlocked constitution-making effort, a stalled transitional justice process and repeated attempts to expand the powers of the security sector. It is important to remember, however, that the government is not a monolith. It is a grouping of various factions which differ in their approach to governance. The last two years demonstrate that there are both regressive and progressive elements within the government – there were several failures, but there were also positive moves. The government co-sponsored a resolution at the UN Human Rights Council promising transitional justice. It

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[111] "Joint Opposition withdraws from sub-committees vested with drafting new constitution" *Newsfirst.lk* (16 February 2017) at http://newsfirst.lk/english/2017/02/joint-opposition-withdraws-sub-committees-vested-drafting-new-constitution/161933

[112] "SLFP has reservations for referendum on new constitution: SB" *Daily News* (28 December 2016) <http://dailynews.lk/2016/12/28/political/103143>

passed the OMP Bill. It ratified the United Nations Convention on the Rights of Persons with Disabilities. It engaged extensively with a range of United Nations Treaty bodies and Special Rapporteurs.[113] Most importantly, because it is an unstable coalition it is responsive to public pressure – for instance it decided, following public protest, to withdraw the initial, problematic drafts of the CTA and the amendment to the CCPA.

These facts mean that there is an opening for progressive change. If the government cannot seize and defend this opportunity, then civil society and the public must do so. They must focus on two areas of strategic importance.

First, they must create public mobilisation for security sector reform. The influence of the security sector, and its tendency to operate independently, must be checked.[114] These groups must also push a public advocacy campaign explaining why national security is best-guaranteed through the promotion, protection and respect for human rights. That is, that national security and human rights are not mutually exclusive. In the words of the United Nations General Assembly's resolution adopting the United Nations Global Strategy on Counter Terrorism: "effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing".[115] This argument is the essence of the statement by the United Nations Special Rapporteur for Torture that:

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[113] These include the Committee on the Elimination of Racial Discrimination; Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families; the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteurs on torture, on human rights and migrants, on the independence of judges and lawyers and on minority issues.

[114] UNHCHR Report 2017 p.50

[115] UNGA 2006 Plan of Action, Part IV (Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism) - (A/RES/60/288) – 8 September 2006

> "Effectiveness against terrorism and organized crime does not require breaking down the minimum guarantees for the protection of life, liberty and personal integrity. On the contrary, practices that are contrary to international principles de-legitimise the State."[116]

This argument needs to be made again and again in the public sphere so that security sector reform is not equated with being weak on Sri Lanka's sovereignty or security.

Second, public pressure must be used to reorient incentives, making it politically unfeasible for the government to adopt a pro-extreme Sinhala nationalist and pro-militarist stance. In other words, advocacy groups must work to reduce the political cost of articulating a plural, inclusive vision of Sri Lanka. This will require long-term, concentrated action against regressive forces, including the Joint Opposition.

Sri Lanka's recent history suggests that transitional moments come in cycles. The last was in 1994. The promise of 2015 must not be allowed to go the way of 1994. Instead, the government and the public must make targeted, strategic interventions to reform Sri Lanka's key institutions and prise open a fast-closing window for reform.

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[116] "Preliminary observations and recommendations of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, Mr. Juan E. Mendez" on the Official joint visit to Sri Lanka – 29 April to 7 May 2016" (7 May 2016, Colombo) at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19943&LangID=E

II

JUDICIAL INTERPRETATION OF FUNDAMENTAL RIGHTS

*Dinesha Samararatne**

1. Overview

The fundamental rights (FR) jurisprudence of the Supreme Court (SC) in the year 2016 offers an encouraging and refreshing departure from the trend that was evident in the previous years.[1] This departure is evident in the progressive approach to judicial interpretation, in the approach to judicial argumentation, in the marked increase in the amounts awarded as compensation and costs, and in the number of cases that were determined by the Court. The judicial performance in 2016 augurs well for the strengthening of judicial accountability for violations of fundamental rights. The broader legal and political context too includes healthy and/or positive indicators for respect and promotion of human rights. The ratification of the *Convention for the Rights of Persons with Disabilities* and the *Convention for the Protection of All Persons from Enforced Disappearance* by the state was widely welcomed and is possibly an indication of improved commitments

* Senior Lecturer, Department of Public & International Law, Faculty of Law, University of Colombo. The author was assisted by Ms Sajini Fernando, undergraduate of the Faculty of Law of the University of Colombo in editing this chapter.

1 All judgements analysed in this chapter have been obtained from the official website of the Supreme Court of Sri Lanka – www.supremecourt.lk. For a yearly analysis of the judicial interpretation of fundamental rights see the annual publications of this volume.

by the state towards its international human rights obligations.[2] The enactment of the *Right to Information Act* and its implementation is another high watermark in the increased protection for human rights along with the enactment of the *Office of the Missing Persons Act*.[3] The enhancement of judicial protection during this year therefore, can be viewed as being part of a broader trend in the improvement of human rights protection in the country.[4]

This chapter examines the FR jurisprudence of 2016 in light of relevant Constitutional principles as well as Sri Lanka's obligations under international human rights law. The chapter begins with an overall assessment of the jurisprudence of 2016. This is followed by a critical evaluation of the jurisprudence related to the right to liberty and right to equality. The judicial interpretations of applicable procedural rules during the year are evaluated thereafter. The remedies provided by the Court including the compensation awards are assessed in the next section, followed by an examination of other significant aspects of the jurisprudence of 2016. The chapter concludes by identifying some areas of concern and some suggestions for reform.

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[2] *The Convention on the Rights of Persons with Disabilities and the Convention for the Protection of All Persons from Enforced Disappearance* were ratified by Sri Lanka on 08 February 2016 and 25 May 2016 respectively. OHCHR, 'Ratification status for Sri Lanka' <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=164&Lang=EN> accessed 28 August 2017.

[3] *Right to Information Act,* No. 12 of 2016, Gazette Notification No. 2004/66 – Friday, February 03, 2017.

Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act, No. 14 of 2016, Gazette Extraordinary No. 2028/45 published on 19 July 2017- concerning the President assigning the Act and the Office, to the Minister of National Integration and Reconciliation.

[4] For an analysis of these developments please see the first chapter of this volume.

2. Fundamental Rights Jurisdiction of the Supreme Court

As per Art 126 of the Constitution, a victim or his attorney-at-law may file a petition before the SC alleging a violation or imminent violation by executive or administrative action of any fundamental right recognised under the Constitution.[5] The petition has to be filed within thirty days of the alleged violation. The Supreme Court exercises a 'just and equitable jurisdiction' in making a decision regarding a FR petition. The scope of this remedy has been expanded through judicial interpretation over time. In addition to a victim or his attorney-at-law, Court has permitted individuals/organizations to file petitions in the public interest.[6] Where the victim has died allegedly due to the

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[5] Art 126 (1) The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV.

(2) Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, within one month thereof, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such application may be proceeded with only leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two judges.

(3) Where in the course of hearing in the Court of Appeal into an application for orders in the nature of a writ of habeas corpus, certiorari, prohibition, procedendo, mandamus or quo warranto, it appears to such Court that there is prima facie evidence of an infringement or imminent infringement of the provisions of Chapter III or Chapter IV by a party to such application, such Court shall forthwith refer such matter for determination by the Supreme Court.

(4) The Supreme Court shall have power to grant such relief or make such directions as it may deem just and equitable in the circumstance in respect of any petition or reference referred to in paragraphs (2) and (3) of this Article or refer the matter back to the Court of Appeal if in its opinion there is no infringement of a fundamental right or language right.

(5) The Supreme Court shall hear and finally dispose of any petition or reference under this Article within two months of the filing of such petition or the making of such reference.;of the Constitution of Sri Lanka.

[6] *Environmental Foundation Limited v. Urban Development Authority, Sri Lanka (Galle Face Case)* SC (FR) 47/2004.

violation of FR, Court has held that family members of the victim may file a petition.[7] Moreover, through a broad interpretation of the right to equality the judiciary has enforced certain Directive Principles of State Policy in the determination of FR petitions.[8]

3. Discernible Progression in 2016

In comparison to the modest number of judgements that were issued under Art 126 over the last five years, the Supreme Court has issued a significantly high number of judgements in 2016. As evident in the table below, it is more than a 100% increase from last year. However it must be noted that data is not available on the number of petitions that were dismissed during this period.

Figure 1: FR judgements 2010-2016

Year	Number of Judgements	In favour of Petitioner	Dismissed	Other	Awards of Compen-sation	Awards of Costs
2016	44	25	18	02	15	05
2015	16	04	10	02	03	-
2014	19	04	11	04	-	01
2013	13	06	07	-	02	01
2012	09	02	06	01	-	02
2011	09	01	06	02	01	-
2010	12	03	09	01	02	03

7 *Sriyani Silva v. Iddamalgoda, OIC – Police Station, Paiyagala* [2003] 2 Sri LR 63.

8 *Kavirathne v. Commissioner General of Examinations (Z score Case)* SC (FR) No 29/2012, SC Minutes of 25 June 2012.

The reasons for this increase are not easy to ascertain. It could be an indication of a more dynamic judicial attitude to the determination of FR petitions and it could also be an indication of the increase in confidence by victims of FR violations in the judicial process. The progress that is evident in the qualitative aspects of the jurisprudence is however undoubtedly evidence of a strong court that is committed to fulfilling its constitutional mandate. This is possibly attributable to the strengthening of the independence of the judiciary in the recent years, particularly through the re-establishment of the Constitutional Council under the 19th Amendment to the Constitution and the additions to the composition of the Court thereafter.

However, in terms of the distribution of the cases as per the fundamental rights that were alleged to be violated, the year 2016 is a continuation of a trend that has been evident since 1978.[9]

Figure 2: FR judgements by FR challenged

	Year	Judge-ments	Art 12	Art 11	Art 13	Other
1	2016	44	41 (93%)	06	13	14(1)(a), (c), (g)
2	2015	16	15 (93%)	01	06	12(2), 14(1)(e), 14(1)(g)
3	2014	19	13 (68%)	01	01	14(1) (a) (c)
4	2013	13	10 (76%)	02	02	15
5	2012	09	09 (100%)	-	-	-
6	2011	09	07 (77%)	-	-	14(1)(g)
7	2010	12	10	04	03	-
	Total	**122**	**105**	**14**	**25**	

[9] See further, Dinesha Samararatne, 'Recent Trends in Sri Lanka's Fundamental Rights Jurisdiction', (2016) Volume XXII, *The Bar Association Law Journal*, pp. 234-246.

A majority of petitions allege a violation of the right to equality. In some cases the right to equality is alleged to have been violated along with other fundamental rights but often the petition is filed only with regard to the right to equality. Twenty two of the 41 cases in 2016 were cases that were determined on the basis of the right to equality. It is evident that the right to equality continues to be the fundamental right that attracts the most number of petitions in Sri Lanka.

4. International Treaty Obligations

While judicial reasoning is more rigorous in the jurisprudence of 2016, engagement with international human rights law per se is quite weak. There is no acknowledgement of Sri Lanka's international obligations under human rights law in the case law, with the exception of the *Manohari* case where the *Convention for the Elimination of All forms of Discrimination Against Women* (CEDAW) was referred to by the Court.[10] Even in to hat case, specific articles of CEDAW were not analysed or referred to by Court. References to comparative jurisprudence are evident only in a few cases in the jurisprudence of 2016. This suggests that that Court does not draw from judicial experiences of other jurisdictions in developing its own jurisprudence in a significant way although Sri Lanka is party to all the major human rights treaties. The judicial interpretation of fundamental rights analysed in this chapter have been declared in international human rights law as articles of treaties, and interpreted as General Comments by the corresponding treaty bodies. Some of these rights have been further interpreted in their consideration in determining individual petitions submitted to the treaty bodies. It is desirable that the adjudication of fundamental rights in a domestic court draws and benefits from the jurisprudence that is being developed in international

[10] *Manohari Pelaketiya v. Secretary, Ministry of Education* SC (FR) 76/2012, SC Minutes 28 September 2016.

law. As evident in the analysis undertaken in this chapter, Sri Lanka has drawn on this body of jurisprudence only marginally, at best.

In the Concluding Observations issued in 2017 in relation to periodic reports submitted by the Sri Lankan Government, treaty bodies have made observations regarding the weak protection mechanisms in domestic law for treaty provisions.[11] The CEDAW Committee for instance has recommended the introduction of judicial review of legislation and the repeal of Art 16(1) of the Constitution, which explicitly validates all existing written/unwritten laws not withstanding their inconsistencies with fundamental rights.[12] This Committee further recommended 'capacity-building' programmes for judges, prosecutors and lawyers to increase the gender-sensitivity in the development of jurisprudence.[13] The *Convention against Torture, Cruel, Inhuman Degrading Treatment or Punishment* (CAT) Committee called on the state to ensure effective and efficient remedies for victims of torture.[14] The findings of this Chapter further justify these recommendations.

5. Right to Liberty

In the interpretation of the right to be free from torture and the right to be free from arbitrary arrest, in comparison to the jurisprudence of the last five years, the Court adopts a rigorous interpretation of facts and the law in 2016. The judicial reasoning resonates powerfully with the often celebrated jurisprudence of the 1990s in which the Court

[11] CEDAW, p.8; CERD p.28; ICESCR p.10; Migrant Workers pp.29, 33.

[12] CEDAW p.11. 'All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter.' Art 16(1) of the Constitution.

[13] CEDAW p.15.

[14] Concluding Observations (2016) CAT/C/LKA/CO/5.

adopted nuanced and well-reasoned interpretations of the right. Furthermore the Court demonstrates respect, empathy and sensitivity to victims in the manner in which it records the events that resulted in the violation of the right.

The case of *Tilekeratne v. Sergeant Ellepola*[15] stands out from the cases decided in 2016 as emblematic of the deep seated issues related to the prevalence of torture in policing and in the judicial enforcement of the constitutional guarantee against it. This case involved the arrest and torture of a 15 year old boy by the police, who was arrested on the suspicion of theft. The Court declared that the minor's rights under Art 11[16] were violated and observes that the mother 'would have suffered mental shock having being made aware of the suffering of her son'.[17] In arriving at this conclusion, Court had the benefit of a confidential report that had been filed by the petitioner. Court noted that the material in that report 'is most revolting to one's sense of human decency and dignity. The third degree methods practiced by the police (...) is totally unacceptable and unbecoming of law enforcement officers (...)'.[18] Having made these grave observations, the Court however ordered a modest sum of compensation, Rs. 50 000 as payable to the minor's mother, and directed the Inspector General of Police(IGP) to take disciplinary actions against the respondents. It is not clear as to why the Court does not direct the Attorney General to file an indictment under the *Torture Act.*[19] A more encouraging aspect of this case is that when the minor was produced before the

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15 *Tilekeratne v. Sergeant Ellepola* SC (FR) 578/2011, SC Minutes 14 January 2016.

16 No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 11 of the Constitution of Sri Lanka.

17 *Tilekeratne v. Sergeant Ellepola,* p.13.

18 Ibid, p.11.

19 *Convention Against Torture, Cruel Inhuman Degrading Treatment or Punishment Act* No 22 of 1994.

Magistrate, apart from calling for reports from the Probation Department and the Inspector of Police, the Magistrate had directed the Legal Aid Commission to file a FR petition.[20] The petition was filed accordingly by the Legal Aid Commission on behalf of the petitioners. This is an extremely commendable development and will be discussed further in relation to standing in a subsequent section of this chapter.

In comparison to the general judicial attitude demonstrated in 2016 in the determination of petitions alleging the violation of Art 11, the decision of *Aravinda v. Atapattu Police Sergeant, Police Station, Pitabeddara*[21] is weak. The petitioner alleged that in the process of being taken into custody, he was subjected to an acid attack after which he was not provided immediate access to a hospital. The medical records affirmed the petitioner's account of the incident. Court held that the Officer-in-Charge (OIC) had violated the petitioner's right to be free from torture by failing to take him to hospital immediately. While the Court noted that the actions of the other police officers also amounted to a violation of the petitioner's rights,it noted further that 'when the OIC took a decision to detain the petitioner in his custody, they could not have gone against the decision of the OIC.'[22] This observation is contrary to the interpretation adopted in the past with regard to responsibility of public officers. It has been held in the past, that officers within the chain of command are deemed to be responsible regardless of their degree of involvement in the impugned

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[20] *Tilekeratne v. Sergeant Ellepola*, p.6.

[21] *Aravinda v. Police Sergeant, Police Station, Pitabeddara* SC (FR) 26/2009, SC Minutes 2 August 2016.

[22] Ibid, p.10.

actions.[23] Moreover, the Court did not arrive at a finding as to whether the police was responsible for the acid attack. As the OIC concerned was deceased by this time, the state was ordered to pay Rs 200 000 as compensation. It is noteworthy that not a single judicial authority is cited in this judgement and that Court does not refer to relevant constitutional provisions on Sri Lanka's obligations under international human rights law.

In the case of *Wijotmanna v. OIC, Police Station, Katugastota and others,*[24] the Court made significant observations regarding the kind of evidence required to establish a violation of Art 11. The petitioner had had an altercation with one of the respondents after the petitioner had asked him to move into the bus, in which they had both been standing on the footboard. The petitioner was subsequently arrested and subjected to alleged acts of torture. These included severe assault and the petitioner's head being held under water. The medical evidence was found to support the petitioner's allegations. Nevertheless, relying on precedent, the Court observed that 'cogent evidence' that is required to establish a violation of Art 11 does not necessarily require medical evidence.[25] The Court invoked the cases of *Silva v. Kodithuwakku*[26] and *Channa Pieris v. AG*[27] in holding that Art 11 provides a fundamental and absolute constitutional guarantee and that its violation can take many forms,

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[23] *Deshapriya v. Captain Weerakoon, Commanding Officer, Sri Lanka Navy Ship "Gemunu"* [2003] 2 Sri LR 99; *Sriyani Silva v. Iddamalgoda, OIC, Paiyagala* [2003] 2 Sri LR 63; Sanjeewa, Attorney –at-Law (on behalf of Gerald Mervin Perera) v Suraweera, OIC Wattala [2003] 1 Sri LR 317.

[24] *Wijotmanna v. OIC, Police Station, Katugastota* SC (FR) 138/2007, SC Minutes 31 March 2016.

[25] Court relies on *Ansalin Fernando v Sarath Perera* [1992] 1 Sri LR, p. 411.

[26] *Silva v Kodithuwakku* [1987] 2 Sri LR, p. 119.

[27] *Channa Pieris v. AG* [1994] 1 Sri LR, p. 6.

psychological or physical.[28] In analysing the evidence that was produced by the respondents, Court held that the record does not provide clear reasons for the arrest or the detention of the petitioner, and that he was detained without being produced promptly before a Magistrate.

A similarly broad interpretation of Art 11 was adopted in the case of *Perera v. Police Constable, Police Station Keselwatta.*[29] The Court accepted the medical evidence provided by the petitioner and held that the petitioner suffered from Post-Traumatic Stress Disorder with co-morbid depression episode as a result of the assault that he had been subjected to at the police station. In this case too, the Court invoked *obiter* from the case of *Silva v. Kodithuwakku,*[30] where Amerasinghe J had observed that '(...) torture (...) is not confined to the realm of physical violence. It would embrace the sphere of the soul or mind as well.'[31] With regard to the alleged violation

[28] *Wijotmannav OIC, Police Station, Katugastota,* (n 24) 8.

[29] *Perera v. Police Constable, Police Station Keselwatta* SC (FR) 260/2011, SC Minutes 1 April 2016.

[30] *Silva v. Kodithuwakku,* (n 26).

[31] *Perera v. Police Constable, Police Station Keselwatta,* (n 29), p. 11.

of Art 13[32], Court rejected the petitioner's claim on the basis that he could not establish that the arrest could have been avoided. Court seemed to have taken the view that where reasons are provided for an arrest, the burden shifts to the petitioner to 'satisfy court that such an arrest could have been avoided.'[33]

The question of acceptability of the report by a Judicial Medical Officer (JMO) was considered in the case of *Koitex v Sub Inspector,*

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32 13(1) No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.

(2) Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law.

(3) Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court.

(4) No person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law. The arrest, holding in custody, detention or other deprivation of personal liberty of a person, pending investigation or trial, shall not constitute punishment.

(5) Every person shall be presumed innocent until he is proved guilty: Provided that the burden of proving particular facts may, by law, be placed on an accused person.

(6) No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence and no penalty shall be imposed for any offence more severe than the penalty in force at the time such offence was committed. Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations. It shall not be contravention of this Article to require the imposition of a minimum penalty for an offence provided that such penalty does not exceed the maximum penalty prescribed for such offence at the time such offence was committed.

(7) The arrest, holding in custody, detention or other deprivation of personal liberty of a person, by reason of a removal order or a deportation order made under the provisions of the Immigrants and Emigrants Act or the Indo-Ceylon Agreement (Implementation) Act, No. 14 of 1967, or such other law as may be enacted in substitution therefor, shall not be a contravention of this Article.; of the Constitution of Sri Lanka.

33 *Perera v. Police Constable, Police Station Keselwatta.*

Police Station, Hikkaduwa.[34] In this case,the petitioner complained of violations of his right to liberty by certain police officers who were alleged to be intimately involved with his partner. He, together with his father, alleged that they were subjected to arbitrary arrest and to torture by those police officers. The Court held that the right to liberty of both the father and son had been violated by the Police and that the son had been subjected to torture. In determining the violation of Art 11, the Court compared two medical reports that were submitted – one issued by the JMO who examined the son while he was in custody and another by a JMO who had examined him soon after his release. The Court rejected the first report as being false.[35] Noting that the respondents could not produce reasonable evidence for the arrest and detention of both petitioners, Court upheld a violation of Art 13. The rejection of a Medico-Legal Form submitted by a JMO as being false has serious implications for the independence of the office of the JMO and the reliability of such evidence. Where such findings are made by Court, processes should be established to ensure further legal action to ensure that public officers are held accountable for the performance of their duties.

The deep seated problems faced in the Criminal Justice system ensuring the right to liberty were evidenced in the case of *Rajapaksha v. Inspector of Police, Police Headquarters.*[36] The petitioner had been arrested, detained and subjected to torture without any reasons being given for his arrest. The petitioner was informed of the reasons for arrest only when charges were framed against him before the Magistrate. A particularly grave issue in this incident is that on the instructions

[34] *Koitex v. Sub Inspector, Police Station, Hikkaduwa* SC (FR) 158/2008, SC Minutes 17 February 2016.

[35] Ibid, 9.

[36] *Rajapaksha v. Inspector of Police, Police Headquarters* SC (FR) 689/2012, SC Minutes 28 March 2016.

of the first respondent police officer another filed a false B report before Court. The false report stated that seven packets of cannabis were found on the petitioner at the point of arrest. The police officer had at that point of instructing his colleague to prepare the B report produced seven such packets which were kept concealed at the police station. The first respondent had taken the petitioner from his home and detained him bare-bodied and handcuffed him in the police jeep. The jeep was parked at a school where the respondent had delivered a lecture on dengue eradication. During that time, the respondent had shamed the petitioner by announcing that an illicit liquor dealer was in the jeep, with the full knowledge that the petitioner's children were enrolled in that same school.

The redeeming aspects of this narrative are that during the proceedings before the Magistrate's Court, the police officer who filed the B report spoke the truth resulting in the discharge of the petitioner. Moreover, pursuant to a complaint made to the police, theIGP had commenced a disciplinary inquiry against both police officers. The Court upheld the violations of the right to liberty of the petitioner, while directing the IGP and the Attorney General to take necessary action.

In the course of this judgement, the Court urged judicial caution in relying on evidence produced by the police in proceedings. Court noted that '(...) this case is a good example for the trial judges to remember that the police sometimes arrest people without any reasons and later introduce contraband (...) to justify the arrest.'[37] Court further noted that '(...) it is safer not to act only on one police officer's evidence if more than one police officer has participated in the raid, because if there is an introduction by the police officers as in the present case, there may, sometimes, be contradictions among the evidence of

[37] Ibid, p. 15.

police officers.'[38] These observations, while valid, point to extremely serious gaps in Sri Lanka's policing for which immediate solutions and remedies must be provided with. Court ought to be able to rely on the evidence submitted by a police officer and if there is proof that evidence has been deliberately fabricated, due action should be taken against such officers according to the law. Merely observing that relying on the evidence of one police officer is not advisable may amount to turning a blind eye to the abuse of office by such police officers.

In addition to this case, there were a few other FR petitions which alleged a violation of Art 13[39]in 2016, in which the Court, having examined the facts held that there were credible reasons for arrest and the petitions were dismissed accordingly.[40]

6. Right to Equality

The right to equality jurisprudence of 2016 offers some interesting developments in that the Court interprets the right to include the right to be free from sexual harassment in the workplace and the right to be free from arbitrary arrest. The other cases reflect the prevailing trend in the right to equality jurisprudence and relates to school admission and recruitment etc. in the public service.

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[38] Ibid.

[39] Art 13 (1) No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest. (2) Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law (...); of the Constitution of Sri Lanka.

[40] *Fernando v Police Inspector Ranjith* SC (FR) 612/2009, SC Minutes 21 September 2016; *Jayasena v. OIC, Fraud Bureau* SC (FR) 350/2013, SC Minutes 3 October 2016; *Shifani v. Wijayamuni* SC (FR) 368/2012, SC Minutes 28 July 2016.

Sexual Harassment as a Violation of the Right to Equality

The case of *Manohari Pelaketiya v Secretary, Ministry of Education*[41] is possibly the most significant judgment that was issued in 2016. The petitioner was a school teacher who alleged the violation of Art 12(1) and Art 14(1)(a) due to sexual harassment at the workplace.[42] Court upheld her petition and issued possibly the first judgement under Art 126 that specifically address women's rights and which cited CEDAW. Court notes that 'Sri Lanka boasts of both constitutional as well as international obligations to ensure equity and gender-neutral equality which this Court simply cannot ignore.'[43] Accordingly Court declares that 'sexual harassment or work place stress and strain occasioned by oppressive and burdensome conduct under colour of executive office would be an infringement' of FR. Court however does not clarify why it chooses to uphold a violation of Art 12(1) as opposed to Art 12(2), which is the explicit prohibition on discrimination. It is not clear from the judgements whether the petitioner claimed a violation of the right to be free from discrimination, however, leave to proceed was granted only in relation to Art 12(1) and Art 14(1)(a). Furthermore, Court does not provide reasons as to why 'sexual harassment' amounts to a violation of fundamental rights. A robust assessment of sexual harassment, how it affects women and the reasons as to why it violates the right to equality would have added more depth to this ground breaking judgement.

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41 *Manohari Pelaketiya v. Secretary, Ministry of Education* SC (FR) 76/2012, SC Minutes 28 September 2016.

42 Art 12(1) All persons are equal before the law and are entitled to the equal protection of the law; Art 14(1)(a) Every citizen is entitled to – (a) the freedom of speech and expression including publication; of the Constitution of Sri Lanka.

43 *Manohari Pelaketiya v. Secretary, Ministry of Education,* p.15.

Access to Education

Eight of the cases under the right to equality involved the right of access to education. Three of those cases were regarding admission to University. In two of those cases, Court held that 'picking and choosing' in the application of the admissions policy would amount to arbitrary action that violates Art 12(1).[44] In two of the school admissioncases the Court held with the petitioner and ordered that the children in question be admitted to the school concerned.[45] In another case, Court noted that a petitioner cannot seek equality of treatment in relation to an illegal decision/action of the state.[46] In these cases however, the judicial focus is on due process as it falls within the scope of the right to equality. The right to education itself, as recognised under the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Child Rights Convention (CRC) do not attract any discussion or debate in any of these judgements.

State as Employer

Several petitions made under the right to equality concerned due process in recruitments, appointments, remuneration etc. in the public sector. In keeping with previous trends, in 2016 the Court continued to enforce fairness, impartiality and adherence to applicable guidelines in these cases. For instance, the case of *Kobindarajah v. Eastern University of*

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[44] *Karunarathna v. University Grants Commission* SC (FR) 09/2015, SC Minutes 20 July 2016; *Wickramaratna v University Grants Commission* SC (FR) 13/2015, SC Minutes 20 July 2016.

[45] *De Silva v. Principal, VisakhaVidyalaya* SC(FR) 19/2015, SC Minutes 11 July 2016; *Hettiarachchi v Principal, Mahamaya Balika Vidyalaya* SC (FR) 41/2016, SC Minutes 2 November 2016.

[46] *Laknidu v Principal, Dharmashoka College, Ambalangoda* SC (FR) 136/2015, SC Minutes 10 November 2016. This principle was upheld during this year in the case of *Samarakoon v National Water Supply and Drainage Board* SC (FR) 284/2013, SC Minutes 23 September 2016.

Sri Lanka[47] involved a challenge to the appointment of a Vice Chancellor of a state university. The petitioner challenged the non-inclusion of his name in the ballot paper and the subsequent appointment of another person to the post. Court upheld the preliminary objection by the respondents and held that the petitioner was out of time with regard to the first part of his complaint, but granted leave to proceed with the challenge to the appointment of the Vice Chancellor. In determining these petitions, the Court engaged in judicial review of the facts as per the applicable guidelines, policies and legislation. In such an exercise, the right to equality only serves as a framework within which the Court enforces the rule of law. Judicial precedent or substantive aspects of law play a marginal role, if any, in these judgements.[48]

Arbitrary Arrests

An arbitrary arrest was held to be a violation of the right to equality in two cases - *Gamini v Inspector of Police, CID*[49] and *Aravinda v Police Sergeant, Police Station, Pitabeddara.*[50] In the *Gamini* case, though the petitioner had complained of violations of Arts 11 and 13 along with 12, Court had granted leave to proceed only regarding the violation of Art 12. On an examination of the facts Court held that the police had no reasons for the arrest and that therefore the petitioner's right to

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[47] *Kobindarajah v. Eastern University of Sri Lanka* SC (FR) 24/2016, SC Minutes 21 June 2016.

[48] *See for example, Athukorala v Secretary, Ministry of Education* SC (FR) 232/2012, SC Minutes 28 October 2016; *Shanaz v University of Colombo* SC (FR) 236/2011, SC Minutes 24 February 2016; *Manel Dassanayake v Secretary, Ministry of Agricultural Development and Agrarian Services* SC (FR) 267/2010, SC Minutes 9 February 2016; *Ameer Ismail v Former Director General* CIABOC SC (FR) 277/ 2010, SC Minutes 7 September 2016; Seneviratne v Inspector General of Police SC (FR) 396/2010, SC Minutes 30 November 2016.

[49] *Gamini v. Inspector of Police, CID* SC (FR) 81/2011, SC Minutes 22 August 2016.

[50] *Aravinda v. Police Sergeant, Police Station, Pitabeddara* SC (FR) 26/2009, SC Minutes 2 August 2016.

equality had been violated. One judge dissented from the bench with regard to the responsibility for this violation. The dissenting opinion held that the OIC too was responsible for the arbitrary arrest that had been carried out. The judge noted that the OIC had signed the B report without verifying facts and had not even filed an affidavit in response to the allegations against him in the case.

Duty to Give Reasons

The cross-fertilization of the FR jurisprudence with the principles of administrative law has been a strong feature of Sri Lanka's FR jurisprudence. The continuation of this trend in the year 2016 is evident in the case of *Premalal Perera v Minister of Indigenous Medicine.*[51] The petitioners alleged that they were removed from the Homeopathic Council in violation of their right to equality and their right to 14(1)(g) and (c).[52] As per the *Homeopathy Act,*[53] the Minister 'may, without assigning any reason' remove a Council member.[54] However, Court recognised judicial precedent where Court has held that regardless of statutory exclusion the duty to give reasons binds persons exercising discretion under public law.[55] Court affirmed in this case that all persons exercising discretion under public law have a duty to give reasons regardless of statutory language. This case therefore further affirms the rights based approach to judicial review of administrative

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[51] *Premalal Perera v Minister of Indigenous Medicine* SC (FR) 891/2009, SC Minutes 31 March 2016.

[52] Art 14(1)(c) The freedom of association; Art 14(1) (g) The freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise; of the Constitution of Sri Lanka.

[53] *Homeopathy* Act No 7 of 1970

[54] Ibid, Section 11.

[55] Court relied on *Nethsinghe v. Wickremanayake* SC Application 770/1999 SC Minutes 13 July 2001.

actions. This judicial view has been developed over a few years through a consistent line of judicial precedent.[56]

7. Procedural Aspects

Writ and FR jurisdictions

In the case of *Sri Lanka Telecom PLC v Telecommunications Regulatory Commission of Sri Lanka,*[57] Court dealt with the question of whether a FR petition would lie against non-compliance with statutory procedure. The Petitioner alleged that the regulatory authority had made a recommendation for the issuance of a license without due regard to the stipulated procedure. Court rejected the preliminary objection raised by the three respondents and held that disregard for due process amounts to a violation of the equal protection of the law. In such an instance a FR petition can be filed. Court noted that there is 'a tendency to incorporate the Principles of Administrative Law to equal protection of law embodied in Article 12(1) of the Constitution.'[58] Court suggested that the petitioner has the choice of challenging impugned actions by way of a writ petition or a FR petition.

Rules re Standing

The case of *Ceylon Electricity Board Accountants' Association v Minister of Power and Energy* decided in 2016 attracted considerable debate given its conclusion that a trade union did not have standing to file a

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[56] See for instance, *Lanka Multi Moulds (Pvt) Ltd v Wimalasena, Commissioner of Labour and Others* [2003] 4 Sri LR 143; *Hapuarachchi and others v Commissioner of Elections and another* SC (FR) 67/08 SC Minutes 11 November 2008.

[57] *Sri Lanka Telecom PLC v Telecommunications Regulatory Commission of Sri Lanka* SC (FR) 194/ 2016, SC Minutes 7 October 2016.

[58] Ibid, p.5.

fundamental rights petition.[59] Court accepted the argument made by the AG that in the absence of a specific constitutional provision which permitted Court to include 'an unincorporated body or persons,' that the Court cannot extend standing to include those categories of petitioners. Court further relied on the fact that a trade union is not allowed to represent its members in litigation. Court held that 'the object of all interpretation is to discover the intention of the legislature' and held that although incorporated bodies have been granted standing under Art 126 that interpretation has not extended to unincorporated bodies.[60] Court further held that Sri Lanka cannot be guided by the widening of standing under the Indian Constitution under Art 32 of the Indian Constitution, as 'there is a fundamental difference in the conceptual structure of the two said Articles.'[61] However, the Court does not explain the difference or refer to relevant jurisprudence of the Indian Court. The difference between Art 126 of the Sri Lankan Constitution and Art 32 of the Indian Court that is relevant to the issue of *locus standi* is that Art 126 specifically vests the right to file a petition with the victim or the attorney-at-law while the Indian article is silent on who may file the petition.[62]

However, Court did leave the door open for a liberal approach to standing in exceptional circumstances.

> The Court has in certain circumstances allowed a public spirited individual or a social action group to bring an action for vindication of the fundamental right of a person or class

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[59] *Ceylon Electricity Board Accountants' Association v Minister of Power and Energy* SC (FR) 18/2015, SCM 03 May 2016.

[60] Ibid, p.13.

[61] Ibid, p.14.

[62] (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed. Art 32(1) of the Indian Constitution of 1956 as amended.

> of persons who by reason of poverty or disability or socially or economically disadvantaged position *[sic]* unable to approach a Court of Law for justice. It is a fascinating exercise for the Court to deal with public interest litigation because it is a new jurisprudence which the Court must be careful, to see that a member of the public who approaches the Court in cases of this kind, is acting bona fide and not for personal gain or private profit or political motivation or other oblique consideration.[63]

The Court concluded its judgement by stating that 'the Court is mindful that it would be disastrous for the rule of law, if such a person is prevented from bringing action, for it would be open to the State or a public authority to act with impunity beyond the scope of its power or in breach of a public duty owed by it.'[64]However it must be noted that the judgement does not refer at any point to the merits of the petition. It is not possible therefore to apply the test developed by the Court in determining whether the petition was in the public interest or not.

In comparison, in the case of *Noble Resources International Pte v Minister of Power and Renewable Energy,*[65] Court took a slightly different position. This case involved a petition made by a foreign company alleging violation of its FR due to non-compliance with applicable tender procedures. Court does not clarify whether the company has been incorporated in Sri Lanka or not. The text of Art 126 restricts the right to file a petition to the victim of a FR violation or his attorney-at-law. However, Court decided to consider the merits of the case, unlike in the *Ceylon Electricity Board Accountants'*

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[63] Ibid, p.14-15.

[64] Ibid, p.15.

[65] *Noble Resources International Pte v Minister of Power and Renewable Energy* SC (FR) 394/2015, SC Minutes 24 July 2016.

Association case, on the basis that it would be 'a travesty of justice' to dismiss a case ona preliminary objection if it has found that a FR has been infringed.[66] Court went onto dismiss the petition but nevertheless recommended that the existing contract be terminated and that fresh bids be called by the government. It made these recommendations taking into account the fact that tender procedures involve public funds and that it is 'the solemn duty of the Court to protect the Rule of Law embodied in the Constitution in order to ensure its credibility in the faith of the people (...).'[67]

A commendable development with regard to standing was the case of *Tilekeratne v. Sergeant Ellepola.*[68] In this case when the minor who had been arrested was produced before the Magistrate, the Magistrate instructed the Legal Aid Commission (LAC) to file a fundamental rights petition on his behalf. The FR petition was brought to Court accordingly by LAC. The LAC is mandated by law to provide access to justice.[69] It is highly commendable that the Magistrate took action *suo moto* to require that LAC should represent a victim of FR before SC. Similar judicial initiatives by Magistrates who are the first point of judicial contact for persons who are subjected to arrest and detention could possibly provide effective remedies for victims of FR violations and thereby increase the protection afforded to the right to liberty.

Thirty day limit

The Court affirmed a purposive approach to the interpretation of the thirty day limit within which victims are required to file petitions alleging a violation of fundamental rights. In the case of *Kobindarajah v.*

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[66] Ibid, p.10.

[67] Ibid, p. 25.

[68] *Tilekeratne v Sergeant Ellepola* SC (FR) 578/2011, SC Minutes 14 January 2016.

[69] *Legal Aid Law* No. 27 of 1978.

Eastern University of Sri Lanka,[70] the Court upheld the interpretation to this rule in *Namasivayam v. Gunawardena*[71] which is, that time will run 'only from the date on which the petitioner did in fact become aware of such infringement and was in a position to take effective steps to invoke the jurisdiction of this Court, unless the petitioner establishes that his free access to the Supreme Court is restrained.'[72] Similarly, in *De Soyza v. Chairman, Public Service Commission,*[73] Court recalled precedent which held that a purposive interpretation should be given to the thirty day limit.

Time taken to conclude FR petitions

A calculation of the time lapse between the filing of a FR petition and the determination of its merits suggests that on average it takes 2-6 years for a FR petition to be heard and for the matter to be concluded. As demonstrated in the table below while 5 petitions were determined within the same year, most petitions were before Court for more than 4 years.

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[70] *Kobindarajah v. Eastern University of Sri Lanka* SC (FR) 24/2016, SC Minutes 21 June 2016.

[71] *Namasivayam v. Gunawardena* [1989] 1 Sri LR 394.

[72] *Kobindarajah v. Eastern University of Sri Lanka*, 7.

[73] *De Soyza v. Chairman, Public Service Commission* SC (FR) 206/2008, SC Minutes 9 December 2016.

Figure 3: Time lapse between filing and conclusion of FR

	No of years	No of Petitions	Approximate %
1	0-1	5	12
2	1-2	11	26
3	2-3	0	0
4	3-4	2	5
5	4-5	7	16
6	5-6	6	14
7	6-7	3	7
8	7-8	5	12
9	8-9	3	7
10	9-10	1	2

The Constitutional requirement is that FR petitions should be concluded within two months of the petition being filed.[74] However the data reproduced in the above tables suggest long delays in the conclusion of several of these cases. The factors that contribute to such delays need to be identified and the impact of these delays on victims, those responsible for the violations and on the justice system should be the subject of critical study. Immediate measures should be taken to reduce the delay in the determination of fundamental rights petitions.

Complaints made to the Human Rights Commission

In the case of *Aravinda v Police Sergeant, Police Station, Pitabeddara,* the Petitioner's father had made a complaint to the Human Rights Commission of Sri Lanka(HRCSL) and the respondents argued

[74] Art 126(5) of the Constitution.

that time had run against the petitioner due to that complaint.[75] The respondents argued that the complaint was made by the father of the victim and that the *Human Rights Commission Act* suspends the thirty day limit for complaints made to the HRCSL by the victim. In interpreting the relevant sections of the *Human Rights Act* which excludes the time taken at the Commission to conclude its inquiry re complaints from the thirty day time limit, Court held that the time will not run against the petitioner as the father was an 'aggrieved person' under that section.[76]

In the case of *Alawala v IGP*[77] Court noted that if the petitioner was put on notice that the recommendation given by theHRCSL will not be implemented by the state authority concerned, that time will begin to run against the petitioner under Art 126. Essentially this would mean that a petitioner must be vigilant in filing her FR petition within thirty days of having knowledge that the recommendations of the HRCSL will not be effective. In arriving at this conclusion Court affirmed the principle that 'equity aids the vigilant, not those who slumber on their rights.'[78]

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[75] '(1) Where a complaint is made by an aggrieved party in terms of section 14, to the Commission, within one month of the alleged infringement or imminent infringement of a fundamental right by executive or administrative action, the period within which the inquiry into such complaint is pending before the Commission, shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court by such person in terms of Article 126 (2) of the Constitution.' S 13 of the *Human Rights Act* No 21 of 1996

[76] *Aravinda v. Police Sergeant, Police Station, Pitabeddara*, 7.

[77] *Alawala v Inspector General of Police* SC (FR) 219/2015, SC Minutes 15 February 2016.

[78] Ibid, p.12.

Affidavits

In *Tirathai Public Co Ltd v CEB,*[79] Court held that it is settled law that affidavits are not mandatory in filing petitions under Art126, but that 'there should be adequate material' for Court to give due consideration.[80] This decision points to a flexible approach in terms seeking adherence to applicable procedures in the determination of FR petitions. This judicial approach is progressive in that it privileges the substantive aspects of a FR petition over its procedural aspects. Such a flexible approach to procedural rules and technicalities makes the remedy more accessible.

8. Remedies

The remedies provided by the Court in 2016 seem to be effective with a high normative impact on respect and promotion of human rights.

Compensation

The compensation awards were notably higher than the awards made during the last five years. For instance in *Seneviratne v Assistant Investigation Officer, CEB*[81]- in consideration of the violation of FRs 12(1) and 14(1), the Assistant Investigating Officer was ordered to personally pay Rs. 750,000 and the Ceylon Electricity Board was ordered to pay Rs. 400,000. Court relied on the dissenting opinion of Justice Mark Fernando in *Saman v Leeladasa*[82] in adopting a broader approach to the determining of the award. It considered the

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[79] *Tirathai Public Co Ltd v CEB* SC (FR) 108/2016, SC Minutes 8 August 2016.

[80] Ibid, p. 6.

[81] *Seneviratne v Assistant Investigation Officer* SC (FR) 476/2012, SC Minutes 16 December 2016.

[82] *Saman v Leeladasa* [1989] 1 Sri LR, p. 1.

fact that CEB had a monopoly of the supply of electricity, which is 'indispensable for human life'.[83] The dissenting opinion had held that compensation for violation of FR should be compensatory for actual loss suffered. Court took the view that the liability under Art 126 is a stand-alone category of liability and that the Court has a wide discretion in determining its scope. The majority opinion in *Saman v Leeladasa* was that compensation awarded for violation of FR was only symbolic and therefore need not compensate for actual loss suffered.

Decisions declared Null and Void

Several Excise Guards challenged promotions to the post of Excise Sergeants by the Excise Department in the cases of *Sarath v Commissioner General of Excise*[84] and *Ravi Perera v Commissioner General of Excise.*[85] Having found that the promotions had been made outside of the applicable marking scheme prepared by the Department, Court held that all those appointments were null and void. Approval had been given to fill 21 vacancies whereas the Commissioner General had made 47 and 20 promotions under the two categories of 'written examinations' and 'merit' respectively.[86] All these appointments were declared null and void by the Court.

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[83] Ibid, p.13.

[84] *Sarath v Commissioner General of Excise SC (FR) 661/2012,* SC Minutes 14 July 2016.

[85] *Ravi Perera v Commissioner General of Excise* SC (FR) 663/2012, SC Minutes 14 July 2016.

[86] *Sarath v Commissioner General of Excise,* p.11.

9. Other Significant Judicial Interpretations/ Observations

Just and Equitable Jurisdiction

In determining the case of *Liyanage v Chairman Pradeshiya Sabha, Kelaniya*[87] the Court made several observations regarding the nature of its jurisdiction under Art 126. Court upheld the claim by the petitioner, that a Minister (at the time) and several other individuals including persons from the relevant local authority demolished the parapet wall and parts of his house in an arbitrary manner violating his fundamental rights. The Court does not specify the rights that they found to have been violated by these impugned actions. Reference however is made to the Directive Principles of State Policy which recognise the state obligation to provide and ensure an adequate standard of living, including housing and the obligation to protect the family as the basic unit of society.[88] Accordingly, Court held that the State Minister is responsible, along with the OIC of the Kiribathgoda Police station for the violations of FR. It is noteworthy that the OIC was not named by the petitioner, but the Court held him responsible for 'dereliction of duties,'[89] and held that 'his conduct is a slur to the good name of the Police Department.'[90]

> 'A court of law cannot be immune or ignorant to happenings around the country that affect human lives which cause tremendous loss or injury to such persons or individuals, inclusive of loss to property. If an illegal act or wrong has been

[87] *Liyanage v Chairman Pradeshiya Sabha, Kelaniya* SC (FR) 573/2010, SC Minutes 28 November 2016.

[88] Ibid, p.15. Directive Principles of State Policy as declared under Art 27(1)(c) and Art 29(2)(12).

[89] *Liyanage v Chairman Pradeshiya Sabha, Kelaniya,* p.25.

[90] Ibid.

> caused to a citizen, who seeks legal remedy a court needs to engage itself in an all-inclusive inquiry (...). Fundamental rights jurisdiction hitherto vested in the Apex Court is wide enough to reach a genuine complaint of a citizen who has suffered as a result of executive or administrative actions. That is the reason for this court even in the past permitted litigants to submit their grievance even by post or post cards, and permit application to be entertained beyond the period ordinarily permitted by the basic law. The underlying reason is that this court has wide jurisdiction to make just and equitable orders, in cases involving breach of fundamental rights. One also should keep in mind that in an environment of lawlessness the fears, difficulties and resistance a law abiding citizen has to undergo. In such circumstances naturally a law abiding citizen would encounter delays to obtain material to support his case, more particularly when a State Minister is involved and incriminated.'[91]

These observations are significant as they relate to the actions of a Minister who was noted as having acted with impunity while in office. This case is an example of the manner in which the Court can ensure accountability for the exercise of public power and thereby uphold the rule of law in the determination of FR petitions.

Concept of Uberrima Fides (Utmost good faith)

Several FR petitions determined in 2016 went into the question of *uberrima fides* of the petitioner. For instance in *Shereffdeen v Principal, Visakha Vidyalaya,*[92] Court dismissed the petition on the basis that the

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[91] *Liyanage v Chairman Pradeshiya Sabha, Kelaniya* SC (FR) 573/2010, SC Minutes 28 November 2016, p.14.

[92] *Shereffdeen v Principal, Visakha Vidyalaya* SC (FR) 01/2015, SC Minutes 3 October 2016.

petitioner had not established *uberrima fides* in petitioning the Court. The petitioners were found to have misrepresented facts and not made frank and full disclosure of relevant facts. Relying on precedent Court observed that the petitioner enters into a 'contractual agreement' with the Court when filing a FR petition 'to the effect that all what would be submitted by him by way [sic] further documents would be true.'[93] If such document were found to be false Court stated that 'the petition should be dismissed in limine.'[94] These judicial observations raise an interesting question as to the place of principles of equity in FR petitions which warrant a more detailed discussion that is beyond the scope of this Chapter.

Discretion of Judiciary, Attorney-General

In 2016, the amenability of judicial actions and the exercise of discretion by the Attorney-General to Art 126 had to be considered by the Court. Court affirmed precedent and held that judicial actions are excluded from Art 126. With regard to judicial review of the exercise of discretion by the Attorney-General too Court upheld precedent which had recognised that the Attorney-General's actions are subject to judicial review under Art 126.

The actions of a Magistrate in committing a person to remand imprisonment were considered in the case of *Gammanpila v. Inspector of Police Special Investigation Unit, Police Headquarters.*[95] Petitioner alleged a violation of his fundamental rights due to arbitrary arrest as well as remand imprisonment. Court granted leave to proceed with the petition with regard to arbitrary arrest but not in relation to the order

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[93] Ibid, p.11.

[94] Ibid, p.12.

[95] *Gammanpila v. Inspector of Police Special Investigation Unit, Police Headquarters* SC (FR) 207/2016, SC Minutes 11 July 2016.

of the Magistrate committing him to remand custody. Court rejected the petitioner's contention that the judicial order was 'in consequence of executive and administrative action.'[96] Relying on precedent, Court held that Art 126 does not lie against the exercise of judicial power.

In the case of *Sarath de Abrew v. Chief Inspector of Police, Police Station, Mount Lavinia*[97] Court considered the petition of a SC judge who claimed that his right to equality and rights under Art 13 (3) and (5) were violated by the AG in indicting him for an offence without 'conducting a fair trial and proper investigation.'[98] Court affirmed that the AG's discretion may be subjected to judicial review but nevertheless based on evidence submitted to Court on a confidential basis held, that in the present case the AG had exercised his discretion reasonably. In arriving at this conclusion the Court made the following observation about the office of the AG:

> The Attorney-General acts as the sentinel of professional Code of Conduct and is required to protect the rights and privileges of the lawyers as well as the purity and dignity of the profession. He is the "keeper of the conscience" and the guardian of the interests of the members of the public. Where the legislature has confided the power on the Attorney-General to forward indictment with a*[sic]* discretion how it is to be used, it is beyond the power of Court to contest that discretion unless such discretion has been exercised mala fide or with an ulterior motive or in excess of his jurisdiction (...) [I]n order to secure proper administration of justice, the Attorney-General must be left to exercise his discretion according to his own judgment,

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[96] Ibid, p. 4.

[97] *Sarath de Abrew v. Chief Inspector of Police, Police Station, Mount Lavinia* SC (FR) 424/2015, SC Minutes 11 January 2016.

[98] Ibid, p.2.

neither acting on any rule of thumb nor taking into account any other consideration other than what is provided by law and the public interest.[99]

Judicial Findings regarding Policing

The judicial observations and findings of violations of fundamental rights during the year under review with regard to policing are commendable. Court raised serious concerns regarding the reliability of the B report;[100] regarding the negligence of officers in charge of the conduct of officers working under him;[101] regarding false charges; and regarding treatment that is cruel, inhuman, or degrading treatment.[102] It is worrying however, that there are no clear pathways for ensuring further legal action against officers found guilty of such conduct from service. Indictments under criminal law including prosecution under the *Torture Act* ought to follow as a matter of course where a police officer has been found responsible for violations of Articles 11 and/or 13 by the Court in determining petitions under art 126.

10. Conclusion

The analysis of judicial interpretation of fundamental rights in 2016 undertaken in this chapter clearly suggests notable progress in the judicial attitude to defending fundamental rights and to an increase in the actual number of cases that the Court has dealt with. Cases such as the *Manhohari* case and the *Noble* case have contributed to the expansion of the scope of this jurisprudence. As noted in previous volumes of this issue, the issues related to human freedom that

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[99] Ibid, pp.12-13.

[100] *Gamini v. Inspector of Police, CID* SC (FR) 81/2011, SC Minutes 22 August 2016.

[101] Ibid.

[102] Ibid.

have been brought before the Supreme Court are not yet as representative as they ought to be of the full range of human rights concerns that Sri Lanka is faced with. Furthermore, greater judicial receptivity to Sri Lanka's obligations under international human rights law and to comparative jurisprudence on fundamental rights would deepen the jurisprudence of the Supreme Court and thereby increase its normative impact. Given the constitutional directive for FR petitions to be determined within three months, the delays in the determination of FR petitions should be addressed immediately. The lack of clarity re applicable rules of standing is best clarified by the Supreme Court so that victims of FR would be able to access the judicial remedy with confidence. However, the improvement in the quality of jurisprudence that is discernible in 2016 is to be welcomed and greater public debate and discussion of the jurisprudence should be encouraged and facilitated.

III

CONSTITUTIONAL REFORM

Harini Amarasuriya[*]

1. Introduction

Since the Presidential elections in 2015 and the General election later in August of that year, the Unity Government of the United National Party (UNP) and the Sri Lanka Freedom Party (SLFP) have initiated a constitutional reform process in Sri Lanka. Constitution reform processes are generally regarded as a means of seeking redress for past wrongs, especially in relation to addressing issues of discrimination and past oppression in all areas of our lives. Many countries that have experienced conflict, regard constitutional reform as one of the most important steps in post-conflict situations. South Africa and Nepal are two such examples where new constitutions sought to rectify issues that were regarded as having led to the conflicts in those countries. Both South Africa and Nepal drafted constitutions that are considered progressive and forward looking and examples of modern constitutions. These constitutions also take specific measures to address issues of inequality and injustice. There are also examples, such as the Indian constitution, which have explicitly addressed issues of oppression and discrimination against particular social groups. Additionally, one of the distinctive characteristics of the constitutional reform process in both South Africa and Nepal, was the public involvement

* Senior Lecturer, Department of Social Studies, Open University of Sri Lanka.

in drafting the constitution. These two countries have been lauded for the transparency and inclusiveness with which they engaged in the reform process and the seriousness with which they treated public consultations.[1]

Sri Lanka is not experiencing debates on constitutional reform for the 1st time; in fact, constitutional drafting processes have pre-occupied Sri Lanka since independence. Recent discussions on constitutional reform in Sri Lanka have centred largely around two issues: finding a political solution to the 'national' problem (the ethnic conflict which is largely perceived as a conflict between the Sinhala majority and the Tamil community, which is the largest ethnic minority group) and correcting the authoritarian inclinations of the Executive Presidency introduced in the 1978 Constitution. The proposed new constitution will be, if effected, Sri Lanka's 3rd Republican constitution. That constitutional reform is necessary for finding lasting solutions to the problems experienced by post-independent Sri Lanka and to position Sri Lanka as a truly 'modern' and independent nation state has been implicit in the many efforts at drafting the ideal constitution.

When the *Yahapalana* government came into power in 2015, expectations ran high about reform on many fronts: this included constitutional reforms. After all, President Maithripala Sirisena was elected on a wave of support mobilised by a civil society platform which started with a campaign to abolish the Executive Presidency that gradually turned into a movement calling for regime change. The General Elections in August of 2015 that followed the Presidential Election, continued on the promise of reform and change. Central to the reform process promised by the new government, was the idea of constitutional change, as a means of abolishing the Executive Presidency, strengthening democratic institutions and as a means of

[1] Democracy Reporting International, 2016

proposing a political solution to the ethnic conflict. There were also expectation that this time, the constitutional reform process would be more transparent and consultative than during previous efforts.

So, the discussions on constitutional reform recently in Sri Lanka were built on the hope of transforming society; as a means of rectifying the mistakes of the past – both with regard to the erosion of democracy (hence the abolishing of the Executive Presidency and electoral reforms) but also as a means of dealing with discrimination and inequality – especially among minority groups.

This chapter discusses the current constitutional drafting process with special focus on the report of the Public Representations Committee on Constitutional Reform (PRCCR) and its recommendations for the inclusion of a Bill of Human Rights. It explores the debates taking place on constitutional reform and how these debates reflect certain features of state/citizen relations in Sri Lanka as well as long standing divisions in post-independent Sri Lankan society.

2. Constitutional Reform: Why Now?

Ever since 1978 and the establishment of the Executive President in particular, the idea of constitutional reform or amendments have been floated and indeed even reached the stage of drafting constitutions. Most memorably, in 2000 the then President Chandrika Bandaranaike Kumaratunga presented a draft constitution to parliament only to have it rejected by the United National Party (UNP), the main opposition at the time. In 2005, President Mahinda Rajapaska was also elected on a platform that promised the abolition of the Executive Presidency. In 2006, President Rajapakse appointed an All Party Representative Committee (APRC) to draft a new constitution. The final report of the APRC was handed over to the

President in 2010. However, despite the recommendations of the APRC, President Rajapakse went ahead with the 18th Amendment to the Constitution that in effect further empowered the Executive President and considerably weakened existing checks and balances in the Constitution.[2]

Thus, the call for constitutional reform was revived once again with even more urgency in 2015. In December 2015 a Public Representations Committee on Constitutional Reform (PRCCR) was appointed by a Sub-Committee of the Cabinet. Of the 24 members appointed to the Committee eventually 19 members accepted the appointment. Members to the Committee were nominated by political parties represented in parliament; however, the *Jantha Vimukthi Peramuna* (JVP), *Jathika Hela Urumaya* (JHU) and the 'Joint Opposition' refrained from nominating any persons to the Committee[3]. The PRCCR was appointed initially for a period of 3 months but this was later extended by two months. After island-wide consultations lasting over a month and obtaining around 3800 submissions the PRCCR submitted a report based on these submissions to the Steering Committee on Constitutional Reforms on the 10th of May 2016.[4]

A Framework Resolution was passed in March 2016 which created a 'Constitutional Assembly' for drafting a new constitution. All 225 members of the current Parliament are members of the Constitutional

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2 *The Eighteenth Amendment to the Constitution: Substance and Process,* Centre for Policy Alternative: Colombo,2011

3 Members of Parliament who support the former President Mahinda Rajapakse and who have opposed the unity government between the Sri Lanka Freedom Party (led by President Maithripala Sirisena and the United National Party (led by Prime Minister Ranil Wickramasinghe) call themselves the 'Joint Opposition'. The 'Joint Opposition' is not formally recognised in the Parliament but work as a bloc against the current government. They are members of parties that are part of the United People's Freedom Alliance (UPFA) of which the main party is the SLFP.

4 PRCCR 2016

Assembly. The resolution also calls for setting up a Steering Committee on Constitutional Reforms headed by the Prime Minister and consisting of 21 members representing all the different political parties represented in Parliament. Six sub-committees were appointed to provide input on specific areas of the constitution. These areas were as follows:the judiciary, public finance, centre-periphery relations, fundamental rights, law and order and public service. After the PRCCR submitted its report in May 2016, the Steering Committee again called for more public submissions directly to the Steering Committee. These were forwarded to the PRCCR and a 2nd report of the PRCCR signed by the Chair of the Committee Mr Lal Wijenayake summarising those submissions was presented to the Parliament[5].

Although the PRCCR process was made open to the public with proceedings open to the media and documents made available to the public, the subsequent process with regard to constitutional reforms have been opaque. For instance, the current status of constitutional reforms is unclear. While the 6 sub-committees have submitted their reports and these have been made available to the public online, there is little public discussion about its content. Deadlines for debates and for the submission of the final report of the Steering Committee for debate in the Constitutional Assembly have been announced and passed with little progress.

Differences of opinion between the two main parties the UNP and the SLFP are evident in the discussions on the constitution. For instance, while the SLFP wants to retain certain aspects of the Executive Presidency, the UNP is in favour of returning to the Westminster model of a parliamentary system. The Joint Opposition has already dubbed the constitutional reform process as a 'traitorous' attempt to 'divide' the country and to establish dubious provisions to appease

[5] See http://english.constitutionalassembly.lk/ for a detailed description of the process.

minority communities. Various members of the government have also been making contradictory claims and statements about the constitutional reform process[6]. All of this has made the possibility of substantial constitutional reform in the near future somewhat doubtful. However, the initiative has not been abandoned, and discussions on constitutional reform continue to take place both within Parliament and outside.

3. The PRCCR Process and Submissions on Human Rights

The PRCCR called for public submissions on constitutional reforms and held public forums in each district where people could hand over their submission or make oral representations. Additionally, people were also encouraged to mail, email or fax their submissions to the PRCCR Secretariat. There were 20 themes under which people could make their submissions[7]. Although there was very little advance publicity or a civic education process due to lack of time, as a result of the media attention on the public hearings, people began to gradually

[6] See for instance http://www.dailymirror.lk/article/Constitutional-Reform-and-Political-Diversions-126622.html; http://asianmirror.lk/news/item/14007-tna-forced-unp-to-change-stance-on-constitutional-reform-claims-weerawansa; http://www.ft.lk/article/582316/Special-SLFP-committee-to-analyse-six-reports-on-constitutional-reforms

[7] The themes were as follows: Nature of the State; Form of Government; Basic Structure of the Constitution; Citizenship, Religion, Fundamental and Group Rights, Directive Principles of State Policy; Legislature; Supremacy of Parliament or Constitution; Separation of Powers; Independence of the Judiciary and State Structure; Power Sharing, Devolution and Local Government; Sharing Power at the Centre; Constitutional Council and Independent Commissions; Public Service; Electoral Reforms; Judicial Review of Legislation; Powers of the President; Election of President; Public Security; Finance; Any other Matters

respond to the call for submissions in almost each district[8]. Individuals as well as organisations and associations provided their suggestions for constitutional reforms.

The PRCCR received a range of proposals. While understandably the submissions were diverse reflecting contradictory positions among citizens of the country on various issues, there were also certain areas that seemed to have consensus. These areas of contradiction and consensus are reflected in the report submitted by the PRCCR. The PRCCR members themselves could not reach consensus on certain recommendations and it was therefore decided that where there was no consensus, recommendations would reflect the diversity of opinions in the public submissions as well as within the Committee. For example, on religion, there are six different recommendations each representing a different formulation of the status of religion in a new constitution. These recommendations ranged from one that called for a secular state to one that stated that no changes should be made to the provisions on religion in the current constitution. Certain other areas, for example, devolution of power, public security, power sharing, powers of the President, also reflect a diversity of views.

However, there were some areas where there was a high degree of consensus or agreement. One of these was the call from all parts of the country, for the expansion of the section on human rights. As noted in the PRCCR Report the demand for expansion of the section on fundamental rights in the new constitution was almost unanimous.[9]

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[8] The PRCCR was appointed in December 2015 for a period of three months. This period was subsequently extended by a further 2 months. During this time, members travelled to every district in the country and held public meetings, collated the submissions that were received and finally submitted a report with recommendations for constitutional reforms based on the public submissions. Please see the Report of the PRCCR for a list of those who submitted proposals to the Committee.

[9] PRCCR, 2016

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[9] PRCCR, 2016

The expansion of rights included both first and second generation rights; calls by various minority groups for protection against discrimination (based on ethnicity, religion, and sexual orientation) the inclusion of special provisions for groups such as women, children, the elderly and people with disabilities. As the PRCCR report also notes, some of the submissions on human rights reflected regional and local politics where minority groups expressed fears of being discriminated and excluded by local majoritarian and elite politics and called for special protection on the basis of a regional minority identity or marginalised status. For example, low-caste groups in the Northern Province made submissions regarding caste discrimination; certain Buddhist *nikaya* made similar representations of caste discrimination within Buddhist institutions; Malay and Sufi groups demanded that they be identified and treated separately from the Sri Lanka Muslim category; Upcountry Tamils made strong representations for recognition as a special group; Burghers from the Eastern province as well as *Adhivasi* groups made submissions calling for recognition of their unique and distinct culture.

This demand for equality and non-discrimination was an issue that was raised by people across the country. As will be discussed later, the idea of seeking protection and special privileges based on ethno-religious identity has a long history in Sri Lanka. Many groups asked for recognition as a 'special' group claiming a different identity to those with whom they were generally categorised. In popular rhetoric as well as academic and official narratives, the main ethnic groups in Sri Lanka are regarded as Sinhala, Tamil, Muslim, Burgher and Malay. Yet, as described above, various groups took pains to highlight the diverse identities within these larger categories. Apart from group identities based on ethnicity, caste and religion, the demand of equal treatment was also made on the basis of gender and sexual orientation.

Women's groups were particularly strong in requesting for socio-economic rights: the right to health, education, livelihood and social welfare, were strongly highlighted by women's groups. Women's groups also made submissions for ensuring that traditional laws did not infringe on other rights enshrined in the constitution. This was emphasised especially in relation to Article 16 of the current Constitution that enabled traditional laws that contravene principles in the Constitution to remain in force. This allowed for certain traditional practices related to inheritance, marriage and divorce in traditional laws of the different communities in Sri Lanka to remain in force despite the fact that they are discriminatory towards women.

An interesting feature of the submissions received by the PRCCR was that most submissions were linked to an individual experience of trying to obtain justice from the state; an experience of harassment and violence from the state or frustration with everyday dealings with public services. For example, the right to education was demanded in the context where parents experienced difficulties admitting children to good quality schools and the rising costs of education. The right to health was stressed in relation to experiences once again of rising costs of health care as well as inequalities in the provision of health care. Social welfare rights were highlighted because of experiences with the steady erosion of social welfare as well as unequal distribution of social welfare. For instance, people talked about the politicisation and corruption of the distribution of social welfare making it difficult for those who really needed social security and protection to access services. Environmental rights and animal rights were other areas on which the PRCCR received submissions. Reflecting changing demographics, the rights of senior citizens were also included in many submissions received by the PRCCR.

This demand for the inclusion of socio-economic rights in the constitution is noteworthy given that Sri Lanka has a history of being

a social welfare state. After all, free health and education although not enshrined in the constitution, have been available even prior to independence. Yet, there was a sense that public services such as health and education were in a state of crisis and that constitutionalising these as justiciable rights would guarantee a better service as well as more equitable access. What was stressed in the submissions was not simply equal access but access to the same quality of service: although health and education was available to all – people argued that the quality of services was highly variable. It was in this regard also that the idea of discrimination was most strongly expressed. Discrimination was experienced not simply with regard to ensuring civil and political rights, but socio-economic rights. For example, language proved to be a significant barrier in accessing public services. Despite years of language policy initiatives to ensure that people should be able to access services in their own language, clearly this was far from what people experienced in reality. Gender, disability, age and sexual orientation were the other areas which were highlighted as bases for discrimination in accessing socio-economic and cultural rights. Thus, the demand for the expansion of human rights in the constitution can be viewed as attempts by citizens to hold the state more accountable to delivering equitably on entitlements due to citizens. Despite years of policy initiatives and political commitment to certain public services such as health, education and social welfare, people felt strongly that there was a need to include these as justiciable rights in any proposed new constitution.

4. Experience of Citizenship and Democracy

What these submissions reveal is Sri Lanka's continuing struggle with the idea of citizenship and democracy. Constitutions generally give expression to how citizenship is defined in a particular state – or more importantly to who is included and excluded from the entitlements and protections provided by the state. Sri Lanka's constitution making

process has been particularly concerned with this – especially in the post-independence era. After the introduction of universal franchise, the relationship between majority and minority communities in Sri Lanka have been fraught; the Sinhalese majority have felt empowered and in some ways vindicated for past real and imagined exclusions by being able to exert their influence numerically over the affairs of the state.[10]

When examining the constitutional making process in Sri Lanka, what is interesting is how certain issues as well as proposed solutions have endured over time. Each attempt at constitutional reform has been marked by struggles to define citizenship and related entitlements. Appeasing the fears of the Sinhalese majority while ensuring justice to the country's minorities has been another area of enduring contention. The position of Buddhism, language policy and the nature of the state (for example whether unitary or not) have been central debates and the sources of significant polarisation in the constitution reform processes since independence.[11] To make sense of the current position with constitutional reform, especially the calls for expanded human rights section, it is therefore necessary to examine why particular ideas keep emerging as central to understanding citizenship, participation and democracy in Sri Lanka.

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[10] Nira Wickramasinghe, *Sri Lanka in the Modern Age: A History of Contested Identities,* Hurst and Company: London,2006.

[11] Asanga Welikala, 'The Failure of Jennings' Constitutional Experiment in Ceylon: How 'Procedural Entrenchment' led to Constitutional Revolution' in *The Sri Lankan Republic at 40: Reflections on Constitutional History,* Theory and Practice, Asanga Welikala ed., Centre for Policy Alternatives: Colombo, 2012.

4.1 Past experiences of constitutional reform

In the journey towards self-rule in Sri Lanka, race and ethnic based representative government meant that claiming rights and entitlements based on identity became institutionalised and legally recognised in successive constitutions. Wickramasinghe (2006) argues that the construction of 'citizenship' in Sri Lanka was defined by exclusion: for instance, in the case of Estate/Indian Tamils, successive pieces of legislature deprived sections of that community of citizenship in Sri Lanka and resulted in their forced repatriation to India.[12] Starting from the Donoughmore Commission, groups seen as sharing a common history and identity were recognised and these identities became the basis on which they were included in the privileges of citizenship. In turn, the idea that proof of origin and role in history were important in claiming safeguards and protection became an accepted mode of representation. Thus, from the beginning of representative government in Sri Lanka, the idea of quotas, special protections, recognition for groups was established.

It is noteworthy that many of the issues that were debated in previous efforts at constitution reform and many of the proposals for rectifying issues of discrimination resurfaced again in the current reform process. When the Soulbury Commission was established in 1944, then too, various groups – based on caste, ethnicity and religion, made submissions demanding special representation in legislative bodies. As a result, the Soulbury Report recommended several safeguards for minorities including what eventually became Section (29)2 of the 1946 Constitution, which prohibited legislation infringing on religious freedom or discriminating against persons of any community

[12] Nira Wickramasinghe, *Sri Lanka in the Modern Age: A History of Contested Identities*, Hurst and Company:London, 2006.

or religion.[13] The introduction of the 2nd Chamber and the creation of multi-member constituencies were also seen as measures to safeguard against majority domination. In 2015 too, proposals were made to re-introduce a clause similar to Section (29) 2 of the 1946 Constitution, to introduce a 2nd Chamber and to create multi-member constituencies. This is reflective of the fact that since 1946, protection for minority groups has been steadily eroding in subsequent constitutions.

Of course, the 1972 Constitution must be examined in the context of the significant ideological influence that had brought S.W.R.D Bandaranaike into power in 1956. Despite independence, the majority community in Sri Lanka continued to feel marginalised from public life. The dominance of an English speaking elite in public service and education sectors, the perception among most Sinhalese that politically and culturally, they continued to be under threat led to the mobilisation of Sinhala intelligentsia and the rural elite to which S.W.R.D Bandaranaike gave political leadership'[14] The ideological victory in 1956 of this constituency however, did not lead to constitutional changes till 1972. The implications of constitutional reform in 1972 were both symbolic and real: enshrining Sinhala as the official language in the constitution resulted in a significant decrease of Tamils and Burghers in the public services. The Official Languages Act had already initiated these changes, but constitutional recognition of Sinhala as the only official language was significant. Buddhism was given a 'special' position in the 1972 Constitution as well, receiving state protection and patronage. As argued by Wickramasinghe (2006),

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[13] Nira Wickramasinghe, *Sri Lanka in the Modern Age: A History of Contested Identities,* London: Hurst and Company, 2006.; Asanga Welikala, 'The Failure of Jennings' Constitutional Experiment in Ceylon: How 'Procedural Entrenchment' led to Constitutional Revolution' in *The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice,* Asanga Welikala ed., Centre for Policy Alternatives: Colombo, 2012

[14] de Silva 2005; Wickramasinghe 2006

post independent Sri Lankan constitutions have been marked by initiatives of successive governments to consolidate the dominance of the Sinhala Buddhist majority.'[5]

The 1978 Constitution brought about significant changes to the existing structure of government. The principal change was the shift from a parliamentary government to a presidential system. The President was elected directly for a period of 6 years and provided with range of executive powers including the right to dissolve Parliament at any point. The Bill of Rights in the 1978 Constitution was seen as the primary means of protecting all citizens. All citizens irrespective of race, religion, language, caste, sex, political opinion and place of birth were entitled to the same rights. It is also significant, that the government that introduced the open economy to Sri Lanka, should also rename the country 'The Socialist Democratic Republic of Sri Lanka'.

The 'foremost' place of Buddhism was preserved in the 1978 Constitution as well. In an effort to introduce a less discriminatory language policy, Tamil was recognised as a national language and it was declared that 'the Official Language of Sri Lanka shall be Sinhala, Tamil and English will also be official languages'. The indistinct wording of the clause gave rise to criticism since it did not lusively establish the official position on languages – for instance, ether official documents would be maintained in all three languages. he 13th Amendment to the Constitution rectified this to some extent ut the lack of state infrastructure and resources meant that in practical rms very little changed.

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[5] Nira Wickramasinghe, *Sri Lanka in the Modern Age: A History of Contested Identities*, Hurst and Company: London, 2006

The victory of the People's Alliance (PA) in 1994 was significant in that it also came in on a wave of civil society activism and support not unlike what happened in 2015. Then too, the promise of reform and change was at the forefront of election campaigning. The liberal democratic elements of civil society had a significant influence in drafting the PA's manifesto, which combined human rights, democracy and sustainable economic development as the cornerstones of the new government's reforms. Constitutional reform was promised in order to solve the problems of the South as well as the North and East. Thus, democratising the institutions of the state, strengthening fundamental rights, independence of the judiciary as well as power sharing with the North and East were promised through constitutional reforms.

As mentioned previously, the draft constitution was presented to Parliament in August 2000 and ran into opposition both within and outside. The dissolution of Parliament in the same month effectively killed any hope of constitutional reform. The United National Front (UNF) that came into power thereafter prioritised peace negotiations with the help of Norwegian mediators over constitutional reform. The short-lived UNF government was succeeded by the UNFPA and in 2006, Mahinda Rajapaksa was elected President. As previously mentioned, although the APRC was appointed and discussions on constitutional reform continued, it was evident that the Rajapaska regime was only seeking to consolidate its dominance over all branches of government and was not interested in any meaningful constitutional reform process that would challenge its power.

The continuing failure of constitutional reform processes in Sri Lanka also show how successive governments succumbed to the force of Sinhala nationalist ideology in order to remain in power. Even the left parties, when in power, gave way and compromised on its positions for instance on language and minority rights when in coalition government. Not only have governments succumbed to the pressures

of Sinhala nationalist forces, but engaged in what can be termed as 'ethnic outbidding' to remain in power or to gain power[16].

4.2 Endurance of issues

The PRCCR consultations reveal that the issues being debated since 1944 continue to occupy the minds of Sri Lankan citizens. They show the extent to which ethnic based representative government has become a means of demanding protection from the state as well as the basis on which groups feel excluded. Yet, the submissions from regional ethnic minorities, women, caste groups and sexual minorities for example, highlighted the complexities as well as the limitations of politics of identity. While ethno-religious identity was the most common basis on which rights and entitlements were articulated, especially those relating to civil and political rights, the limitations of those identities for women, children, those with different sexual orientations and also smaller ethnic groups was evident in the submissions made to the PRRCR. How any future constitutional reform process can navigate these complex demands of identity and exclusion will be of great interest. Simply turning a blind eye to those demands and formulating 'ethnically blind or neutral' policies would be one approach; however, past experience as well as the representations made by people to the PRCCR has shown that in a context where the organs of government and societal processes function in a highly ethicised manner, such ethnically blind or neutral policies often get implemented in highly discriminatory ways.

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[16] See for instance Neil De Votta, 'From Ethnic Outbidding to Ethnic Conflict: The Institutional Bases for Sri Lanka's Separatist War, Nations and Nationalism, 11, pp. 143-144, 2005; Rajesh Venugopal, 'Cosmopolitan Capitalism and Sectarian Socialism: Conflict, Development and the Liberal Peace in Sri Lanka.' PhD. Thesis, Oxford University, 2009.

Interestingly and importantly, the significant focus on socio-economic and cultural rights, highlighted sources other than ethno-religious identity thought which Sri Lankan citizens experience inclusion/ exclusion. People's experiences of accessing health, education, employment, social services etc. revealed many examples where not having the 'right connections' to power and privilege, not speaking the 'right' language or simply not fitting into the accepted or 'proper' category of a 'deserving' person, deprived people of their rights and entitlements.

The demand for the inclusion of socio-economic rights in the constitution as well as the debates around this issue reveal a strong tension between the historical tendency in Sri Lanka to define citizenship and entitlements based on ethno-religious identity and a more inclusive idea of citizenship. This tension becomes all the more intense in a context where the constitutional reform process is in fact viewed primarily in terms of resolving the 'ethnic problem' in Sri Lanka. The debates reveal in fact the ideological cleavages in Sri Lankan society as well as the limitations of the dominant narratives about the 'ethnic conflict', 'reconciliation' and what is regarded as the 'national problem' in Sri Lanka.

5. Post Report Debates and Constitutional Reform Process

That some of the recommendations made in the PRCCR would be controversial was to be expected. The fact that what the PRCCR were merely recommendations for consideration of the Constitutional Assembly was entirely overlooked by those who were quick to criticise its contents. Sections of the report and some of the multiple formulations recommended in the report were picked up as what was going to be included in the new constitution. Therefore, the sections that discussed a secular state, devolution, reform to personal laws,

recognition of sexual orientation as a basis for discrimination, became fodder especially for Sinhala nationalist groups to paint the entire constitutional reform process as anti-national which would lead to the 'division' of the country[17]. However, this was not surprising: as mentioned previously, almost all political parties in Sri Lanka have succumbed to the phenomenon of ethnic outbidding for political mileage. Particularly for political parties bidding for the Sinhala vote, presenting themselves as protectors and defenders of the Sinhala community are time-honoured political strategies.

What was perhaps more surprising was the debate that sprang up around constitutionalising socio-economic rights in the constitution. Given the widespread demand for the expansion of human rights, the chapter on Fundamental Rights in the report submitted by the PRCCR was the longest providing a range of recommendations for the inclusion of civil, political, social, economic and cultural rights in the proposed new constitution.

Almost immediately after the PRCCR report was made public, the idea of including socio-economic rights in the constitution was strongly criticised[18]. Many legal pundits as well as the business community ranged themselves against the inclusion of socio-economic rights. Fears were also expressed by some members of civil society that highlighting and mobilising around socio-economic rights undermined the 'real issues' that needed to be tackled in the new constitution, namely a political solution to the ethnic conflict. On

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17 See for instance http://www.thesundayleader.lk/2016/08/07/why-they-oppose-the-new-constitution/

18 http://www.ft.lk/article/571279/Economic-and-social-rights-in-the-new-constitution—A-terrible-idea; http://www.economynext.com/Socio_economic_rights_in_Sri_Lanka_s_constitution_may_backfire_on_the_poor-3-7428.html; http://dailynews.lk/2016/12/29/features/103185; https://www.colombotelegraph.com/index.php/human-rights-commission-emphasizes-on-need-to-incorporate-economic-social-and-cultural-rights-in-new-constitution/

the other hand, the Human Rights Commission of Sri Lanka issued a strong statement of support on the inclusion of socio-economic rights in the new constitution (HRC 2016).[19] Women's groups who had mobilised to make representations to the PRCCR organised a public meeting and handed over a statement to the Prime Minister in September 2016 to demand the inclusion of socio-economic rights in the new constitution. The Bar Association of Sri Lanka and various other civil and professional organisations organised forums to discuss the merits and demerits of constitutionalising socio-economic rights.

Those opposed to including socio-economic rights in the new constitution argued that it would place an unnecessary burden on the state and also that it would lead to placing too much of a reliance on the judiciary on what should essentially be issues that are resolved through a political process. Those arguing for the inclusion of socio-economic rights in the constitution pointed to the examples of many modern constitutions that have done so without necessarily facing any problems and the indivisibility of rights[20].

The sub-committee report on Fundamental Rights included many of the recommendations in the PRCCR calling for considerable expansion of human rights including the inclusion of socio-economic rights. Surprisingly, the sub-committee report did not include women's rights. Women's groups who made submissions both to the PRCCR and the Steering Committee continue to try and lobby for the inclusion of women's rights as a distinct section in the Bill of Rights.

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[19] Human Rights Commission of Sri Lanka, Statement issued in 2016.

[20] See for instance http://dailynews.lk/2016/12/29/features/103185; LST Review October 2016

Why did the recommendation to include socio-economic rights in the constitution evoke such a passionate debate? The debate in fact exposed divisions within civil society groups that had worked together to call for constitutional reform. Particularly, surprising was the claim made by some, that the mobilisation on socio-economic rights distracted from the 'real' problem of ensuring that constitutional reform would bring about a resolution to the 'national problem' – the ethnic conflict. Why was the demand for socio-economic rights viewed as distinct and in fact, inimical to the political demands of minority communities in Sri Lanka?

6. Constitutional Reform, Conflict and Potential for Transformation

Sri Lanka, as indicated earlier has a history of engaging in constitutional reforms. Sri Lanka also has an equally long history of violent conflict with different groups turning to armed revolt against the state. The ethnic conflict in Sri Lanka is perhaps the best known, but two other insurrections led by the *Janatha Vimukthi Peramuna* (JVP) in 1971 and in 1988/89 resulted in equally bloody and violent consequences. In all of these encounters the state unequivocally turned its security apparatus against its citizens mercilessly in order to quell revolt. In fact, the security apparatus of the state and its ruthlessness only increased with time. Even after the end of the war against the LTTE in 2009, the security apparatus of the state has remained intact. After each of these violent encounters, various commissions have been appointed; the dead and the disappeared have been counted; much money and energy has been spent on documenting the miseries of the victims of violence and their families; promises of holding those responsible for violence made and broken; promises of reparation for victims of violence have been made and broken. If there is anything to be learned from those years of violence, it is that the Sri Lankan state has proved itself to be capable of unspeakable levels of violence

against its citizens and that no government in power (even when it won elections by capitalising on promises of reform) has shown any inclination towards dismantling or even reducing the potential of the state to unleash violence on its people.

These conflicts in Sri Lanka have given rise to a range of scholarship that has tried to understand the underlying causes of conflict. While much of the literature has focused on the trope of ethno-religious nationalism to explain the conflict, there has also been some interest in understanding the violence, particularly in the South through the youth lens, particularly as a consequence of youth unrest.[21] Many of the youth who were part of the 1971 and 1988/89 insurrections were from rural, relatively marginalised parts of the country. The Presidential Commission on Youth in 1991 notes the sense of injustice expressed by the youth who testified before the Commission with regard to access to education, employment and other state services. By and large, the 'youth unrest' approach to analysing the JVP violence has argued that rising levels of education accompanied by shrinking employment opportunities and acute politicisation of existing employment opportunities particularly in the state sector, led to increasing levels of frustration among youth for which the JVP provided a political platform.[22]

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[21] Robert Kearney, 'Sinhala Nationalism and Social Conflict in Ceylon.' Pacific Affairs 37 (2): pp. 125-136, 1964; S.T. Hettige, 'Sri Lankan Youth: Profiles and Perspectives', in S.T. Hettige, Markus Mayer ed., Sri Lankan Youth: Challenges and Responses, Friedrich Ebert Stiftung: Colombo, 2002; Harini Amarasuriya, C. Gunduz, M. Mayer, *Sri Lanka: Rethinking the Nexus between Youth, Unemployment and Violence,* International Alert: London, 2009.

[22] S.T. Hettige, 'Sri Lankan Youth: Profiles and Perspectives', in S.T. Hettige, Markus Mayer ed., *Sri Lankan Youth: Challenges and Responses,* Friedrich Ebert Stiftung: Colombo, 2002; Harini Amarasuriya, 'Leadership Training for Youth: A Response to Youth Rebellion? In Cadjan Kidubu: Global Perspectives on Youth Work, Brian Belton, ed., Sense Publishers:Rotterdam, 2014.

Analysing the 'roots' of youth violence, Mayer (2002) has drawn parallels from the North and the South to argue that those recruited to the Tamil militant movements as well as the JVP came from similar deprived and marginalised backgrounds.[23] Scholars have argued that repeated efforts of movements primarily led by youth, to capture the state needs to be examined and understood in this context. Others have also argued that that the anti-state (or the counter-state) element in much of the youth political activism in Sri Lanka is indicative of the evolution of the Sri Lankan state as the central agency mediating people's interests in a range of areas from economics to health to education and reflects the specific relationship of youth to this state.[24] Sri Lankan youth are not so much anti-state as fighting to establish a *better* state – one that is more responsive to their needs.[25]

The criticism that is most often levelled against the state is that the largesse of the state is distributed unequally. This aspect of the Sri Lankan state – that its welfare and development benefits are unequally distributed is an issue raised by successive generations in Sri Lanka. The main issue raised by those fighting the state is that the benefits and resources of the state are distributed along lines of privilege. For the JVP, the lines of privilege were drawn along class identities – while for the LTTE they were drawn along ethnic lines. However, the insurrections in the North and the South of the country have been dealt with largely as two separate issues. Also there is little evidence

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[23] Markus Mayer, 'Violent Youth Conflicts in Sri Lanka: Comparative Results from Jaffna and Hambantota' in *Sri Lankan Youth: Challenges and Responses,* Siri Hettige and Markus Mayer eds., Friedrich Ebert Stiftung:Colombo, 2002.

[24] Jayadeva Uyangoda, 'Social Conflict, Radical Resistance and Projects of State Power,' in Markus Mayer, Dharini Rajasingham-Senanayake, Yuvi Thangarajah, Eds. In *Building Local Capacities for Peace: Re-thinking Peace and Development in Sri Lanka,* Macmillan India Ltd., 2003.

[25] Harini Amarasuriya, 'Leadership Training for Youth: A Response to Youth Rebellion? In *Cadjan Kidubu : Global Perspectives on Youth Work,* Brian Belton, ed. Sense Publishers: Rotterdam, 2014.

that the LTTE and the JVP ever saw themselves as fighting against a common enemy and in fact, the JVP especially since the 1980s and up until the end of the war has been seen as one of the primary barriers to any peace efforts initiated from the South.

But the fact that violence in Sri Lanka escalated during a time when trade liberalisation, de-regulation, cut backs on social welfare and increased privatisation were being introduced has been also largely ignored. One of the earliest efforts to analyse the rise of violence and conflict in parallel with economic reforms was by Newton Gunasinghe.[26] More recently, Rajesh Venugopal has written extensively on how this effort to treat ethnic and development inequalities separately has been a critical factor in the failure of recent efforts to bring about peace or an end to violent conflict in Sri Lanka.[27]

Why has this socio-economic analysis of conflict in Sri Lanka, so little leverage politically or within dominant civil society movements? One reason for this is the ascendency of neo-liberalism and its influence on both scholarship and political activism. But there is also a more complicated reason. And that is as argued by Venugopal (2009), the link between populist Sinhala nationalism and the ideal of a social democratic state with a strong social welfare focus.[28] This has rather perversely meant that peace and reconciliation efforts are usually associated with a pro-market, neoliberal agenda and that nationalist mobilisation against peace efforts are led by groups who are traditionally anti-economic reforms. This also mean peace efforts were driven by an understanding that conflict prev

[26] Newton Gunasinghe, 'The Open Economy and Its Impact on Ethnic Rela Sri Lanka' in *Newton Gunasinghe: Selected Essays,* Sasanka Perera, ed., Colombo Scientists' Association, 1996.

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[27] Rajesh Venugopal 'Cosmopolitan Capitalism and Sectarian Socialism: Conflict, Development and the Liberal Peace in Sri Lanka.' PhD. Thesis, Oxford University, 2009.

[28] Ibid

terms of people's perceptions about the state, elected representatives and the organs of the state have not been taken considered seriously in subsequent discussions and debates on constitutional reform. In fact, the reactions to the public representations and the opaqueness of the subsequent constitutional drafting process reflects the resistance to democratisation from within the very centre of the power and privilege in Sri Lanka.

Further, the consensus across ethnic groups about the need for ensuring greater socio-economic equality, democratisation and accountability could have been used as a means of building support for constitutional reform. In the classic mode of ethnic outbidding that Sri Lanka has experienced over and over again, rather than seeing where there was agreement, what has been highlighted are the areas on which there was division among people. Political actors have therefore ranged themselves primarily along the lines of ethno-religious identity in their support or opposition for constitutional reform. At the same time, those who push for constitutional reform as a means of addressing the 'national question' have also failed to see the limitations of ethno-religious identity as the only or even primary basis of making claims of entitlement. As indicated by the submissions received by the PRCCR, ethnic categories themselves are contested; further, ethnicity was albeit an important but only one of the identity markers based on which people felt included or excluded. For instance, the representations made by women, sexual minorities as well as those who felt excluded from political power, show the myriad ways in which people felt disempowered and disadvantaged.

7. Conclusion

The nature of the process of constitutional reform in Sri Lanka has revealed once again the disconnect between elected representatives, their advisors and the public. A constitutional reform process that is genuinely interested in transforming the relationship between the state and citizens; in genuinely addressing the mistakes of the past needs to engage in public consultations as an exercise in understanding what the people think about their state, about their experiences as citizens and their opinions of the various organs of government. The public submissions received by the PRCCR have shown a huge level of frustration and anger among people regarding their everyday experiences as citizens. These experiences are marked by injustice, discrimination and inequality. It also shows the extent to which citizens continue to rely on the state for their wellbeing. Even years after the open economy, the state continues to be the primary mediator between people and essential services, security and protection. The submissions also showed that people saw the main barrier to a more responsive and accountable state and state institutions as the legislative arm of the government: that elected representatives abused their positions and their privileges to manipulate the organs of government in their own interests. The demand for an expanded human rights chapter in the new constitution as well as the inclusion of justiciable socio-economic rights must be viewed as people's attempts to protect themselves from the excesses of the state and from the abuse of privileges by those in power.

Rather than attempting to understand the thinking behind people's submissions and to examine the experiences that led people to make specific recommendations for a new constitution, political expediency and deal making have once again taken over the process. Although constitutions are supposed to be about 'the people', the disdain with which those involved in constitution making deal with 'the people'

has come through very clearly in recent times. Of course there is no homogenous group of 'people' speaking in one voice and if nothing else, this process has shown exactly how complex and diverse Sri Lankan society is. Yet, seeking public views necessitates making room for those complexities to emerge and finding ways of arriving at consensus or at least acknowledging the contradictions and tensions within different parts of the polity. This is why the constitutional reform process requires political vision and leadership as much as it needs technical expertise and sophisticated negotiations among political elites.

Constitutional reforms that transform state-society relations require political leadership and vision that is able to hear what various groups of people say and transform those experiences into formulating the kind of constitution that can address those concerns. The PRCCR process clearly showed that the people of this country do not have much hope that there is political leadership in this country with the necessary vision for that kind of transformative initiative. It can be argued that many of the proposals made by people were made on the basis that Sri Lanka will not have such political leadership. People understood the constitution to be the law of the land that could hold the political authority in check and that could protect citizens from the vagaries and abuse of a dysfunctional political system. That is perhaps the strongest message that came through public consultations – yet that also seems to be the message that has been completely ignored in the constitutional reform process that is underway.

Therefore it is imperative that the constitution making process is open to debate and discussion and made much more transparent than it is now. It is also necessary for at least the main political parties in government to articulate the need for constitutional reform and its scope. The contradictory statements coming from the government especially on the substantive issues to be reformed has been hugely

detrimental to the political mobilisation that is inevitably required for the constitution reform process to be legitimate. Finally, there is also a huge role to be played by independent civil society groups and the media in keeping the debates alive; in ensuring that public opinion is taken into consideration seriously; that the process remains transparent and most importantly, that the Constitutional Assembly is pressurised to put forward to the public a constitution that is truly transformative of state-citizen relations in Sri Lanka and recognises the plurality and diversity of this country in all its many colours and shades.

IV

STATUS OF PERSONS WITH DISABILITIES IN SRI LANKA

Azra Jiffry[*] *and Binendri Perera*[**]

1. Overview

Disability in Sri Lanka is not recognised as a social construct that impedes effective participation due to certain sensory barriers.[1] Instead it is viewed as an entrenched form of incapacity to ensure for oneself the necessities of life, highlighting the absence of an underlying rights-based approach.[2] Attempts to introduce a rights-

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* LLB (Hons) (Colombo), Freelance Researcher at Law & Society Trust.

** LL.B (Hons) (Colombo). Currently working as a lecturer (on temporary basis) at the Faculty of Law, University of Colombo and a Researcher at Law & Society Trust.

1 Convention on the Rights of Persons with Disabilities (CRPD), Art. 1.

2 Section 37 of the Protection of Rights of the Persons with Disabilities Act No.28 of 1996 provides for the definition as "any person who, as a result of any deficiency in his physical or mental capabilities, whether congenital or not, is unable by himself to ensure for himself, wholly or partly, the necessities of life."

See also, Dilhara Pathirana, "Rights of Persons with Disabilities" (Sri Lanka: State of Human Rights 2009-2010, Law & Society Trust, 2011); Dinesha Samararatne and Karen Soldatic, 'Disability without Dignity: Rights, Women and Disability in Rural and Post-war contexts in Sri Lanka' (unpublished); Response to Request for Information from the Special Rapporteur on the Rights of the Persons with Disabilities in Sri Lanka, prepared by the Law & Society Trust (October 2016). The authors of the chapter along with Mr. K. Satanarachchi compiled the abovementioned Report in response to a Questionnaire from the Special Rapporteur on the Rights of the Persons with Disabilities, and therefore they are informed by the interviews and research conducted for the said purpose that has assisted in writing the chapter.

based approach through legislative and policy frameworks too have not translated into reality. Through the lens of a reasonable abled-man, denying the opportunity for a Person with Disabilities (PwD) to participate in public affairs is barely felt and even justified in certain instances indicating the lack of resources for an inclusive setup. However for a person with disability, this denial amounts to the denial of a fundamental right of the PwD, who is traumatized as a result of not being able to participate and contribute to the society.

Against this backdrop, the chapterunderlines the developments pertaining to the PwDs that unfolded in 2016 and assess the current state of affairs of PwDs' protection of rights against the threshold requirements provided for in the Convention on the Rights of Persons with Disabilities (CRPD). The chapter in its second part discusses Sri Lanka's ratification of CRPD as the undisputablemilestone with respect to upholding the rights of PwDs in 2016. In doing this, special attention is paid to the implementation of 'Accessibility' principle in the pre-ratification and post-ratification stage. In addition to the ratification of the CRPD, the year in general was hopeful for the people specifically due to the novel developments that took place in drafting the new Constitution of Sri Lanka and the Report of the Consultation Task Force on Reconciliation Mechanisms.[3] Their specific relevance to the PwDs is also discussed in the chapter.

The next part outlines the problematic aspects in the national and legal framework that effectively disempowers the PwDs. The fourth andfifthparts delve into the practical aspects of provision of services to the PwDs assessed against the rights provided for

[3] In both events, i.e., developing a new Constitution and setting out Reconciliation mechanisms, public consultations were obtained and compiled, which enriched the entire process in each instance.

in the CRPD.[4]The subsequent part analyses the plight of PwDs belonging to special groups. Based on the findings from the above parts, the authors contend that much needs to be done by the State and non-State actors in terms of protection of rights of the PwDs and their empowerment.

2. Sri Lanka's Ratification of CRPD

Sri Lanka ratified the CRPD in February 2016 eight years after becoming a signatory to the Convention. The CRPD is unique in its own that the arsenal of general principles in the CRPD lays down a comprehensive framework to uphold the rights of the PwDs. The said framework is complemented by Article 33, whereby the Convention requires the state to set up a focal point in order to coordinate between the different sectors at different levels which include health, education, justice, sports, transport etc. to facilitate implementation of the Convention.[5]Further the State should establish and strengthen independent oversight mechanisms to monitor the implementation, with the full participation of the civil society and in particular the Disabled People's Organisations (DPOs).[6]

The CRPD places great importance in the implementation of the Convention. Flynn, in her work *From Rhetoric to Action,* argues that the CRPD goes a step further than any other Human Rights Convention by providing new implementation and monitoring

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4 Response to Request for Information from the Special Rapporteur (October 2016) (n3).

5 CRPD, Art. 33.

6 Committee on the Rights of PwDsrecognises that the independent monitoring is likely to be conducted by the institution that has NHRI status, for instance, the Human Rights Commission of Sri Lanka. See, *Guidelines on Independent Monitoring Frameworks and their participation in the work of the Committee* <www.ohchr.org/Documents/HRBodies/CRPD/GuidelinesIMF.doc>accessed on 01.08.2017.

techniques.[7] For instance, by stipulating a focal point for coordination the CRPD indicates that ensuring the protection of rights of PwDs extends across a wide range of state sectors situated at different levels.[8] The said Article 33 is thus able to interact with the rights of PwDs and make their scope more meaningful.[9]

Although Sri Lanka was one of the few countries that placed its signature as early as 2007 supposedly indicating the state's commitment to uphold the rights of the PwDs,[10] the orthodox institutional setup of the state continued to be regressive. The interests of PwDs remain ostracized as a concern solely within the purviews of Social Affairs Ministry.[11] For instance, the said Ministry issues Special Identity Cards (SID) for PwDs in some parts of the country which is subject to much contention from the advocates of the rights of PwDs for further excluding the PwDs from the society.[12] In fact SIDs have been issued to PwDs in some countries in order to facilitate them the services provided by the State. For instance, the State of Malta provides free entrance to various sports clubs and free

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7 Eilionóir Flynn, *From Rhetoric to Action: Implementing the UN Convention on the Rights of Persons with Disabilities,* Cambridge Disability Law and Policy Series, 2011, p.27.

8 Janet E. Lord & Michael Ashley Stein, "The Domestic Incorporation of Human Rights Law and The United Nations Convention On The Rights Of Persons With Disabilities," *Washington Law Review,* 83, pp. 449-479 (2008) at p. 463.

9 Eilionoir Flynn places this at the intersection of equality, participation, solidarity and autonomy, in a venn diagram along with articles 31, and 6 and 7. See, Eilionóir Flynn, (n7), 14.

10 Manique Gunaratne, 'Sri Lanka ratify the United Nations Convention on Rights of the Persons with Disabilities (2016) <http://efcnetworkondisability.employers.lk/wp/sri-lanka-ratify-the-united-nations-convention-on-rights-of-persons-with-disabilities-uncrpd/> accessed 4 June, 2017.

11 'Disability is not Inability', *Daily Mirror* (06.12.2016) <http://www.dailymirror.lk/article/Disability-Is-Not-Inability-120267.html> accessed 04.06. 2017

12 Through discussions with PwD rights advocates and organisations such as AKASA.

transport services in limited instances for the holders of such SIDs.[13] However in Sri Lanka, not only the selection process was arbitrary, but also the privileges offered to the SID holders remain unclear. Matters pertaining to the PwDs have thus been heavily subject to exclusion and exploitation while failing to break away from the welfare based approaches.[14]

2.1 Accessibility

The CRPD provides for accessibility as a multifaceted right to enable the PwDs to 'live independently and participate fully in all aspects of life'.[15] In order for PwDs to live independently, the state should without failing facilitate essential services such as accessibility to institutions, transport, sports, telecommunication and technology. Sri Lanka however has seen many policy documents and a Supreme Court decision on enhancing accessibility to public places without much avail. Despite the Accessibility Regulations in force,[16] key locations including public institutions remain inaccessible to date and even in accessible buildings, higher floors remaining inaccessible.[17] The UDA is responsible for the implementation of the Accessibility Regulations and the overlapping powers created through the devolution of powers to the provincial bodies result in a blame game against the respective authorities. On a positive note, the Minister of Social Empowerment and Welfare had stated in the latter half of 2016 that legal action

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[13] 'Special ID Cards' (Malta) <https://crpd.org.mt/services/special-id-card/> accessed on 04.06.2017.

[14] Despite its obligation to refrain from acts that defeat the purpose of the convention-signatory obligation.

[15] Art. 9, CRPD.

[16] Disabled Persons (Accessibility) Regulations, No. 1 of 2006

[17] Ajith Perera, 'National development thwarted by failure to enforce accessibility' *The Island* (17.07.2013) <http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=83795> accessed on 20.07.2017.

will be taken against Local Bodies that approve building plans that are non-compliant with the Accessibility Regulations.[18] The Local Bodies would be penalised for acting unlawfully disregarding the Regulations and it can prove to be an effective means of ensuring accessibility of buildings and infrastructure.[19] However the veracity of the Minister's statement is yet to be witnessed.

PwDs further face difficulties in accessing public transportation and accessing the seats reserved for them thereon, due to the non-receptive attitudes of the transportation staff and lack of structural facilitation. Consequently, inaccessibility is a key barrier in education, employment, justice, participation of public life and leisure activities by the PwDs. However, due to the state's lack of concern on protection of the rights of PwDsand resourcesbeing constrained, the Accessibility Regulations are stagnated at the documented stage.

In so doing, the State has failed to take any meaningful steps to transform these bleak ground realities, despite being a signatory of the CRPD for eight years until 2016. Whereas the ratification of the CRPD is viewed as a victory in itself by the advocates who lobbied for this end for a long time[20] and much hope is placed on establishment of a rights-based framework consequent to ratification of the CRPD, concerns remain as to fulfillment of this hope. Ratification of CRPD was more of a reluctant step produced by the pressures from the disability rights advocates at the domestic level and a method of appeasing the international community.[21] Ratification alone does not

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[18] 'Access Denied, Law is Ignored' *Ceylon Today* 22 Nov. 2016<http://www.ceylontoday.lk/columns20160321CT20170330.php?id=512> accessed on 22.07.2017

[19] Regulations are made by the Minister acting under section 25 of the Act, and such duly gazetted Regulations have the force of law, arguably, equivalent to that of a legislation as such regulations are validated by the Act.

[20] 'Access Denied, Law is Ignored', (n18).

[21] Manique Gunarathne, (n10).

transform the status of the PwDs; it is just a herald for the state to take upon itself a plethora of arduous tasks delineated in the CRPD to empower and uplift the lives of the PwDs.[22]

Thereby, the convention itself places a huge responsibility on all the branches and officials of the state. Consequently, political and bureaucratic empathy with the spirit of the CRPD and the unwavering will to transform the system in accordance with the CRPD principles is imperative to truly become the dawn of a new era for the status of the PwDs. Coincidence of initiating a process to enact a new Constitution for Sri Lanka in 2016 as well as procedure for drafting a new legislation and a new National Action Plan for Human Rights enshrining the rights of the PwDs being underway provide ample opportunity for the state to incorporate the CRPD principles into legal framework of the country.

3. Domestic Legal Framework on Rights of the PwDs

3.1 Transformation of the Constitutional recognition of the PwDs in 2016

The Constitutions of Sri Lanka since independence have made attempts to be sensitive to the rights of the minorities as lucid through Article 29 of the Soulbury Constitution. However, identification of marginalisation was limited to the basis of ethnicity. Although the 1978 Constitution of the Republic of Sri Lanka expanded the vistas on dimensions of discrimination, disability has not been expressly recognised as a prohibited ground of discrimination under Article 12(2).

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[22] Ryan Goodman, Derek Jinks, 'Measuring the Effects of Human Rights Treaties' (2003) 14 EJIL 171-183. <http://www.ejil.org/pdfs/14/1/404.pdf> accessed 04.06.2017.

On the other hand, the constitutional reform process to enact a Third Republican Constitution evidenced an unprecedented participation of the PwDs in its drafting stages and as a result, rights of the PwDs are elaborated in much detail than in any constitutional document compiled or enacted thus far.The inclusive process for creating a new Constitutioninitiated in December 2015 was carried out in 2016 with the appointment of the Public Representation Committee on Constitution Reform (PRC) by the Cabinet of Ministers,[23] the first ever attempt to consult people as regards the constitutional reform. This inclusivity provided an opportunity for the human rights advocates as well as PwDs themselves to participate in the constitutional reform process to ensure that autonomy, dignity and liberty of PwDs are adequately enshrined in the new Constitution. The final report of the PRC, which was submitted to the Constitutional Assembly on March 2016, endorsed that they have considered the submissions of the PwDs.[24]

The report contains recommendations to incorporate comprehensive provisions on the fundamental rights of PwDs[25] and their language rights in official communications.[26] The PRC Report also recommendsthecreation of an independent body named 'Disability Rights Commission'; however the composition, functions, powers and the extent of independence of this commission remain nebulous. The essence of Article 33 for coordination of various sectors and independent monitoring had not been incorporated into the recommendations. This is a dire concern given the fact that the body responsible for rights of the PwDs plays a critical role in the process of

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23 Public Representations Committee on Constitutional Reform, 'Report on Public Representations on Constitutional Reform' (May 2016) 1.

24 Ibid, p. 6.

25 Ibid, pp. 122-124.

26 Ibid, p. 132.

implementation and scrutiny of its progress articulated in Article 33 of the CRPD. Whereas the mandate of the PRC was to report the public representations on constitutional reform, lack of reference to CRPD which was ratified then and also was a focal point in submissions made by the PwDs, casts an ominous shadow on the prioritisation of the rights of PwDs in the next stages of the process.

Further down the Constitution making process, the Constitutional Assembly appointed six Sub Committees in order to assist the Steering Committee to prepare a Draft Constitutional Proposal for Sri Lanka.[27]The Report of the Sub-Committee on Fundamental Rights in the Constitutional Assembly also recognizes disability as a prohibited ground of discrimination, and further recommends 'rights of citizens with disabilities and special needs' as a stand-alone provision.[28] The Report further emphasizes on the communication needs of PwDs.[29] Nonetheless there is no reference to CRPD which should have been the foundation of the State's approach to PwD rights following its ratification. Notwithstanding the above developments, whether these recommendations will in fact become part of the new Constitution without being filtered out remains to be seen when the new Constitution sees the light of the day.

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[27] While the Legislature functions as the Constitutional Assembly, 21 Members from the Assembly formed the Steering Committee which was primarily responsible for the draft Constitutional Proposal taking into consideration the recommendations from the PRC Report. See, 'The Steering Committee of the Constitutional Assembly' <http://english.constitutionalassembly.lk/steering-committee> accessed on 22.07.2017.

[28] The Steering Committee of the Constitutional Assembly, 'Report of the Sub-Committee on Fundamental Rights' (2016) 4-5, 14-15.

[29] Ibid, p. 23.

3.2 *Jurisprudence on disability rights*

While the PwDs' entitlement to equal protection of the law is generally upheld through Article 12(1) of the Constitution,[30] the lacklustre jurisprudence in disability rights contains only one FR judgment citing the provision, *Ajith Perera v. AG*[31], highlighting judiciary's reluctance to initiate progressive changes. The Court ordered that new buildings, public places including toilets should comply with the Accessibility Regulations, and that it should be mandatory to gain building approval.Although the order required immediate implementation of the accessibility regulations, to date it remains confined to black letter.

Furthermore, the impact of the decision at the jurisprudential level is also feeble, due to lack of reference to international human rights law and treaty obligations under CRPD to which the Sri Lanka was then, a signatory. Though disability is mentioned as a group for which 'special provisions' can be made in law as per Article 12 (4) of the Constitution, in *Re Local Authorities Elections (Amendment) Bill,* the Supreme Court took a controversial position and observed that a 'special provision' while allowed to be made for the advancement of women, PwDs and children, it cannot be used as a weapon to depart from the principles of the equality provision enshrined in Article 12(1).[32] Therefore, according to the apex Court, the provision does not authorize 'affirmative action' or women, disabled persons or children, debilitating the potential of

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[30] Padmani Mendis, *Training and Employment of People with Disabilities: Sri Lanka 2003* (International Labour Organisation 2004) 16.

[31] *Dr. Ajith Perera v Attorney General* SC FR No 221/2009 SC Minutes 27 April 2011. Please see for a detailed discussion, DilharaPathirana, "Rights of Persons with Disabilities," Sri Lanka: State of Human Rights 2009-2010, Law & Society Trust: Colombo, 2011, p. 456

[32] *Re Local Authorities Elections (Amendment) Bill* SC (Special Determination) 6/2010)

this Article to call for affirmative action in respect of the PwDs.[33] The state of affairs in the jurisprudence has remained consistent until and beyond 2016; the lack of visibility for the concerns of the PwDs at the constitutional level is thereby entrenched via the judicial attitude.

3.3 National legal and policy framework relating to PwDs

3.3.1 Incorporation of CRPD principles through legislative reforms: An opportunity lost

The Protection of the Rights of Persons with Disabilities Act [34](the Act) is the primary legislation which governs the rights of the PwDs in Sri Lanka, and it falls short of CRPD standards in many respects. Firstly, its definition of the PwDs is formulated in negative terms based on the inability to ensure the 'necessities of life,'[35]more aligned towards doling out charity under the welfare-based approach. In contrast, the CRPD views disability as an evolving concept, resultant of external factors such as interaction, attitudinal and environmental barriers.[36] The significance of the CRPD definition is in keeping the inherent dignity and autonomy of the PwDs intact in identifying them, a key point at which the rights-based approach differentiates from the charity-based approach.

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[33] The Court stated

"..Art. 12(4) of the constitution is not a weapon, but only a shield for the state in order to justify any kind of departure from the mainstream purely to encourage the advancement of women, children or disabled persons. Accordingly, Article 12(4) cannot be used to authorize affirmative action on behalf of women, children and disabled persons..." See, ChulaniKodikara, "A Quota for Women in Local Government in Sri Lanka: Questions of Equality, Modernity and Political Leverage" (ICES Working Paper No. 05, July 2014) 11.

[34] *Protection of the Rights of Persons with Disabilities Act No. 28 of 1996*

[35] Ibid, section 37 of the Act.

[36] (Adopted 24 January 2007, entry into force 3 May 2008) 2515 UNTS 3 (CRPD).

Secondly, recognition of the CRPD principles in the Act is limited to accessibility, educational and employment opportunities, the impact of which has further deflated in its transformation to practice.[37] This is in stark contrast with the principles in Article 3 of the CRPD, inclusive of 'accessibility' and 'equality of opportunity,' clarified and enhanced by an enforceable framework of rights. The CRPD approach is thus progressive in its emphasis of rights of the PwDs and the importance given to their effective translation into practice.

Thirdly, the National Council for Persons with Disabilities (NCPD) established by the Act for the purpose of 'promotion, advancement and protection of the rights of the PwDs'[38] has failed to become an independent mechanism for promoting, protecting and monitoring the implementation of the CRPD as envisaged by Article 33 (2) of the Convention. Reasons for the failure are manifold: its current position in the Ministry of Social Empowerment and Welfare, appointment of its members being dependent on the recommendation of the Minister and the financial dependency of the members as a result of the minister deciding their remuneration. Moreover, the NCPD, assisted by the National Secretariat for Persons with Disabilities (NSPD), does not function as a pivotal point for coordination of different sectors and at different levels as per Article 33 (1) of the CRPD. This is attributed to the lack of coordination with other executive bodies, for instance the Women's Bureau and National Secretariat for the Elders, and also with the provincial bodies. NSPD's attitude in working with provincial bodies is to fill in the gaps wherever they fall short, rather than being meaningful partners working towards the same goal.[39]

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[37] Section 23 and 24 of the Act.

[38] Section 12 of the Act.

[39] Interview with the NSPD.

As an attempt to enact fresh legislation in accordance with the rights-based approach contained in the CRPD,draft bills were produced by the CSOs since 2004. The Draft Bills call for progressively defining disability and legislative recognition of the gamut of rights in the CRPD. Another primary goal of these proposed reforms was to provide for the establishment of an independent authority responsible for implementation of the substantive rights. Viewing the rights of the PwDs as a cross cutting issue which needs coordination between the ministries, the suggestion was made for a mechanism to be functioning from a level higher than the Ministries i.e. by the Head of the State.[40]

This legislative mechanism could have been a significant avenue for incorporating the CRPD principles. Howeverin 2016, the Ministry of Social Empowerment and Welfare arbitrarily took over the legislative reform process,undermining the participation and inclusivity of the PwDs.[41]Subsequently the draft which was under review underwent changes, particularly to place the implementation mechanism within the purview of the Ministry. But the Ministry's ability to achieve effective implementation has been called into question, due to the defects in implementing the current system. Nevertheless, the Ministry gained cabinet approval for a 'more independent mechanism,' and the draft has been at the Department of Legal Draftsman.[42] The understanding is that the independent commission shall replace the National Council that is already in place with a view to 'provide a greater service' to the PwDs,[43]the scope of which has not been set out

[40] As stated by Dr.Padmani Mendis.

[41] As pointed out by PwD advocates involved in the drafting.

[42] 'Press briefing of Cabinet Decision taken on 2016-11-15' <http://www.cabinetoffice.gov.lk/cab/index.php?option=com_content&view=article&id=16&Itemid=49&lang=en&dID=7239> accessed on 17.03.2017.

[43] Ibid.

in the public domain. Taking account of the fact that the function of the independent mechanism under Article 33 of the CRPD is to oversee the implementation of the CRPD and not to serve the PwDs directly, the Ministry's call to create the independent commission for the said purpose does not fall in line with the CRPD requirements.

3.3.2 National Human Rights Action Plan 2016-2020

There are several progressive policy documents, including the National Policy of 2003 which was drafted after a socio-economic survey carried out on the status of the PwDs, the only survey of its kind carried out in relation to PwDs in Sri Lanka.[44] The National Policy endeavours to apply the international human rights principles to the domestic economic, social and cultural conditions.[45] The Accessibility Regulations of 2006 and 2009, the National Human Rights Action Plan 2011-2015 and the National Action Plan 2014 on Disability also delineate processes and structures for implementation. However, as discussed elsewhere in the chapter, the documents remain confined to black letter, their transformation into practice trammelled both by the dearth of enforceable constitutional, legislative provisions on the rights of the PwDs[46] and the systemic, attitudinal and resource constrains at the implementation process.

Subsequent to the lapse of the above Action Plan in 2016, the National Human Rights Action Plan for the year 2016-2020 was drafted under the authority of Ministry of Foreign Affairs, supported by the UNDP. Furthermore, approval of a new National Action plan for Human Rights served the purpose of obtaining GSP plus concessions again, because the country's eligibility for these concessions depended, inter alia,

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[44] As stated by Dr.Padamani Mendis.

[45] Ibid.

[46] Ajith Perera, (n 17).

upon Sri Lanka's ratification and promotion of international human rights standards.[47] The draft that was scrutinised and submitted to the Cabinet of Ministers in November 2016,was approved by the Cabinet of Ministers only by the end of February, owing to the international pressure.[48] An ulterior motive in drafting the National Action Plan for the said economic concessions and also its approval being contingent on appeasing the international community raise doubts on the actual commitment of the State to protect and promote human rights, and specifically the rights of the PwDs.

As far as the drafting process is concerned, the National Human Rights Action Plan 2011-2015 treated disability as a cross cutting issue and different drafting committees prioritised certain rights of the PwDs. However, the gradual intensification of disability rights advocacy required further emphasis on the rights of the PwDs in National Human Rights Action Plan 2016-2020. A separate Committee was formed for furthering the said purpose,and the rights of the PwDs were also treated as rights overlapping by the Committee on Economic, Social and Cultural Rights. The pronged approach of the State to treat disability rights under two categories thus mainstreams the rights of the PwDs in the overall human rights agenda.Identifying the instances where they coincide with other rights recognises inclusivity and participation of PwDs in the society.

On the other hand, concerns remain as to the extent of implementation, because implementation of the previous Action Plan has largely been ad hoc due to ineffective scrutiny. The advocates of disability rights

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[47] 'European Council grants GSP+ to Sri Lanka', <http://www.colombopage.com/archive_17A/May11_1494515096CH.php> accessed on 21.03.2017.

[48] 'Sri Lanka assures UNHRC of commitment to accountability and reconciliation'<http://www.daily news.lk/2017/02/28/local/108992/sri-lanka-assures-unhrc-commitment-accountability-and-reconciliation> accessed on 21.03.2017

emphasise on the need to give special attention to transform policy into practice and address the practical barriers to do the same.[49]

4. Enjoyment of special CRPD Rights Targeting Elevation from the Status of Impairment

Viewing disability as an 'evolving concept,' the CRPD identifies disability as conjuncture of two elements, namely persons with impairments and attitudinal and environmental barriers which affect their behavior in society as an equal with able-bodied individuals. On this basis, rights of the CRPD are targeted at empowering PwDs through transformations at the above mentioned two elements. The chapter in this section analyses the rights which seeks to elevate the PwDs from their status of impairment. Habilitation and rehabilitation, protecting integrity of person, right of independent life and inclusion in the community, promotion of freedom of expression and opinion via improvement of access to interpretation and communication support, access to information and right to health are discussed as such rights found in the CRPD.

4.1 Habilitation and rehabilitation

Article 26 of the CRPD provides that comprehensive habilitation and rehabilitation be undertaken for PwDs in order to make them independent and participate in all aspects of life. Providing adequate habilitation and rehabilitation is not limited to the medical dimension but extends to social and vocational dimensions.[50] It encompasses the gaining and regaining of skills and ability that may have been

[49] As stated by advocates who were involved in the drafting process of National Human Rights Action Plan 2011- 2015.

[50] Valentina Della Fina, Rachele Cera, Giuseppe Palmisano, *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer International Publishing, 2017) 489.

compromised as a result of a person's disability. The rehabilitation needs to begin at the earliest possible stage, and be conducted by way of multidisciplinary assessment of individual needs and strengths.[51] Providing for rehabilitation at the earliest helps the person to maintain their independence and autonomy without being excluded, and following the said multidisciplinary approach in rehabilitation individualizes the experience of the concerned PwD.[52]

In order to facilitate comprehensive habilitation and rehabilitation, more than 90 countries including Sri Lanka follow an approach known as the Community Based Rehabilitation (CBR) designed by the WHO. CBR is an instrument of empowerment for PwDs that involves training, health care, capacity building and efforts of integration of PwDs back into the society. In Sri Lanka, the CBR exists both within the government and non-governmental sectors.[53] The state sponsored CBR according to the disability rights advocates is in a dire state limiting itself to a series of lectures and having no means of any follow up of the training sessions. [54] Moreover, the CBR is limited to persons with 'less-severe' disabilities raising a number of contentions.[55] Disabled Persons' Organisations further claim that the PwDs are subject to an arbitrary selectiveness in the admission to a

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51 "...States Parties shall organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services, in such a way that these services and programmes:

(a) Begin at the earliest possible stage, and are based on the multidisciplinary assessment of individual needs and strengths; .."

52 Valentina Della Fina, (n 50).

53 As part of the CBR process, the 'self-help groups' are created comprising PwD and their families to equip the stakeholders with skills and knowledge. According to the Unit, currently 492 officers conduct training in accordance with the WHO manual and the national policy on disability.

54 As observed by a medical doctor who is also a disability rights advocate.

55 Persons with less- severe disabilities in this context refers to persons who have disabilities but are able to act by themselves without others' support.

CBR and there is barely any progressive changes in the programme. Further there are limitations in providing rehabilitation equipment and devices to fulfill the community-based physical rehabilitation needs of low-income PwDs.[56] For instance, the lack of provisioning of appropriate prosthetics and orthotics has forced many PwDs being weighed down with outdated devices.The CSOs and Non-Governmental Organisations (NGOs) have tried to fill the void through their own CBR initiatives but inevitably with limited reach and success due to the constraints in resources and lack of mobility and awareness among the PwDs.[57]

A comprehensive multi-disciplinary approach of this nature inevitably requires commitment, persistence as well as resources. However in Sri Lanka, accommodating any progress on rehabilitation is particularly challenging because the CBR functions in the absence of a rights- based approach. For instance, the state's inability to prioritise and allocate resources is tolerated by the larger society as a justifiable excuse for the state authorities to compromise on the quality of basic healthcare services to the PwDs. Furthermore, the lack of a coordinated system in place for early intervention[58] and providing rehabilitation as stipulated in the CRPD particularly entangles the lives of children with disabilities. The Census and Population of Housing Report of Sri Lanka excludes the census of children with disabilities aged 0-5 although instances of disability are found in children belonging to the age category. The rationale for the exclusion is supposedly the difficulties in ascertaining definite cases of disability in the specific age category and the possibility to

[56] CBR noted they carry out this to a limited extent though it's in the mandate of NSPD.

[57] A number of Civil Society Organisations stated the obstacles in accessing aid due to taxes and poaching of their trained staff by the government.

[58] Early intervention refers to programmes targeted at children aged 0-5 with developmental delays.

positively alter the long term trajectory of the child.[59] However the lack of official data impedes proper planning of early intervention/ rehabilitation among young children to facilitate positive alteration. The omission also impliedly contradicts CRPD's requirement of commencing rehabilitation at the earliest stage since the state does not recognise children with disabilities below 5 years of age.

4.2 Protecting the integrity of the person, right of independent life and inclusion in the community

Article 17 of the CRPD highlights that PwDs have 'a right to respect for his or her physical and mental integrity on an equal basis with others', complemented by Article 19 which expresses the right of the PwDs to live independently and be included in the community. In this light, PwD's access to residential support and personal assistance needs further analysis.

The CRPD provides for access to residential support in a manner to prevent isolation and segregation of PwDs but in reality it has turned into a mechanism that facilitates segregation, in specific for the disabled children.[60] The residential support centers often have a joint school for children of special needs which virtually confine the children to a narrow space for any progression. On the other hand, mainstream schools are reluctant to admit children with disabilities.[61] The marginalization that takes place in the guise of special education

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[59] However, children with more complex needs are identifiable between 0-2 years. Not acknowledging their complexities can contribute to delay early detection and intervention for children with disabilities.

[60] CRPD, Art 19 (b)

[61] 'Sri Lanka's Invisible Children: The Need for Inclusive Education for Children with Special Needs',

<http://www.ips.lk/talkingeconomics/2016/04/25/sri-lankas-invisible-children-the-need-for-inclusive-education-for-children-with-special-needs/ > accessed on 22.07.2017.

deprives the children with disabilities their right to full inclusion and participation in the society. This violation reflects to the innate flaws of the charity model for PwDs which fails to respect the dignity and empower the individuals.Private actors who provide residential support face various challenges in terms of technology, financial resources and human capital.[62] Lack of an independent mechanism to monitor the level of residential care provided by private institutions raises grave concerns specifically where children with disabilities and persons with intellectual disabilities are treated in homes without specialised staff for the purpose.[63]

Lack of personal assistance and an improper setup of financial aid to the PwDs have created an atmosphere inapt for thriving with independence and respect for autonomy.The notion of personal assistance is not recognised because the families of PwDs are socially obliged to play the role of personal assistant. This practice has led to the embedding ofthe notion of dependency on the PwDs upon their family members. On the other hand, the income–support schemes of the statearein place to support 'needy' PwDs which include provision for a monthly allowance and other one-time allowances: for construction of a new house, self-employment and medical assistance for surgical needs, medicine and traveling allowance, and educational assistance. Accordingly the state draws an inevitable link between disability and poverty.Provisions notwithstanding there are

[62] 115 such homes had been registered under the Department of Social Services in 2016, some of them maintaining a special education unit for children with disabilities.

[63] See Response to Request for Information from the Special Rapporteur (October 2016) (n3) p 13.

many complications involved in accessing and obtaining the financial assistance.[64]

4.3 Promotion of freedom of expression and opinion of PwDs - Access to Interpretation and Communication Support

Access to Interpretation and Communication Support continues to be a largely ignored aspect of disability hindering the PwDs' ability participate and express their opinion. In specific, the state institutions do not have records or database of the total number of interpreters and teachers available in the country for communication support. On the other hand, the inadequacy of interpreters also poses problems in reaching out to the PwDs. The severe lack of certified sign language interpreters[65] coupled with their uneven geographic distribution—concentration largely in Colombo—poses serious problems in accessibility and communication for the hearing impaired. In cases where a sign language interpreter is required in another district, the Department has to send interpreters from Colombo manifesting the dire situation.[66]

Although braille education is said to be accessible in the education sector, through university[67], the College of Education and specifically

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[64] Relatively higher number of PwDs from the districts of Kurunegala (9.81%), Jaffna (6.56%) and Ampara (5.76%) receive monthly allowances. Conversely the highest number of PwDs is in fact reported from NuwaraEliya, Kandy, and Ratnapura. The reason for the mismatch in the number of PwDs and the PwDs who receive assistance remains unclear but is likely reflective of the problems of accessibility of the financial assistance schemes, especially in the up-country estate areas.

[65] Only 5 are available, according to the NSPD.

[66] It was reported however that the NSPD and the National Institute of Education have commenced certified courses to train officers in sign language to fill in the demand for certified interpreters.

[67] 111 graduate teachers are available. See Response to Request for Information from the Special Rapporteur (October 2016) (n3) 9.

tailored courses, students with visual impairments continue to face difficulties in accessing education in school and university. In instances of national examinations for school students, the Ministry of Education provides assistive devices after the application is scrutinized by the Department of Examinations. For this purpose the Department of Examinations assesses the disability of the student, whereby the student is required to go through a tedious set of procedures to prove his/her level of disability. This is indicative of the lack of respect for PwDs' equal protection of the law, which transforms into barriers in accessing education.

Moreover, information on communication support is not made widely available and levels of training and awareness on communication support have remained relatively low.For instance, although the NSPD stated that it provides interpreters on request, no other evidence of providing sign language interpretation was provided. Inability of abled persons to communicate in sign language and their indifferent attitudes towards learning the sign language require the PwDs to always be assisted by an interpreter. Further, events in the public domain seldom cater to communication needs of the PwDs.These together require PwDs to constantly depend on another abled-person for their day to day needs and actively exclude them from participating in public affairs.

4.4 Access to information

Importance of accessing information by the PwDs is stressed at the preamble of the CRPD. Article 4 lists out provision of information 'about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities' as a general obligation of the state. Access to information is further recognized in Article 21 of the CRPD alongside freedom of expression and opinion, and states that information available to the

general public should be available in accessible formats to the PwDs as well. Article 31 of the CRPD moreover emphasizes on statistics and data collection on PwDs. Provision of information to the PwDs as well as availability of information on PwDs enhances their visibility, inclusivity and participation in the society. Upholding of this right in Sri Lanka has added significance in Sri Lanka in the backdrop of enactment of the *Right to Information Act, No 12 of 2016* in 2016, legislatively recognizing access to information and establishing the Right to Information Commission.[68]

Referral procedures concerning PwDs are in the main facilitated through informal channels and there are no official records of referrals. A medical doctor serving in a Government Hospital could direct a PwD for CBR[69] or in the case of a child, to the special needs education unit to obtain necessary training prior to being integrated into inclusive education.[70] The system of making referrals is limited to a small network of institutions under the Ministries of empowerment and social welfare, and health, and education, and its impact is hard to assess in the absence of records and information.

Information that is made accessible through the Ministry website is hindered by insufficient means of income, and the unawareness of the use of technology.Given the fact that many PwDs in Sri Lanka are in need of financial aid and require support in using technology, the state needs to rethink its ways of making the information more accessible to the deserving persons.

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[68] *Right to Information Act* No. 12 of 2016, section 11.

[69] Information provided by the CBR representative during the interview.

[70] Information by the Non Formal and Special Education Unit of the MoE

4.5 Right to health

Equality, non-discrimination and availability of special health care facilities catered specifically towards disabilities constitute the crux of the CRPD right to health.[71] Currently, identification of the PwDs as children happens by parents seeking intervention by the health institutions for provision of necessary services on their own volition. Parents alternatively access special educational institutions and the Non-formal and Special Education Unit at the Ministry of Education.[72] The Ministry of Health has a unit for Youth, Elder, Disabled and Displaced, which mainly engages in development of rehabilitation facilities, improving accessibility and raising awareness on disability.[73] However, there is a dearth of statistics on the status of support services, trained staff and financial allocations made for promoting the right to health of PwDs in contravention to the requirements set out in Article 31 of the CRPD on statics and data collection.[74]

5. Enjoyment of CRPD Rights Targeting to Redress Attitudinal and Environment Barriers

Integration, inclusivity and effective participation of PwDs in public, educational, economic, social, cultural and recreational spheres of life is an integral theme of CRPD.[75] Transformation of this theme into practice primarily depends on opportunities created for the PwDs enter these spheres and receptiveness of the PwDs in them.

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71 CRPD, Art. 25

72 As stated by an officer at the Non-Formal Education Unit

73 Annual Health Bulletin 2014 (Medical Statistics Unit, Ministry of Health, Nutrition and Indigenous Medicine) 125.

74 Article 31 not only provides for the collection of appropriate information but also to disaggregate the information accordingly to identify and address the barriers faced by PwDs in exercising their rights.

75 CRPD, Art. 3, 13, 23, 24, 27, 28, 29 and 30.

Preliminary steps to achieve this end are improving accessibility and raising awareness.

Where disability is viewed as arising from interaction of PwDs with non-receptive environmental and attitudinal factors, raising awareness plays a significant role, for awareness leads to receptiveness, respect and promotion of rights.[76] In Sri Lankan context, the right is of special significance in transforming the prevalent orthodoxy of viewing disability as a penance for a past sin, a shame and a burden, which attaches stigma on PwDs as well as their kith and kin.[77]Article 8 refers to scope of awareness-raising and three avenues of achieving the same, namely, public awareness campaigns, awareness rising via the education system and media campaigns consistent with the CRPD. However, in Sri Lanka the media provides minimal space for promotion of the rights of the disabled. Secondly, the education system, that is competitive and preoccupied with the quantitative goals, fails to inculcate rights-sensitivity in children. The training programmes are conducted by the state for their officials which, however, inculcate welfare based approach as opposed to being rights based. Even the CBR programme has not made sufficient impact in raising awareness on rights of the PwDs and interaction with them.

5.1 Educational Sphere

Article 24 of the CRPD reiterates three main features essential for the effective enjoyment of the right to education by the PwDs. Firstly, it provides for inclusivity in the general education system, which Sri Lanka does not abide by presently due to segregation of the disabled

[76] CRPD, Articles 2 and 8.

[77] 'National Policy on Disability for Sri Lanka', <http://siteresources.worldbank.org/INTSRILANKA/Resources/NatPolicyDisabilitySep2003srilanka1.pdf> accessed on 27.06.2017.

children in special schools[78] and Special Units. Such special Units are available in 6.94% of the general schools in the country as at 2015.[79] While the children in 25 special schools have nil opportunities of integration into the general education system, the inclusivity purpose of Special Units in general schools are also nullified in practice due to attitudinal and resource barriers.Consequently the students' progress is confined to the Special Education Unit contours and they lag behind in their education, rather than getting integrated into the general education system.[80]

Secondly, the CRPD insists on equality of opportunity and equality of quality, first of which is frequently jeopardised in Sri Lankan primary and secondary education because presence of children with disabilities are viewed as a negative factor for competitiveness and quantitative factors such as pass ratio at exams. Regional disparities in resource allocation for education, which is a grave drawback in Sri Lankan education system also transform into a formidable barrier for PwDs in accessing education because their mobility is anyway restricted in comparison to the reasonably able bodied individuals.[81] At the primary and secondary level, equality of quality education is compromised by segregation of PwDs from the general education system and further due to lack of reasonable accommodation and

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[78] The progress in terms of 'inclusive education' is stagnated to the stages of 'exclusion' and 'segregation' of children with disabilities in mainstream education. Further measures are required to reach 'integration' and achieve 'quality inclusive education'. See, General Comment 4, Right to inclusive educationCRPD/C/GC/4 (2016)

[79] Data Management Branch, Ministry of Education, 'Sri Lanka: Education Information 2015' (2015) <http://www.moe.gov.lk/english/images/Statistics/EducationData_2015.pdf> accessed 06.10.2016.

[80] As pointed out by Dr. Padmani Mendis

[81] *The State of Economic, Social and Cultural Rights in Sri Lanka: A Joint Civil Society Shadow Report to the United Nations Committee on Economic Social and Cultural Rights,* (April 2017) <http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/LKA/INT_CESCR_CSS_LKA_27228_E.pdf> accessed on 27.06.2017.

support services provided for the PwDs to continue with education. Accordingly, even though the PwDs enrol at educational institutions there is a high dropout rate: only 70.9% of the children with disabilities within the age group of 5-14 attend school, despite the legislative requirement of compulsory attendance for the said age group.[82]

Attendance of PwDs in the tertiary education is lowest at 2.6%.[83] There is a special university admission scheme for 'blind and differently abled candidates,' a step seemingly taken to achieve substantive equality. However, this admission scheme is expressly limited to bio-science, physical science, commerce and arts, thereby frustrating the even goal of formal equality of opportunity.[84] In these circumstances, the PwDs have no choice but to opt for private tertiary education institutions depending on their financial capacity. However, a majority of PwDs are poverty striken and as a result only a few privileged could access this expensive option. Nevertheless, there are dire concerns regarding the quality of private educational institutions in Sri Lanka emanating from the absence of any form of quality regulation by the state.[85]

Third feature of the right to education elucidated through CRPD encompasses reasonable accommodation and support services to the PwDs, is integral for ensuring quality, inclusive and free education for the PwDs. Apart from the lack of concern for reasonable

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[82] *Education Ordinance,* No 31 of 1939.

[83] Within the age group of 20-29 involved in under graduate/ post graduate studies. *Census of Population and Housing – 2012 Sri Lanka, POPULATION TABLES,* (Department of Census and Statistics 2012)

[84] University Grants Commission Sri Lanka, 'Admission to Undergraduate Courses of the Universities in Sri Lanka - Academic year 2015/2016' (2016) 130 <http://www.ugc.ac.lk/downloads/admissions/Handbook_2015_2016/ENGLISH%20HANDBOOK%202015-2016.pdf> accessed on 20.10.2016.

[85] Harini Amarasuriya, 'SAITM a Manifestation of the Deep Crisis in Education' *Daily Mirror,* 13th Feb .2017.

accommodation in the education system, there is also lack of support services for the continuation of education and the final assistance given by the NSPD as a Rs. 10000/= lump sum[86] is not sufficient to facilitate basic and secondary educational needs of a child with disabilities. At the tertiary education level there are support services available for students, such as braille facilities and accessibility devices for students with mobility disabilities.However, these programs are fuelled solely by the motivation and commitment of the respective university staffs.

Sri Lanka acceded to the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled 2013 in 2016 as the twenty fourth country to do so.[87] This treaty adopted by the World Intellectual Property Organisation, with express reference to the CRPD, aims to eradicate the book famine whereby persons with visual impairment and other print disabilities are denied access to the copyrighted works due to intellectual property regimes which protect the copyright holders.[88]The treaty specifically states that this will promote education of these PwDs, as well as aiding them in combating poverty. Despite promises to amend the country's Intellectual Property laws at the point of accession to the treaty, such amendments to *Intellectual Property Act,* No 36 of 2003 have not yet seen the day.[89]

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[86] University of Kelaniya, for instance, provides reasonable accommodation to the students with disabilities.

[87] WIPO, 'Main Provisions and Benefits of the Marrakesh Treaty' (2013) <http://www.wipo.int/edocs/pubdocs/en/wipo_pub_marrakesh_flyer.pdf> accessed on 23.07.2017; WIPO, 'The Marrakesh Treaty – Helping to end the global book famine' (2016) <http://www.wipo.int/edocs/pubdocs/en/wipo_pub_marrakesh_overview.pdf> accessed on 23.07.2017.

[88] Ibid.

[89] Ibid.

5.2 Economic sphere

The main aim of Article 27 is creation of an 'open, inclusive and accessible' work environment to PwDs. The right emphasises on assistance at different stages of employment, from finding, obtaining and maintaining employment to returning to employment and career advancement. However an overwhelming majority of 70.9% PwDs are not economically active, lack of accessibility, communicational and social barriers hindering such activeness.[90] Employment ratio of PwDs in Sri Lanka is 41.1% with a striking difference between employment of males (61.6%) and females (24.4%).[91]

The CRPD specifically focuses on three sectors of employment: public sector, private sector and self-employment.[92]Since 1988, the Sri Lankan government has had a 3% quota for employment of the PwDs in ministries, departments and corporation, which however has never been properly fulfilled by active recruitment of PwDs to the state institutions.[93] It was observed that the NSPD itself has not met the said quota. On the other hand, the private sector has been relatively progressive in the employment of PwDs. Employers' cooperation with the CBR programme, also supported by the EFC network in employing the PwDs demonstrates a positive trend.[94]

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[90] Padmani Mendis, *Training and Employment of People with Disabilities: Sri Lanka 2003* (International Labour Organisation 2004) 12-14.

[91] Calculated as the ratio of the employed to the working age population with disabilities. *Census of Population and Housing – 2012 Sri Lanka, POPULATION TABLES,* (Department of Census and Statistics 2012)

[92] Article 27, CRPD

[93] Public Administration Circular No. 27/88 dated August 1988 cited in PadmaniMendis, *Training and Employment of People with Disabilities: Sri Lanka 2003* (International Labour Organisation 2004) 18.

[94] As stated by a CBR program coordinator and Ms.Manique Guneratne from EFC.

However, PwDs face challenges from lack of qualifications and fluency in English in seeking employment in private sector.[95] Self-employment and entrepreneurship advancement has been dismal because the vocational training provided for the PwDs under the supervision of the CBR programme often does not meet the needs of the market.[96] The NSPD allowance for the said purpose lack holistic approach recommended by the CRPD and fail to ensure that PwDs are able to successfully engage in their respective self-employment.

5.3 Political and public sphere

Sovereignty of the people as recognised in Article 3 of the Constitution refers to legislative, executive and judicial powers which are exercised via representatives and franchise and fundamental rights which are directly enjoyed by the people of Sri Lanka on the basis of equality expressly stated under Article 12. Thus, the PwDs have a right to be elected to office as representatives of the people to legislature, executive and judiciary. However, a PwD is seldom elected; currently only two members hold office from the entire country, one member at the Parliamentary level and the other at the Provincial Council level.[97] Furthermore, there has been no PwD representation in the judiciary. As regards the franchise, *Elections (Special Provisions) Act,* No 28 of 2011 provides for the voting by the PwDs. However, the mechanism for blind persons to vote by an 'accompanying person' adversely affects the secrecy of their ballot and freedom of expression because the 'accompanying person' voting on behalf of the blind

[95] As observed by the Employers' Federation of Ceylon.

[96] As stated by Dr.Padmani Mendis, Advisor on Disability and Rehabilitation.

[97] A female Member of Parliament representing the Wanni district. The Uva Provincial Council member Mr Senerath Attanayake served office until his demise on 29th August 2017.

person inevitably finds out who he or she is voting for and also has the opportunity to distort the vote.

In respect of the fundamental rights, the availability of only one FR judgment relating to PwDs as discussed above[98] further denotes their invisibility at the judicial apparatus. The PwDs face a myriad of issues in accessing courts, from difficulties of physical access to the premises to communicational barriers arising from lack of sign language interpreters, which violates Article 13 of the CRPD on access to justice. The Legal Aid Commission (LAC) suffers from financial constraints and thereby, qualification for legal aid is tightly regulated by means based tests.[99] Priority is not given for disability. The Disability desk of the LAC does not function at present and the PwDs are required to come to the LAC to request assistance, a heavy burden in light of the accessibility issues faced by them.[100]Victim and Witness Protection mechanisms[101] are still in the formulation stages in Sri Lanka with the National Authority for the Protection of Victims of Crimes and Witnesses being active only since 2015 with enactment of the Assistance to and *Protection of Victims and of Crimes and Witnesses Act,* No 4 of 2015. Furthermore, systemic abuse of human rights by the police officers is a grave concern in Sri

[98] *Ajith Perera* (n 31).

[99] 'The Legal Aid Sector in Sri Lanka: Searching for Sustainable Solutions' <http://www.undp.org/content/dam/srilanka/docs/governance/Legal%20Aid%20Policy%20Brief2.pdf>accessed on 14.06.2017.

[100] Based on the verbal inquiries made at the LAC.

[101] 'Victims and witnesses: No protection, but persecution', <http://www.sundaytimes.lk/160731/news/victims-and-witnesses-no-protection-but-persecution-202919.html> accessed on 22.07.2017.

Lanka,[102] issues which are acutely felt by the PwDs, whose disability allows for further neglect and condemnation of their concerns.

The participation of PwDs in NGOs and DPOs is a special aspect of the right to participate in political and public life enunciated in the CRPD. The NGOs which provide services to the PwDs in Sri Lanka function voluntarily, with minimal assistance, funding and cooperation with the State. Lack of funding, state taxes which affect them and occasional antagonistic behaviours of the State, for instance in poaching their trained staff pose challenges to these institutions.[103]Attempts of the Ministry of Defence to register the NGOs are also viewed with mistrust, though the NSPD and the CBR programme have attempted to reach out to the NGOs based on the said registration. As regards the DPOs, each Divisional Secretary Division is to have one DPO to discuss the concerns of the PwDs. However, these organisations suffer from lack of resources and capacity to voice their concerns to the government with sufficient force.

[102] 'Sri Lanka: Pledge to End Police Abuse Not Met', <https://www.hrw.org/news/2017/02/20/sri-lanka-pledge-end-police-abuse-not-met>, accessed on 19.03.2017; 'Sri Lanka: Routine Police Torture Devastates Families' <https://www.hrw.org/news/2015/10/23/sri-lanka-routine-police-torture-devastates-families> accessed on 19.03.2017

[103] As stated by Ms.Chintha Munasinghe from Navajeevana Rehabilitation

6. Special Concerns of the Diverse Sub Groups of PwDs

6.1 Women with disabilities (WwDs)

Redressing the multiple discrimination faced by WwDs and ensuring their equality, development, advancement and empowerment is the main vision of CRPD in relation to WwDs.[104]The dearth of data on WwDs in Sri Lanka obstructs concrete assessments being made about the status of their lives. The WwD are not considered a special group deserving special focus for protection and promotion of their rights by the Ministry of Social Welfare and Development, or by the Ministry of Women's Affairs. On a precise note, the National Committee on Women under the Ministry of Women and Child Affairs do not composite WwDs, despite their continued demands[105]. The Women's Bureau that works on advancement of women does not have any special focus on women and girls with disabilities.[106]

In addition, attitudinal barriers pose heightened challenges for women in all aspects of life,[107] including access to education, employment, transport, sports and judicial mechanisms.[108]The discrimination at different stages of life of a WwD is manifold, as a girl-child from the overprotective attitudes of the family, and as a woman in exercising

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104 The twin-track approach stated in the General Comment 3, Women and girls with Disabilities CRPD/C/GC/3 (2016) is required in the long run to rectify the unequal state of affairs. However lack of political will and the systemic discrimination towards women that is perpetuated by patriarchal norms and behaviours pose greater challenges.

105 As stated by Ms. Manique Guneratne.

106 Women's Bureau is a State institution under *the Ministry of Women and Child Affairs that functions as the 'national machinery for women's development in keeping with the state policies through socio – economic empowerment'. See Women's Bureau, Ministry of Women and Child Affairs* <http://www.childwomen min.gov.lk/English/institutes/womens-bureau>*accessed on 19.03.2017.*

107 National Policy on Disability for Sri Lanka (n77)

108 Dinesha Samararatne and Karen Soldatic, 'Rural disabled women's inclusion in post-armed conflict Sri Lanka' (2014) Paper published by Social Scientists Association.

her matrimonial, sexual and reproductive rights.[109] However more often than not, the discrimination is not developed within family but imposed by the outer community by way of gender stereotypes and isolation.[110] It goes unreported and unaccounted for, because of the community's vulnerability and 'invisibility' from the mainstream society.

6.2 PwDs with intellectual Disabilities

The definition provided in the Protection of the Rights of Persons with Disabilities Act[111]speaks of 'persons with deficiency in mental capabilities', thus including the persons with intellectual disabilities and severe psychiatric disabilities. Sri Lanka, as a country that suffered three decades of war, has not sufficiently invested in facilitating mental health especially for the people who lived in the war zones. The services provided by the state have largely been ad hoc, if at all, and complemented by initiatives from CSOs, which have also faced numerous obstacles in undertaking psycho-social interventions in the north and east.

On the other hand, lack of awareness of intellectual disabilities in the society too negatively affects people with intellectual and psychiatric disabilities, causing various prejudices against the persons with intellectual disabilities.[112] In particular, the adults

[109] The dependence on a family member throughout their lifetime often places them in a less-dignified and subordinate position, where their freedom of expression and choice are not respected and they are more prone to domestic abuse, particularly after marriage.

[110] It is observed that parents from a rural background bring up a girl child with disabilities without any special treatment, which nurturesself-worth, security and a positive attitude in the child. However it is also observed that WwD in rural areas are more prone to be victims to sexual offences. See DineshaSamararatne and Karen Soldatic, (2014) (n108) 8.

[111] No 28 of 1996.

[112] As stated by CSOs working with Persons with psychiatric disabilities

who face learning and severe psychiatric disabilities are overlooked as a community in relation to persons with physical disabilities. Lack of residential and community support for such persons is also reported.[113] In addition, there is a limited number of psychiatrists to treat persons with psychiatric disabilities and the lack of trained staff to provide assistance further marginalise persons with psychiatric disabilities. Psychiatrists often tend to emphasise medication and pharmacotherapies with little attention to occupational therapy and social intervention.[114]

Moreover, in instances where the persons receive treatment, they are often detained and treated against their will, which jeopardise the dignity of such persons.[115]The standards and safeguards in relation to treatment and its monitoring are not provided for in the current legislation that governs mental health issues in Sri Lanka.[116]The drafting of a new legislation on mental health and the Mental Health Policy have been long overdue,[117] with concerns over limited consultation for the drafting of the Policy.

In Batticaloa for example, also a district affected by the war, it was noted that while community centers to look after elders were available, they did not have adequate facilities to accommodate the elders with disabilities. The hospitals that provide rehabilitation include one

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[113] Ibid

[114] Clinic based care and not community based ongoing care

[115] As stated by the PwD advocates working with people having mental health issues in the Eastern Province

[116] The Mental Disease Ordinance, No 1 of 1873 is the current legislation relating to mental health which is based on the concepts and attitudes to mental disorder that prevailed in 1873 when this Law was first enacted. Many changes have taken place since then and the need to revise the existing Ordinance has been recognized.

[117] The legislation above is grossly outdated. Discussions on the draft Bill are said to be underway by the CSOs but there is no official information of a new Mental Health Bill to replace the old Act. The Mental Health Policy 2005-2015, expired in 2015.

children's hospital with facilities no more than basic and with a limited number of physiotherapists. While CBR and rehabilitation hospitals are vital to re-integrating persons traumatised by the war and suffering from intellectual/ psychiatric disabilities,[118] the lack of such facilities in adequate measure in war-torn provinces raises grave concerns and underlines how the mental health issues of PwDs are treated.

6.3 PwDs due to the armed conflict

The three-decade old war that ended in 2009 contributed significantly to the increase in the number of PwDs in Sri Lanka. Combatants as well as civilians suffered disability, though its effect is most acutely felt in the north and eastern provinces. This is further aggravated by invisible psychiatric disabilities also caused by the war. Disabled soldiers and the ex-combatants form two categories which are hard to reconcile due to manifest distinctions in their political opinions.

The Ranaviru Seva Authority was formed in 2000 to cater for the disabled soldiers. The *Ranaviru Gammanas* have been set up for the accommodation of disabled soldiers, and facilities such as health and rehabilitation, counselling, vocational training and monetary compensation are extended to the soldiers.[119] Although the state's intention was to portray the special attention it extends to the disabled soldiers by designing a fully-fledged village with necessary facilities,[120] the measure in effect excludes them from participating in the public affairs and entrenches their isolation in a customised environment

[118] Only 2 rehabilitation hospitals are available in the country, in Ragama and Digana, with few more hospitals having a separate unit for rehabilitation.

[119] See in this regard, N de Mel, 'Playing Disability, Performing Gender: Militarised Masculinity and Disability Theatre in the Sri Lankan War and Its Aftermath' in Shaun Grech, Karen Soldatic (ed), *Disability in the Global South: The Critical Handbook* (Springer, 2016) 104

[120] Ibid.

specifically developed for the PwDs, instead of developing a common platform where the PwDs can be included.

On the other hand, the ex-combatants with disabilities face numerous challenges in returning to their normal lives as they are subject to heavy military scrutiny, continued suspicions and harassment on a regular basis.[121] The persecution is felt more acutely by the disabled female ex-combatants, who face triple discrimination based on disability, gender and their involvement with the 'other side'.[122] For instance, the military personnel follow disabled female ex-combatants where they travel alone in the streets and encroach upon their privacy when they stay indoors making them prone to harassment and abuse. The routine harassment faced by them was acknowledged in the Final Report of The Consultation Task Force on Reconciliation Mechanisms that recognized the disabled ex-combatants among the vulnerable groups in need of 'specific attention.'[123] The Report emphasized a holistic, integrated approach whereby assistance is provided for female ex-combatants alongside other young women, and the needs of the former combatants to be addressed together with the concerns of other PwDs.[124] Nevertheless, mechanisms for translating these recommendations into practice are still not properly set out.

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[121] As reported by CSO representatives from Batticaloa, working with disabled ex combatants and PwDs affected by war. CSOs and DPOs work actively on improving the conditions of persons with disabilities, affected by the armed conflict. However there is lack of support from the state.

[122] 'the other side' in this context is used to reflect the 'us' versus 'them' mentality, that continues to cause friction between the communities, in particular the ex-combatants and the sympathizers of the Liberation Tigers of Tamil Eelam (LTTE) on the one hand, and the Sinhala Buddhist nationalists on the other. The intimidation by the military towards the disabled ex-combatants is observed to be a reflection of this paradigm.

[123] Consultation Task Force on Reconciliation Mechanisms, 'Final Report of the Consultation Task Force on Reconciliation Mechanisms – Executive Summary and Recommendations' (17th November 2016) 116.

[124] Ibid.

7. Conclusion

The services provided by the state have been largely coloured by a welfare- approach. The people at the receiving end of financial assistance are termed 'needy' persons with disabilities. Facilitating accessibility in buildings and other public places whereby all PwDs would benefit has not been prioritized by the state. Thus the State has actively contributed in isolating the community of PwDs as a whole from participating in public affairs. In addition, as far as the financial assistance is concerned, bureaucracy and lack of transparency delay the timely and efficient provision of service further compromise an already inadequate level of assistance.

Accordingly the system in place nurtures an environment conducive to keeping PwDs as dependents and provides minimal space for effective participation of PwDs in decision-making. These measures further entrench discrimination and neglect of PwDs and their rights. The delay in bringing about legislation to give effect to the comprehensive framework of rights in the CRPD is yet more evidence of the marginality of this issue within the corridors of power.

Though the policy framework on disability has increasingly adopted progressive language and rhetoric, their translation into reality and implementation is largely unsatisfactory. Sri Lanka is urgently in need of radical reforms and a bottom-up approach to ensure effective upholding of the rights of the PwDs. This must range from ensuring adequate data and records pertaining to PwDs to auditing the full range of accessibility and support services so they reflect the priorities of the community rather than the state. The entire process however must be built on a transparent and inclusive approach that privileges the voice and leadership of PwDs in order that all policy initiatives are relevant, effective and sustainable.

IV

FROM PROTECTION TO DEREGULATION: WHITHER LABOUR LAWS IN SRI LANKA?

Lakmali Hemachandra[*] *and Ramindu Perera*[**]

1. Introduction

Labour, has historically been an agent of social change, social upheaval and radical social transformation so much so that Karl Marx in the 19th century charged all workers to unite and take over state power. In the late 19th century and the early 20th century labour, was fertile ground for radical politics to grow based on the idea of democratic control of the state by working class people. By the early 20th century the tension between labour and capital in the western world reached the point of social upheaval as reflected by the Russian Revolution and massive labour based agitations around Europe, especially triggered by the conditions of war spreading across Europe.

It was in this context that the International Labour Organization (ILO) was created in 1919 after the end of the first world war, with the belief that peace can only be based on social justice. In aftermath of the Second World War, ILO adopted the Philadelphia Declaration

* Attorney at Law

** Lecturer, Department of Legal Studies, The Open University of Sri Lanka

in 1944 which boldly declared in the first article that labour was not a commodity. The post war consensus therefore included measures to protect labour from extreme exploitation and commodification.

The post-colonial Sri Lankan state, was fashioned along the lines of the welfare state of the western world and labour laws constituted a heavy portion of the welfare state. The Industrial Disputes Act, the Employment Provident Fund Act, the Shop and Office Employees Act, the Termination of Employment of Workmen's Act are some of the legislations enacted in this period, that form the cornerstones of the labour law regime in the country.

However, in the 1970's, with the emergence of neoliberalism as a dominant political economic ideology, state intervention in the economy weakened globally. Neoliberal political economic theory understands state intervention to protect labour and the labouring class as a hindrance to free capital and market movements and advocates the state to withdraw from the economic sphere.The neoliberalization of the Sri Lankan state quickly followed the liberalization of the economy, with the establishment of the open market economy based on foreign investments and free trade tilting the state towards the side of capital.

This chapter argues that liberalization of the economy reflects on the state in relation to labour in two ways. Firstly, the legislative and policy interventions of the state on labour take a sharp anti- labour, pro-capital tone. Secondly, the withdrawal of state institutions from the task of protecting labour and enforcing labour laws enables a culture of circumvention that steadily grows in the country.

The chapter attempts to evaluate this two fold impact of economic liberalization on labour with reference to the year 2016 showcasing concrete examples from legal reforms, policy reforms and encounters

in the more practical, grass root level. Although the issue of labour can be investigated much more particularly with reference to migration, gender, geographical and sectorial differences, this chapter purposefully deviates from such an approach in order to highlight the common experience of labour in relation to law and policy.

Accordingly the chapter is structured as follows:

Section two encapsulates an overview of the trade and investment policy of the new government with the view of contextualizing labour and its links with trade and investment policy with reference to the year 2016. Section three attempts to conceptualize the impact of economic liberalization on labour and identifies two avenues through which economic liberalization has made inroads to labour, on one hand through legislative, policy reforms and on the other through the emergence of a circumvention culture. Section four goes on to ascertain laws, policies and incidents in the year 2016 that showcase that the protection of labour rights is weakened and violations are aggravated, under economic liberalization. Emergence of labour issues in the North and East post war is briefly discussed in section five. Finally, section six offers concluding remarks, while proposing recommendations to strengthen the position of labour and labour rights in Sri Lanka.

2. Overview of the Trade and Investment Policy of 2016

The year 2016 was a significant year for labour, trade and investment as the policy of the new government, elected in 2015 on trade and investment, started to unfold. The new coalition government comprising the two main political parties expressed their overall economic strategy in a number of policy declarations including the Prime Minister's economic policy statement of 2015 and the budget proposals presented to the Parliament in year 2015 and 2016. These declarations, praising free market economics as the engine of

development, clearly laid down an economic strategy largely promoting a liberalized investment and trade regime.

The Prime Minister's economic policy statement, presented two months following the election of the new government explicitly declared government's intention to initiate 'third generation economic reforms'. This comprised the reconstruction of the economy to facilitate its integration with the global supply chain and encouraging international investment in Sri Lanka[1]. Compared to other countries in the region, Sri Lanka's relative inability to cater to investor requirements was highlighted by the Prime Minister and the government's commitment to obtain a higher rank in the global competitive index was emphasized.

The perspective embedded in the Prime Minister's policy statement took a concrete form in the numerous policy measures presented in the budget proposals for year 2016. Removing taxes payable by foreigners in obtaining local land for lease, establishing an 'agency for development' to create a business friendly environment, setting up new export processing zones and transferring the management of existing Export Processing Zones (EPZs) to private sector management companies[2] are some significant measures proposed with the view of attracting global capital inflows.

In addition to the prominence given to attracting investment capital, another striking aspect of the government's economic policy

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[1] Economic Policy Statement of the Prime Minister,(Eighth Parliament First Session, Parliament of Sri Lanka, 05 November 2015)<http://www.lankabusinessonline.com/full-text-economic-policy-statement-made-by-pm-in-parliament/>accessed on10 October 2017

[2] Budget Proposals for Year 2016, (Eighth Parliament First Session, Parliament of Sri Lanka, 20 November 2015) Para 50 <http://www.pmdnews.lk/wp-content/uploads/2015/11/bgtspeech2016E.pdf> accessed on 10 October 2017

observable in 2016 was its drive towards greater liberalization of trade. Accordingly, the government focused on a speedy conclusion of the proposed Indo-Sri Lanka Economic and Technological Cooperation Agreement (ETCA) thereby attempting to extend the scope of the existing Indo-Lanka free trade agreement[3]. The proposed agreement intended to liberalize trade of services with the view of allowing free movement of labour between the two countries in selected categories. In addition to ETCA the government proclaimed its intention to enter in to further bi-lateral free trade agreements with Singapore, China, South Korea, Japan and Bangladesh[4], demonstrating its focus on large scale trade liberalization. The bottom line of this policy is the assumption that a liberalized trade regime would lead to more foreign capital inflows and would create favourable conditions for local exporters targeting foreign markets.

In addition to the ideological inclination towards free trade and further liberalization of the economy, the agreement between the government and the International Monetary Fund (IMF) for an Extended Fund Facility (EFF) of 1.5 billion USD shaped the government's economic policy reasoning in 2016. Since Sri Lanka faced a serious balance of payment crisis, coupled with a foreign debt crisis, without sufficient foreign reserves to repay foreign borrowings of previous years the government sought financial assistance leading to an agreement with the IMF containing terms and conditions prescribed by the latter. The IMF EFF was also seen by the government as an indication of the fiscal

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[3] 'ETCA to be Signed End of This year', 06 October 2016, *Daily Mirror*,<http://www.dailymirror.lk/116970/ETCA-to-be-signed-end-of-this-year-Ranil>accessed on 10 October 2017

[4] Bandula Sirimanna, 'Sri Lanka to Sign ETCA with India by End of 2016' , 31 July 2016, *Sunday Times*, http://www.sundaytimes.lk/160731/business-times/sri-lanka-to-sign-etca-with-india-by-end-2016-202527.html.accessed on 03 October 2017

reliability of the Sri Lankan economy, creating favourable conditions for further financial borrowings and expanded foreign investments[5].

Among other conditions such as reducing the budget deficit to 3.5 of the GDP by 2020, the IMF agreement emphasized on liberalization of trade and facilitation of investment inflows[6]. The impact of the IMF agreement on state policies on trade and investment is largely reflected in the budget presented in November 2016 for the following financial year. The budget proposed the establishment of an 'Agency for International Trade' in order to expedite signing of free trade agreements and the formation of new free trade zones in Kalutara, Rathnapura, Vavuniya and Puttalam[7]. Further following prescriptions of the IMF, the government initiated a public enterprise restructuring programme with the intention of partial or total privatization of a number of state assets.

In summary, the year 2016 can be identified as a year in which the political establishment's commitment to free trade and a liberalized investment regime was reaffirmed. Thus, the newly elected government continued the general trend of liberalization which dominated the Sri Lankan economic polity since the introduction of neoliberal economic policies in late 1970s. Following the end of civil war in 2009, Sri Lanka's integration with global finance accelerated leading to a revival of neoliberal economic policies in the country triggering

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5 'IMF loan: Out of the Trap or in to the Fire? 2016,Pamphlet published by Alliance for Economic Democracy.

6 IMF Communications Department,'Press Release: IMF Executive Board Approves Three-Year US$1.5 Billion Extended Arrangement under EFF for Sri Lanka', 03 June 2016, https://www.imf.org/en/News/Articles/2015/09/14/01/49/pr16262.accessed on 10 October 2017

7 Budget Proposals for Year 2017, (Eighth Parliament First Session, Parliament of Sri Lanka, 10 November 2016) <https://www.parliament.lk/en/budget-2017/budget-speech-second-reading-of-the-appropriation-bill>, Pg. 40. accessed on 11 October 2017

'the second wave of neo liberalism in Sri Lanka[8]'. This second wave, which materialized under the Rajapaksa government continued with a renewed affirmation in 2016 determining the trajectory of most other social indicators including labour.

3. The Impact of Investment and Trade Liberalization on Labour: A Conceptual Sketch

In Sri Lanka liberalized trade and investment practices have undermined labour rights in two major ways. First, it has created a 'race to the bottom' effect, compelling policy makers to restructure labour laws with the view of accommodating the free flow of capital and investments, thus stripping away the protective content of existing labour laws.

Second, these practices have led to the formation of a 'culture of circumvention' in relation to labour laws. In this sense, although labour laws exist in paper, extra-legal practices have developed beyond the scope of formal legal protection allowing enterprises to circumvent their legal obligations.

A brief explanation of these two patterns would be helpful in mapping the trajectory of trade, investment and labour in 2016. The drive to treat private sector investment including global capital inflows as paramount to economic growth compels governments to adopt measures to restructure the entire socio-economic setting with a view to providing incentives for potential investors. In this light for a long time the 'rigidity' of the Sri Lankan labour market has been cited by policy makers and international financial institutions such as the IMF as an

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[8] Ahilan Kadiragamar, 'Second Wave of Neo Liberalism:Financialisation and Crisis in Post War Sri Lanka', Economic and Political Weekly,Vol. 48, Issue No. 35,31 (2013) <http://www.epw.in/journal/2013/35/web-exclusives/second-wave-neoliberalism-financialisation-and-crisis-post-war-sri> accessed on 13 November 2017

obstacle for expansion of investments[9]. Strong labour laws in Sri Lanka which materialized in a particular phase of the country's post-colonial state (which was defined by an import-substitution economic policy and a comprehensive welfare state intervening largely in economic activities) were now seen as archaic and obsolete since they allegedly demoralize investments. *The Termination of Employment of Workmen (TEWA) Act*[10] restricting an employer's authority to terminate workers on non-disciplinary grounds, provisions of the *Industrial Dispute Act* enabling labour tribunals to order reinstatement of workers in cases of unjust dismissals[11], the relative liberty of trade unions in initiating strike actions are some of the existing legal provisions which have been largely criticized by parties pushing for a relaxation of labour laws[12].

Responding to this call for labour flexibility, in the last few decades Sri Lankan governments have continued attempts to reform existing laws. Some of these reforms were withdrawn in the face of public protests while some were successfully enacted. For instance, removing restrictions on night work for women in factories[13], relaxing legal limits on over-time work extractable from a worker[14], curtailing the discretion of the labour commissioner in ordering compensation for

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9 World Bank Group,Doing Business in South Asia, World Bank, 2007, p.53.<http://www.doingbusiness.org/~/media/WBG/DoingBusiness/Documents/Subnational-Reports/DB07-Sub-South-Asia.pdf>accessed on 04 October 2017 ;'Sri Lanka State of the Economy Report', Institution of Policy Studies of Sri Lanka, 2015

10 *Termination of Employment of Workmen (Special provisions) Act no.42 of 1971.*

11 Industrial Disputes Act no.43 of 1950, s 33(1).

12 Earl Brown, 'The New Employment Policy Paper - A Recipe for Cheap Labour?', Moot Point Legal Review, Centre for Policy Alternatives,(2002), vol.5,p. 55

13 *Employment of Women, Young Persons and Children, The Factories and The Shop And Office Employees (Regulation Of Employment And Remuneration) (Amendment) Act No. 32 of 1984.*

14 *Factories (Amendment) Act no. 10 of 2002.*

wrongfully dismissed workers[15], relaxing the procedure of termination inquiries in a manner favouring the employer[16] are examples of how liberal trade and investment policies triggered a similar shift in labour policy.

The emergence of the culture of circumvention arises from two factors; one, flexible labour practices adopted by employers to avoid their obligations under labour laws and second, absence of a political will on the part of the state to address these circumventions. The increasing use of contract, temporary and casual work to substitute for permanent work is an example of the former. This further includes outsourcing core functions of enterprises and hiring non-permanent workers through contracting agencies known as 'manpower agencies'. Another example for circumvention is the widely adopted anti-union practices. Systematic anti-union practices are evident especially in free trade zones while even in enterprises outside FTZs managerial measures are applied to prevent or discourage workers from being organized.

Structural changes that the Sri Lankan economy has undergone in the last few decades have aggravated these conditions. For instance, the expansion of the informal economy and institutions in the formal economy resorting to informal labour arrangements such as sub-contracting have increased precariousness among workers. As in most other countries in Sri Lanka the rise of informal labour is correlated with consequences of economic liberalization[17]. For example, trade liberalization intensifies the drive towards informality since

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[15] *Termination of Employment of Workmen (Special Provisions) Amendment Act No. 12 of 2003.*

[16] *Industrial Disputes (Hearing and Determination Of Proceedings) (Special Provisions) Act No. 13 of 2003.*

[17] Siri Hettige, *Policy Responses to Precarious Work in Sri Lanka: Policy Responses Precarious Work in Asia,* (Hsin-Huang Michael Hsiao, Arne L. Kalleberg, and Kevin Hewisoneds, Institute of Sociology, Academia Sinica, Taipei, Taiwan, 2015).P.237

international competition compels enterprises to adopt cost cutting measures such as the employment of informal forms of labour.

Informal workers are not protected by formal labour law mechanisms and thus remain precarious. Given the fact that 66% of the Sri Lankan labour force comprises informal labour[18] the existence and expansion of informality functions as a major factor undermining the position of labour, enabling employers to adopt exploitative practices.

On the other hand, the state's relative reluctance in confronting this circumvention culture demonstrates the transformation that state institutions have undergone during the long period of implementation of neo-liberal policies. Existing institutional frameworks surrounding formal labour laws including labour inspections and functionaries of the labour department largely lags behind their expected performance. Since the state ideology itself affirms the notion of primacy of private investment, an inherent bias towards capital dominates policy implementation. The determination exhibited by the policymakers in creating a business friendly environment is virtually non- existent in addressing structural issues affecting labour.

4. A Look Back at Labour in the Year 2016

4. 1 Labour law reforms

Two favourable laws were enacted in 2016 in relation to labour i.e. a) the National Minimum Wages Act[19] and b) the Budgetary Relief Allowance Act[20]. The former established a minimum wage of ten

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[18] Ramani Gunatilaka, 'Informal Employment in Sri Lanka: Nature, Probability of Employment, and Determinants of Wages', [2008] ILO Asia-Pacific Working Paper Series.

[19] *National Minimum Wage of Workers Act No. 3 of 2016.*

[20] *Budgetary Relief Allowance of Workers Act. No. 4 of 2016.*

thousand rupees in sectors where monthly wages are paid while introducing a four-hundred-rupee minimum wage for daily paid work. Since the Act applies to any worker in any sector this is a step forward guaranteeing a minimum wage for informal sector workers. Though this is undoubtedly a satisfactory move, larger issues related to determining a living wage for workers remains to be a serious concern. The limitation of the Minimum Wages Act is discussed elsewhere in the chapter.[21]

The latter legislation required private sector employers to increase the wages of employees by 2500 rupees in two stages. This is a silver lining since this establishes a precedent of the state directly interfering in private sector wage increase. Traditionally salary hikes were provided through budgetary provisions for public sector employees, but except for year 2005, the state did not develop a practice of interfering in the raising the wages for private sector employees. Although, a wage increase of 2500 rupees is inadequate in the light of rising living costs, especially for those who are belonging to low paid categories, state intervention in regulating private sector wages is a commendable step towards further protection of workers.

However, regardless of the enactment of certain labour friendly measures, the overall labour reform strategy of the government, unleashed in 2016, was orientated towards deregulation of labour laws. This orientation is clearly embedded in several authoritative policy recommendation documents reflecting the underline vision of adjusting existing laws according to the interests of the business community.

[21] See box 2.

a) The National Human Resource and Employment policy

The National Human Resources and Employment policy (NHREP) is a package first formulated by the Rajapaksha regime in 2012. The Ministry of Labour and Trade Union Affairs of the new government presented a slightly revised version of the NHREP to the National Labour Advisory Council in July 2016 for the purpose of drawing consultations. Since the NHREP represents the official government policy on labour this requires thorough scrutiny.

Building on the perspective of labour flexibility the NHREP in several paragraphs refer to the labour regime of the country as a complex, archaic system which is not conducive for investors[22]. Within this paradigm, it suggests several concrete reforms with the underlying philosophy of facilitating investment. For example, referring to the issue of unemployment, the NHREP alarmingly endorses the use of contract labour in rural areas as an 'innovative practice' contributing to employment generation[23]. In a context where contract labour is used by employers to circumvent their legal obligations and causing increased precariousness on the part of workers this endorsement appears as a legitimization of this exploitative practice.

Further, the NHREP proposes deregulation of small and medium enterprises (SMEs) from the purview of minimum wage legislation and shifting the task of determining minimum wages in these enterprises towards collective bargaining processes[24]. The rationale cited for this proposal is avoiding damages incurred by SMEs in complying with minimum wages legislation. However, given the fact that trade union

[22] National Human Resources and Employment Policy, Ministry of Labour and Trade Union Affairs, 2016.

[23] Ibid, para 324.

[24] Ibid, para 336, 343.

presence in small and medium enterprises is extremely weak, this suggestion in reality amounts to exemption of SMEs from adhering to minimum wages requirements.

Moreover, the NHREP refers to the importance of a 'productivity based wage system[25]', again attempting to legitimize an anti-labour practice adopted by employers. Among other reasons, reducing the process of wage determination to productivity negatively impacts the worker as it oversees external factors such as the cost of living and health concerns of workers which have to be taken in to account in determining a living wage. These elements of the NHREP drew a critical response from trade unions while one prominent union described it as the labour ministry presenting an 'investment policy' instead of a policy to empower labour[26].

b) Labour reforms proposed in the budget for year 2016

The budget proposals for 2016 are significant since it is the first budget presented by the newly appointed government. As explained before in this chapter, within a macro economic framework of attributing a paramount status to private sector investment as the driving force of economic growth, it contained several proposals on labour.

First, the budget proposed to extend the time period required to make a temporary worker permanent from six months to one year. This means that the employer is given an extended time to employ a worker without assuring him any employment security.

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[25] Ibid, para 337.

[26] Communique of Ceylon Mercantile Union sent to the Minister of Labour, July 2016.

Second, it proposed encouraging part time employment as a mean of achieving flexibility in work, which again promotes precarious forms of labour at the expense of legally protected full time permanent work.

Third, there was a controversial suggestion to restructure the existing 45 hours working week into five days as opposed to the currently existing five and half days of the working week, violating the internationally recognized principle of an eight hour working day.

Finally, the budget proposed to slash the non-contributory pension scheme of public sector workers, which was for a long time seen as a legal entitlement making public sector employment attractive for employees. This proposal came in to force in 2016 replacing the former non-contributory scheme with a new contributory pension arrangement.

Responding to the budget proposals pertaining to labour, trade unions called for an island wide strike to oppose the maiden budget of the government. This strike action was called off at the last minute since several major unions withdrew from the action following discussions held with the Prime Minister[27]. However, the Ceylon Bank Employees Union proceeded with the strike with around 30 000 bank workers representing both state and private sector banks participating in the strike.

[27] 'Several Trade Unions abandon Strike Action Following PM's Statement', News First, 15 December 2015. <http://newsfirst.lk/english/2015/12/several-trade-unions-abandon-strike-action-following-pms-statement/121412>accessed on 03 October 2017

c) The 'Shirani Thilakawardane' report

A comprehensive labour law reform package surfaced in late 2015 which was termed as the 'Shirani Thilakawardhana report'. It was heavily criticised by trade unions as an attempt at reform by stealth and remained a concern of trade unions in the subsequent year. Involvement of the International Labour Organization (ILO) country office in the report led to several trade unions questioning the integrity of the international organization.

This report was formulated by the retired Supreme Court judge Shirani Thilakawardhana under an assignment of the ILO country office as a part of one of its Decent Work Country Programme. The report came under criticism by a number of trade unions on the one hand due to its lack of transparency and due to its pro-employer content on the other. Trade Unions accused the ILO of not consulting them and thus violating the principle of tripartism in formulating these proposals[28].

The report contained several welcoming proposals addressing certain deficits of the labour law system. These include granting trade unions the right to directly sue an employer in cases of unfair labour practices[29], establishing a framework to prevent sexual harassment in workplaces, providing a clear definition for 'essential services' to avoid manipulation of the term to suppress legitimate strike action and removing existing anomalies in maternity benefit payments[30].

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[28] The letter submitted to the ILO Colombo office by the Trade Union Collective on 12th October 2015.

[29] IDA provision - under the existing law the Labour Commissioner has the sole authority to initiate litigation and delays in the part of the commissioner denies justice for the victims of anti-union practices.

[30] *Shop and Office Employees Act No. of 1955* part I A- current law provides an 84 days of maternity leave for first two child births and restricts this to 42 days from the third and consequent confinements.

However, in spite of these positive suggestions, the report at the same time carried significant reforms focusing on deregulation of labour laws. For example, it recommended the relaxation of existing regulations on non-disciplinary terminations by amending the Termination of Employment of Workmen Act (TEWA) in a manner that restricts the application of the Act to terminations done upon retrenchment and closures of businesses. As it exists, TEWA provides that an employer seeking to terminate the service of an employee on a non-disciplinary ground should obtain prior approval of the labour commissioner for such termination, provided that the employee has not consented to the removal[31]. This strict provision on termination was criticised for a long time by international financial institutions as well as the local employers' community as a hindrance for growth[32].

The proposal in the report to remove the existing restriction for night work of women employed in shops and offices is another example for accommodating the demands of the employer community in the process of labour reforms. Currently, as per the provisions of the Shops and Office Employees Act[33] employers are not allowed to employ female workers in shops and offices beyond 8 p.m. Removal of this restriction is viewed by employers[34] as important since it enables the utilization of female labour throughout the day. Further, the report suggested to restrict the existing power of the minister to unilaterally extend provisions of a collective bargaining agreement to establishments not originally parties to the agreement. Presently, the minister exercises

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[31] *Termination of Employment of Workmen Act No 45 of 1971s 2.*

[32] 'Labour Laws a Constraint on Employment Generation- EFC Survey', Sunday Observer, 1st April 2012<http://www.employers.lk/efc-news/507-labour-laws-a-constraint-on-employment-generation-efc-survey>accessed on 10 October 2017

[33] *Shop and Office Employees Act1954,* s 10(2).

[34] 'EFC Asks for Five Day Working Week, Extended Hours for Women', The Island, 30 October 2017 <http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=63842>03 October 2017

discretion to make such extension orders and as a practice this is done in instances where the minister is of the opinion that certain provisions of an agreement deserves wider application granting equal benefits and entitlements for workers employed in similar categories or industries[35]. The report suggests that the minister should obtain prior consent of every party before making an extension order which means the total abolition of the existing discretionary power.

The National Minimum Wages Act and its implications

The enactment of the National Minimum Wage Act No. 03 of 2016 is significant as it addresses a long awaited requirement regarding setting a minimum wage fixing mechanism. The existing mechanism of wages boards was seen for a long time as inadequate in determining minimum wages for several reasons. The main reason is the decline of the number of workers covered by wages boards. Only a mere 20% of the labour force is covered by wages boards whereas in 1961 it covered 55% of the workforce. This decline reflects the impact of growing informalization of the economy coupled with the expansion of sub-contracting and casualization of labour[1]. Currently in Sri Lanka around 60% of workers are employed in the informal sector. These workers *per se* are excluded from the purview of the Wages Boards Ordinance.

[35] *Industrial Disputes Act 1950*, s 10.

The new Act stipulates ten thousand rupees as the minimum wage for monthly work and four hundred rupees for daily work (section 3). Further it obliges every employer to maintain a register detailing the name of workers employed, the nature of their work and wages paid for them (section 5). The labour officials are entitled to initiate random inspections to ensure that employers adhere to the minimum wage requirement (section 6). An employer failing or omitting paying the minimum wage can be prosecuted and is punishable with a fine not exceeding twenty thousand rupees or imprisonment for six months or both (section 9.1).

The statutory minimum wage will benefit sectors not covered by wages boards or collective agreements. However, the conceptual limitation embedded in the minimum wage concept is that it does not necessarily guarantee a living wage. A living wage is the sufficient income enabling worker to maintain a safe decent living standard in the community. This includes fulfilling needs such as food, shelter, utilities, transport, healthcare and education. On the contrary, the minimum wage only assures a bare minimum standard of life. As for 2015, it is estimated that the living wage for an average Sri Lankan family consisting four members is 48,608 LKR [2]. In this context the inadequacy of the currently prescribed minimum wage of 10 000 LKR is obvious.

Thus, it is important to push for a mechanism fixing a 'living minimum wage' instead of a mere minimum wage. Further, the Act contains certain debatable provisions such as the exclusion of domestic workers from the definition of 'worker' thereby denying domestic workers the protection provided by the Act. Since domestic work is a form of informal work not covered under most labour laws in the country this exclusion further reinforces the discriminative practice against domestic work.

1. Devaka Gunawardhana and Buddima Padmasiri, presentation on the research on wages boards, presented at 'Attacks on the Labour Regime' International Norms and Experiences, Sri Lanka's Non implementation of Labour Standards, the Neo Liberal Assault and Challages Facing the Labour Movement, Labour Workshop organized by National Association for Trade Union Research and Education, June 24th to 26th, 2016

2. Asian Floor Wages Figures, 2015. http://labourbehindthelabel.org/campaigns/living-wage/

Further the report recommends to amend the meaning of the term 'unfair labour practices' of the Industrial Disputes Act by inserting 'unfair practices of employees' to the definition[36]. The existing law refers to unfair labour practices exercised by employers and 'removing the bias of law' is cited as the reason for the Amendment. This notion of 'removal of bias' leads to a conceptual problem. The purpose of labour legislations from its historical inception was to protect the worker against the backdrop of unequal bargaining power between the employer and employee. This perspective stems from the understanding that worker is the 'weaker' party of the employment contract and thus the state is required to empower the worker against the prerogative of the employer through social legislation.

Thus, the concept of unfair labour practices is a measure to assure freedom of association of workers against abuse of power of employers. Therefore, it is paradoxical to speak of a bias of the law on unfair labour practices since the very idea of the concept should be empowering the subordinate party of the employment contract over the dominant party. Therefore, enabling the dominant party to sue the weaker party on 'unfair labour practices' is against the very spirit of the concept allowing employers to trap trade unions in endless litigation incapacitating their conduct.

[36] Ibid, s 32 A.

Trade Liberalization and its impact on labour

In 2016 the issue of the relationship between free trade and labour gained attention in Sri Lanka due to the heated debates emerged surrounding the ETCA agreement. During a visit to India in October, the Sri Lankan Prime Minister addressing the Indian Economic Summit publicly declared the government's intention to finalize the agreement by end of 2016. ETCA triggered opposition from professional bodies with the Government Medical Officers' Association (GMOA) becoming a leading critique of the proposed agreement. Since ETCA aims to liberalize the service sector, these bodies raised the issue of potential Indian labour influx into Sri Lanka affecting the bargaining power of professionals in the labour market. Meanwhile certain Sinhala nationalist forces also took up the ETCA issue to mobilize masses and to trigger dissent against the government. Most of these anti ETCA campaigns represented a xenophobic element, attempting to provoke anti-Indian sentiments and depicting 'immigrant Indian labour' as a threat to the nation.

Thus, obsessed with the anti-Indian rhetoric, this mainstream anti-ETCA campaign overlooked the real socio-economic dangers trade liberalization poses including endangering labour standards. Trade liberalization may endanger labour in several ways.

First, removing import restrictions will impose a pressure on local producers to reduce their operational cost leading to suppression of wages of workers. Drawing from experiences of the NAFTA agreement researchers have documented how trade liberalization led to lower wages, increased precariousness, low employment security and loss of social security[1].

Second, free trade may cripple the bargaining power of workers and trade unions. Immigrant labour can be manipulated by employers as a tool to suppress the bargaining strength of workers. Further, in a context where cross-border mobility of capital is high, enterprises can always use the threat of shifting their businesses geographically as a means to undermine demands of workers.

Third, especially an agreement such as ETCA would make Sri Lanka attractive to foreign investors since they can locate their production in Sri Lanka targeting the massive Indian market. This is one of the reasons the economic establishment is interested in concluding the agreement as its economic strategy largely depends on stimulating growth through the influx of foreign investment. However, though removal of tariff by the Indian government is beneficial for such investors it alone does not assure investment inflows. Other factors such as low labour costs and liberal labour laws are equally decisive if this strategy is to be effective. Hence, the investor oriented environment opened up by trade liberalization can generate a downward pressure on labour.

In the context that the Sri Lankan government is committed to pursuing a policy of free trade, its implications on labour have to be highlighted more vigorously in the mainstream dialogue, transcending the narrow anti-Indian rhetoric of the current discourse surrounding ETCA.

1. *Has Globalization Gone too Far?, Dani Rodrik, Challenge, Vol 41, No.2 (March-April 1998), pp. 81-94*

4.2 *In between right and wrong: Extra Legal Practices and Circumvention of Labour Laws*

a) Manpower Labour and Precarious Work

Weaknesses in enforcement and weakening of the trade unions along with the structural changes in the economy have been instrumental in creating a culture of circumvention and non-enforcement of labour laws. Employers have developed systematic practices, largely propelled by the tendency to accumulate through flexibility, to avoid complying with labours laws. Fixed terms contract, internships, temporary jobs, part time jobs and outsourcing and insourcing core work are some of these practices developed by employers to make labour flexible in line with rapidly moving capital, creating 'the precariat,' a class of workers subject to precarious working conditions[37].

In addition to the expansion of the informal sector which accounts for 60% of the labour force, informalization of work in general, giving rise to precarious working conditions has been a common malaise in the global working class. In Sri Lanka, the rise of manpower labour, a form of contract work which disguises the employment relationship, is widely used to circumvent labour laws and shift the social cost of labour onto the worker.

Manpower is an arrangement which distances the actual employer from the employee by placing an agency in between. Manpower agencies hire workers and supply them to employers in the form of labour supply contracts. The employment relationship therefore gets substituted with a contractual relationship, disguising the real nature of employment. Manpower and other contract forms of labour results in wage discrepancies between contract and permanent workers, loss

[37] Guy Standing, The Precariat: The New Dangerous Class, (Bloomsbury USA, 2011) p. 11

of social security and weakening of trade unions. The precariousness of work, pre-empts the contract workers from joining trade unions and exploring avenues of collective bargaining. Stripped off the protections guaranteed under an employment relationship, the workers are thrust into a contractual relationship.

Conversion of state enterprises into public private partnerships and emphasis on the profit motive of state enterprises have resulted in state enterprises using manpower labour as seen in the cases of Ceylon Electricity Board, Sri Lanka Telecom PLC and Sri Lanka Ports Authority. However year 2016 was a year of resistance for the manpower workers. In several state owned or semi owned enterprises, manpower workers showed a tendency towards unionizing and demanding an end to manpower labour.

I. Ceylon Electricity Board

6759 manpower workers in the Ceylon Electricity Board were made permanent in the year 2016, as a result of continuous trade union actions by the Ceylon Electricity Workers' Union.[38]

However 137 metre readers employed as manpower workers in the CEB were not made permanent, due to differences in union affiliations. Metre readers of CEB thereafter staged a Sathyagraha action which was removed by the Police, by a court order obtained under Section 106 of the Criminal Procedure Code.

[38] 'State Sector Manpower Workers in Limbo', The Sunday Times, February 05th 2016, <http://www.sundaytimes.lk/170205/news/state-sector-manpower-workers-in-limbo-227233.html>accessed on 14th November 2017

II. Sri Lanka Telecom PLC

On 17th October three manpower workers of Sri Lanka Telecom PLC[39] climbed to the top of the transmission tower in the Sri Lanka Telecom PLC headquarters, demanding to be absorbed into the permanent cadre of SLT. Sri Lanka Telecom employees 2100 manpower workers, recruited through Sri Lanka Telecom Human Capital Solutions, a subsidiary of SLT, which functions as a manpower agency. On December 26th 2016, manpower workers in SLT started a strike action demanding permanent work, which continued onto the year 2017.

III. Sri Lanka Ports Authority - Magampura Port Manpower Workers

Magampura Port Workers Union launched a strike action on the 6th of December demanding permanent worker status to 483 manpower workers employed at the Magampura Port.[40] The strike started in the wake of the decision to sell the Magampura Port to a Chinese company. Workers alleged that the government is reluctant to recruit them into permanent work due to the on-going privatization process.Workers claimed that they were recruited through manpower agencies under the directions of the former President Mahinda Rajapakse. On 11th December the situation escalated as the Navy was deployed to remove the striking workers

[39] 'Signal tower' protest by SLT manpower workers', *Daily Mirror,* 17th October 2016, <http://www.dailymirror.lk/117556/-Signal-tower-protest-by-SLT-manpower-workers> accessed on 10 October 2017

[40] 'Magampura Port Workers Launch a Continuous Strike', GoldFM News, 8th December 2016, <http://www.hirunews.lk/goldfmnews/149256/magampura-port-workers-launch-continuous-strike> accessed on 07 October 2017

from two foreign vessels they were occupying[41]. Several workers were attacked during the Navy intervention and video footage of the Navy Chief threatening and intimidating journalists was widely circulated in the media.

IV. Judicial and legislative approach to atypical employment

The question of atypical employment relationships and what criterion constitute an employer has been reflected and decided on by the Sri Lankan Judiciary in several cases. Consequently several judicial tests are used to identify an employee in the absence of a contract of employment such as **the control test, the integration test, the economic reality test** and **the multiple or dominant impression test.**

In the established judicial precedent as in the cases of *De Silva v. The Associated Newspapers of Ceylon Ltd*, *Perera v. Marikar Bawa Ltd* and *Ceylon Fertlizer Corporation v. Ceylon Mercantile Union*, where atypical employment relationships were nevertheless held to be employment relationships, it is accepted that the employment relationships can be identified beyond and outside of the actual contract that exist between parties. Judicial scrutiny of employment contracts, third party labour supply contracts and independent contractors has recognized atypical forms of employment and the tendency to disguise employment relationships.

In *Sri Lanka Insurance Corporation v. The Commissioner of Labour*[42] decided in December 2016 the Supreme Court reiterated the

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41 'Sri Lankan government sends Navy to suppress striking port workers', World Socialist Web Site, 12th December 2016, <https://www.wsws.org/en/articles/2016/12/12/port-d12.html> accessed on 07 October 2017

42 SC Appeal 27A/2009.

previous precedent by deciding that motor claims assessors, who worked in the Sri Lanka Insurance Corporation on a job to job basis were employees of Sri Lanka Insurance Cooperation.

A close study of the labour law in Sri Lanka will show that in most cases where manpower labour is used, all the judicial tests can be successfully applied to establish the employment relationship. Section 59 (a) of the Wages Boards Ordinance[43], which is the only provision in law that refers to contract work empowers the Minister to investigate disguised employment relationships. However, the judicial tests and existing legislative provisions have proven inadequate to bring the workers inside the purview of labour laws and protections, mainly due to the weak collective bargaining power of the workers.

Therefore a comprehensive piece of legislation which addresses the issue of precarious work broadly in order to bring the informal sector, manpower workers, contract workers and various other forms of supposedly flexible work arrangements into the purview of labour regulation is urgently required if the rising tide of precarious work is to be controlled. At the moment the weakening of the labour department, along with the weakening of the working class movement has created a considerable vacuum in law enforcement which enables the employers to use precarious labour while abdicating all responsibilities towards workers.

b) Freedom of Association in Free Trade Zones

The export processing zone or the free trade zone in Katunayake was established in 1978, immediately after the economic liberalization with the view of attracting foreign direct investment. At the time of its

[43] *Wages Boards Ordinance of 1941*, s 59.

conception, the free trade zones were expected to be exempted from the labour regime of the country. However, trade unions challenged the constitutionality of the bill in the Constitutional Court successfully, debunking a very early attempt to deprive workers in the free trade zone of labour protections.

Here again, in spite of gaining formal protection of the labour regime, free trade zone workers remain outside of the protections guaranteed under the labour laws of the country. Notably, only one company operating in Katunayake free trade zone has a collective agreement.

Anti-union discrimination in the free trade zone ranges from refusals to recognize trade unions, public campaigns to malign unions, discriminatory shop floor practices, intimidation, threats of physical attacks, dismissals and suspensions.

The role of the Board of Investment (BOI) in creating a culture of circumvention in the free trade zone is heavily criticised by the Trade Unions. Although the former Chairman of BOI, Upul Jayasooriya had promised to stop the use of manpower labour in the free trade zone[44], union activists accuse the BOI of acting as an accomplice in allowing manpower workers to enter the zone using daily BOI passes.

On the other hand, trade union activists find it very difficult to enter the zone to organize workers and promote trade unions[45]. Freedom of association guaranteed by the Constitution is heavily violated in the zone. Workers who try to organize and form unions are instantly thrown out of work and blacklisted. Black listed workers find it difficult

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[44] 'Manpower agencies banned from FTZ', *The Sunday Times*, December 20th 2015, <http://www.sundaytimes.lk/151220/news/manpower-agencies-banned-from-ftz-176004.html>accessed on 14th November 2017

[45] Interview with SugathRajapakshe, Ceylon Industrial Workers Union, Katunayake. March 30th 2017

to find work inside the free trade zone due to the information channels between employers.

BOI is also alleged of hindering labour inspection in the free trade zone in Katunayake by supplanting the Department of Labour[46]. Although labour inspection in other factories happen without the prior knowledge of the employers, in the free trade zone, according trade union activists, due to the requirement of obtaining a BOI pass before entering the zone, employers are tipped off about labour inspection visits.

Many trade unionists, inside the free trade zone, believe that BOI is not impartial and puts the interests of employers above the interests of workers. The workers working and living inside the free trade zone area face numerous challenges outside of work in relation to safety, accommodation, food and health. During the floods in May 2016 although workers were affected as much as the factories and employers, administrative restrictions in accessing welfare due to the temporary nature of residence blocked them from receiving any aid provided by the government. Trade unionists also complain that the government too was not interested in the workers interests as much it was keen on getting the business on its feet again.

Free trade zone workers come from rural areas in the country and reside in the outskirts of the zone temporarily. However these residential arrangements are largely informal and do not come under the supervision of the BOI or any other responsible authority. Lack of administrative accountability for the workers place them in a vulnerable position when they want to access state assistance. For example, in one instance when an issue of water supply was brought

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[46] *Balasingham Skanthakumar,* 'Living for the day': Contract Workers in Sri Lanka's Free Trade Zones,(2017), Dabindu Collective.p. 17

up by the workers to the divisional secretariat, the worker was asked to come through the owner of the residence. When the unions and workers attempt to hold the BOI responsible for living conditions outside of the zone, the officials shrug off any responsibility claiming matters outside of the zone to be not their concern.

On 22nd June 2016 responding to the escalated anti-union practices in the free trade zone, five major trade unions came together to hold a protest in front of the Board of Investment in Katunayake with the participation of more than 1000 workers[47]. Overtly anti-union practices in the zone and the slandering campaign conducted against the Co-General Secretary of the Free Trade Zone and General Workers' Union were the major triggers behind the protest.

c) Linking wage to productivity

The dispute in Polytex Kegalle, located outside of the Free Trade Zone in Katunayake, started after the production slowed down in the factory between 1st of February and 19th of February. The management alleged that more than 500 workers had started a go slow action and suspended 38 workers, including the President, Secretary and other active members of the trade union. Ceylon Mercantile, Industrial and General Workers' Union (CMU), to which the Polytex Garments union is affiliated to in turn accused the Management of using the fall of production to witch hunt the union members[48]. According to CMU the reason behind the slow down in production was the failure by the

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[47] 'Sri Lanka : thousands protest against anti- union discrimination at FTZs', Industrial Global Union Web site on 07th July 2016, <http://www.industriall-union.org/sri-lanka-trade-unions-protest-against-anti-union-discrimination-at-ftzs> accessed on 14th November 2017

[48] Lakmali Hemachandra, Unions under Fire in the Garment Industry, Law & Society Trust blog, 13th May 2016, http://lawandsocietytrust.blogspot.com/2016/05/unions-under-fire-in-garment-industry.html, accessed on 14th November 2017

Management to increase the wages of the workers. The Management according to the union promised to increase wages by Rs. 3000 if a productivity rate of 70% was reached. However after the workers did reach the target the promised wage increase was not given which caused the slow down in work. At the end of a domestic inquiry which the workers accuse of being biased, 28 workers, including the President of the union were suspended in June.

Polytex Garments workers had worked relentlessly without taking breaks or leave to reach the 70% productivity level which they had missed in the previous year. Wages based on productivity, instead of more traditional criterion of cost of living and living standards of workers, is widely used by employers to squeeze the maximum amount of work from employees. Productivity ideology entices the workers to give up hard won workers' rights like the 8 hour work day and mandatory leave in pursuit of a higher wage. In fact Polytex Garments Kegalle and Ekala have been a site of bitter battles between the CMU and the Polytex Management over the refusal of the Trade Union to accept productivity based wages in the collective agreement.

Productivity based wage arrangements in several collective agreements. The Plantation Workers' collective agreement discussed elsewhere is a fine example of this practice sneaking into collective agreements.

d) Restructuring of the Department of Labour

2016 also saw Labour Officers taking trade union action against salary anomalies, the proposed new service minute and the Madihahewa report which the Government Labour Officers' Union alleged was an attempt at weakening the Labour Department and lowering the standards of the labour officers' service. However the alleged Madihahewa report which seeks to restructure the Department of Labour was never made accessible to the public.

The President of the Government Service Labour Officers' Association was called to the police on the 24th of October 2017 after the Commissioner of Labour lodged a complaint against him alleging disruptions to performing her duties. Labour Officers' Trade Union along with several other trade unions, on the other hand saw, the complaint by the Commissioner of Labour herself has an attempt to intimidate the workers who were gearing up for trade union actions[49].

Collective Agreement of the Plantation Sector

The most militant workers' struggle to come out of the year 2016 was the wave of protests by the plantation workers against the menial wages and demanding the Rs. 1000 daily wage promised by politicians during the previous year's election cycle.

The protests were aimed at the renewal of the collective agreement between the plantation workers' unions and the Employers' Federation of Ceylon which represents 22 plantation companies. The agreement expired in March and was up for renegotiation. Workers across the country, from Nuwaraeliya, Hatton, Matale to Mathugama took to the streets in a spontaneous wave of protests to urge their bosses and unions to fulfill the promise of a daily wage of Rs. 1000.

[49] Communique of Independent Trade Union Alliance sent to the Hon. Prime Minister dated 25th October 2016.

Under the previous agreement the workers were paid Rs. 450 per month and an attendance bonus. However during the Presidential and General Election in the previous year, politicians including the Prime Minister had promised the workers an increase to Rs. 1000. However, in spite of the protests the collective agreement was signed on 18th October 2016 increasing the daily wage Rs. 500, a mere Rs. 50 raise from the earlier wage.

The most important addition to the collective agreement however was the productivity based wages which, as per the new agreement, pays a worker Rs. 140 provided that the target of the day is achieved. Altogether the new daily wage for a plantation worker who achieves the daily target would be Rs. 730 adding the attendance incentive of Rs. 60 and a share supplement of Rs. 30.

From the previous wage of Rs. 450, the new wage appears to be a considerable hike. However, unionists and workers explain that the daily target is usually set at about 20 kilos, a bar that no worker is capable of meeting. Unionists also complain that since the new collective agreement labour migration from the plantations to the urban areas in search of work in the informal sector has increased.

Plantation workers are tied down to the estate in a semi feudal fashion because their houses are given to them on the condition of one member of the family working for the estate. Unionists and workers explain that although the plantation work force as decreased considerably over the last few years, due to the harshness in working conditions, low social mobility and low incomes, the ownership of the house being tied to the estate prevents the workers from abandoning the estate altogether.

While the employers and plantation owners complain that the estates are not profitable anymore, some workers organizations have put forward the idea of distributing the estates among the workers releasing them from their semi feudal landlords and enabling them to enter into decent work.

Plantation workers in Sri Lanka, have historically been a community deeply discriminated by the post-colonial Sri Lankan state on the basis of their class and ethnic identities. Brought to Sri Lanka by the Colonial British regime, the early plantation workers were of Indian origin.However as the labour movement in Sri Lanka gained momentum in the early 20th century, especially under the leadership of militant socialists from Lanka Sama Samaja and Communist Parties plantation workers started organizing and agitating based on working class demands which ruffled the plantation owners and the government. The *Citizenship Act of 1947* disenfranchised the plantation workers converting them into a stateless community subject to an apartheid economic system in the plantations. The move was largely motivated by the need to curb working class activism in the plantations and to stop the rising star of the left among the plantation workers who by 1947 posed an electoral threat to the United National Party government. To this date the plantation workers are not fully absorbed into the civil administration of the country and the estate holds considerable sway over matters concerning their day to day living

In November Government Labour Officers' Union went on a month long strike, ending on December 1st only after the Minister of Labour and Trade Union relations promised to meet their demands.

The Department of Labour is vested with considerable powers and duties in relation to labour protection, especially in the event of

industrial disputes. However, the trade unions complain that the Department is no longer efficient in solving workers' problems or looking at problems from a labour perspective. The Deparment's withdrawal from keeping the employers in check through labour inspection and investigations is a major concern for the trade unions, especially because the weakened trade unions of the present day rely on the labour law and the industrial dispute resolutions mechanisms vested with the Minister and the Department of labour unlike in the days of militant trade unionism.

(e) Judicial attitude towards labour rights

As the earlier reference to the case law on atypical employment relationships illustrates, the Sri Lankan judiciary has in the past taken strong stances on the protection of labour and workers' rights. The existence of institutions in the nature of the labour tribunals and industrial courts, which are far more flexible than the civil courts, have definitely developed a labour friendly attitude within the judiciary.

However, there have been several cases and judgments in the recent past, especially coming out of the Supreme Court and other higher courts, which are unusually severe on trade unions, workers' rights and labour in general. The JAFF case in 2006, which ruled a strike action in the Ports Authority to be illegal, the Ansell Lanka Case, which again delegitimized a strike action and the trend developing in the District Courts to grant enjoining orders against trade union action (in spite of trade union action having been exempted from civil actions) are some of these instances.

As referred to earlier the judgement of the case of Insurance Corporation delivered in December was in favour of labour and reiterated the earlier precedent on atypical employment relationships. However the case of Ceylon Electricity Board Accountants Association v. Hon.

Patali Champika Ranawaka[50](hereafter referred to as the CEB case) a trade union, which is an unincorporated body, was decided to have no *locus standi* to represent a worker who is a member of the trade union. The Supreme Court went on to dismiss the case not even allowing an amendment to the Petition.

Section 126 (2) of the Constitution reads,

> (2) Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, within one month thereof, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement.

The issue in contention in the CEB case was whether a trade union can be considered to be a person within the meaning of Section 126(2) of the Constitution. Although incorporated persons are already interpreted to be within the meaning of persons in Section 126(2), in the CEB case the Supreme Court chose to interpret the word person restrictively, putting trade unions outside of the ambit covered by it.

The decision, not only narrows down the scope of *locus standi,* but also prevents trade unions from taking a rights based approach to labour rights violations, in spite of Article 14(c) and 14(d) enshrining the freedom of association and the right to form and join trade unions as fundamental rights in the Constitution. Trade Unions are collective organizations funded by the membership with the mandate to represent and collectively bargain on behalf

[50] SC FR No. 18/2015.

of the members. Therefore, the refusal of the Supreme Court to award *locus standi* to trade unions to represent members in fact delegitimizes trade unions and collective action by workers, giving fundamental rights a restrictive and an individualistic interpretation.

5. Conclusion

As outlined in this chapter, the undermining of labour in the face of a liberalized trade and investment regime was evident in year 2016 and this represents the trend of general deterioration of labour encountered since the introduction of neo-liberal economic policies in to Sri Lanka in the late 1970s. The state's obsession with facilitating investors at any cost has led to labour law reforms in the direction of deregulation on one hand and to overlook circumventions of existing laws on the other. This has produced an atmosphere which promotes precariousness among workers, disempowering them and dispossessing them from their entitlement to a dignified life.

The following recommendations are suggested to address the above discussed issues related to trade, investment and labour from a perspective of securing labour rights and protection of labour.

a) Review the impact of free trade and liberal investment policies on labour rights. Re-formulate these policies guaranteeing compliance to labour rights and laws by the investors. Existing labour laws which adopt a protective stance towards labour should be retained and new reforms to labour, should only be made after wide consultations with labour representatives.

b) In the long run a commission should be established to review the existing labour law framework and to make recommendations to address the new issues encountered by labour in the context

of globalization. The mandate of this commission should be to formulate recommendations consistent with the spirit of social justice and de-commodification of labour.

c) Existing labour laws should be strictly enforced. The capacity of the Department of Labour should be expanded and improved to suit the growing need for inspection and regulation. The number of labour officers should be increased and regional labour offices should be equipped with sufficient staff to carry on labour inspections and investigations. The process of labour inspection has to be transparent as well as regular.

d) Introduce legislative measures to prohibit exploitation done through utilizing non-standard forms of work such as manpower and contract labour. Use of contract labour to perform core functions of an enterprise should be prohibited. In cases of outsourcing, such functions should be brought under strict regulation. The Indian Contract Labour (Regulation and Abolition) Act of 1970 can be used as a model for a law as such.

e) Penalties for unfair labour practices should be stricter. The existing Rs. 20,000 fine for anti-union discrimination should be increased and it should be supplemented with provisions providing for imprisonment. Older laws such as the TEWA contain provisions for imprisonment in cases of violations but not the law on unfair labour practices which was introduced in 1999. Further, workers should be given direct access to file action in court on unfair labour practices without proceeding through the labour commissioner. To this extent, the Industrial Dispute Act should be amended.

f) Ensure collective bargaining processes to be effective. The current position of law which stipulates that an employer cannot

refuse to bargain with a trade union representing at least 40% of the workers of the workplace should be amended lowering the threshold to 25 percent in order to reflect realities of organization of labour. The state through the Labour Department should implement a policy encouraging unionization of workers.

g) The function of existing wages boards should be reviewed and effective measures should be adopted to ensure their due functioning. The existing national minimum wage should be upgraded in to a national living wage in order to ensure a decent living for working people who are not covered either by wages boards or collective agreements.

h) A special inquiry has to be undertaken to review of enforcement of labour standards in Free Trade Zones. This should be regarded as a distinct task of the Labour Department as the degrading conditions FTZ workers face is a form of rights violations encountered by an entire community as a whole. It is recommended that a specified authority be established to look in to matters related to labour in FTZs. Broader issues outside the workplace such as housing, living conditions, sexual harassment and other gender related issues too have to be addressed by this authority.

VI

THE HUMAN RIGHTS COMMISSION OF SRI LANKA – 2016 IN REVIEW

Uween Jayasinha[*]

1. Introduction

National Human Rights Institutions (NHRI's) are regarded as one of the foremost independent institutions in the State machinery that protect and preserve the human rights and freedoms of the people of a given State. NHRI's, which take the form of independent commissions, offices of Ombudsmen, or autonomous committees, are defined as "State bodies with a constitutional and/or legislative mandate to protect and promote human rights; they are part of the State apparatus and are funded by the State".[1] Thus, they are empowered, either constitutionally or by legislation, to monitor and/or investigate the compliance of State organs with their domestic and international human rights obligations, while also being given the mandate to take measures to provide relief where violations of human rights have occurred or are continuing to occur by making recommendations to redress the said violations, and/or amicably settle disputes arising out of such violations of human rights by methods of alternative

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* The author is a graduate from the Faculty of Law, University of Colombo, and is presently an Attorney-at-Law of the Supreme Court of Sri Lanka.

1 OHCHR, *National Human Rights Institutions: History, Principles, Roles and Responsibility*, HR/P/PT/4/Rev.1 (United Nations, New York & Geneva, 2010), p. 13

dispute resolution.[2] A NHRI that enjoys "public legitimacy" – being independent, accountable and efficient – being part of the State apparatus, thus, has the capability of playing a substantial role in the protection and promotion of human rights within their jurisdictions, while also feeding into State policy/legislation on key issues pertaining to the rights and freedoms of the citizens of the State.[3]

It is for this reason that NHRIs are lauded as necessary institutions for the protection and promotion of human rights in the modern State apparatus. Sri Lanka, by enacting the *Human Rights Commission of Sri Lanka Act* in 1996, established the Human Rights Commission of Sri Lanka (HRCSL), thereby setting up its official NHRI.[4] The HRCSL, which replaced the Human Rights Task Force and the Commission for Eliminating Discrimination and Monitoring of Human Rights (both of which were set up under emergency regulations), was given the mandate to, *inter alia*, investigate and inquire into complaints against violations and/or imminent violations of the fundamental rights guaranteed in the Constitution of Sri Lanka,[5] advise and assist the government in the formulation of legislation and administrative practices with a view to preserving fundament rights,[6] making recommendations

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[2] B. Skanthakumar, *Neither Restraint nor Remedy: The Human Rights Commission of Sri Lanka*, Law & Society Trust: Colombo, 2012, pp. 2-3

[3] P. S. Pinheiro& B. S. Baluarte, National Strategies – Human Rights Commissions, Ombudsmen and National Action Plans (The Role of National Human Rights Institutions in State Strategies), Human Development Report 2000 Background Paper, found at <http://hdr.undp.org/sites/default/files/paulo_sergio_pinheiro_.pdf>; C. R. Kumar, 'National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights', *American University International Law Review*, vol. 19, issue no. 260 ,2003, p. 281; A. Smith, 'The Unique Position of Human Rights Institutions: A Mixed Blessing?',*Human Rights Quarterly*, vol. 28, issue no. 905, 2006, p.906

[4] *Human Rights Commission of Sri Lanka Act No. 21* of 1996 [herein after 'HRCSL Act']

[5] *HRCSL Act*, section 10(a) and section 10(b)

[6] *HRCSL Act*, section 10(c)

to the government to bring legislation and administrative practices in line with international human rights norms,[7] and promote awareness of and provide education in relation to human rights.[8]

Despite its expansive mandate, the HRCSL has been the subject of much criticism over the years as being an institution that had played, at best, a lackadaisical role in fulfilling its mandate, owing to, *inter alia*, political interferences with its independence, lack of constructive engagement with the government, and lack of adequate resources, resulting in a lack of its public legitimacy– the compromising of its independence, accountability and efficiency. The criticisms of the HRCSL came to a head when, in 2007, the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights downgraded the accreditation of the HRCSL from 'A Status' to 'B Status'.[9] The 'B Status' accreditation is given to NHRIs when they are regarded as being only partially in compliance with the Principles Relating to the Status of National Institutions (Paris Principles)[10] and, as such, the HRCSL continues to be a NHRI only partially in compliance with the Paris Principles.[11]

However, some of the criticisms of the HRCSL, particularly those pertaining to its independence being compromised by political interferences, were redressed in the year 2015 with the establishment

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7 *HRCSL Act*, section 10(d)

8 *HRCSL Act*, section (f)

9 International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, *Report and Recommendations of the Sub-Committee on Accreditation* (Geneva, proceedings of 22nd to 26th October 2007)

10 Principles relating to the Status of National Institutions [herein after The Paris Principles], UNGA Res. 48/134, adopted on 20th December 1993

11 International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights Sub-Committee on Accreditation, accreditation statuses of NHRI's can be found at <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Pages/default.aspx>

of the Constitutional Council under and in terms of the Nineteenth Amendment to the Constitution of Sri Lanka.[12] While many international observers and local staekholders were critical of the lack of credibility and transparency in the appointments of the Chairman and Commissioners of the HRCSL when the Seventeenth and Eighteenth Amendments to the Constitution were in force,[13] the enactment of the Nineteenth Amendment addressed these concerns by ensuring transparency and credibility in the appointments and tenure of office of the members of the HRCSL, and thereby breathing fresh life into the HRCSL, restored public legitimacy with respect to the independence of the HRCSL, at least to some degree.[14] In October 2015, the Constitutional Council appointed the new Chairperson and Commissioners to the HRCSL, and the year 2016 was anticipated as the year that the HRCSL would recommence its functions and mandate with renewed fervour.[15]

This chapter will, therefore, review the performance and functioning of the HRCSL for the year 2016, while exploring performance indicators and the challenges faced by the HRCSL in achieving its mandate. The chapter will comprise three parts; the first part being a statistical review of certain key performance indicators of complaints processing of the HRCSL, the second part being a review of its other

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12 Chapter VIIA of the Nineteenth Amendment to the Constitution, certified and Gazetted on the 15th of May, 2015.

13 United Nations Human Rights Committee, Concluding Observations on the Fifth Periodic Report of Sri Lanka, CCPR/C/LKA/CO/05 (21st November 2016), p.5; U.S. Department of State, Country Report on Human Rights Practices – Sri Lanka 2014 Report, found at <http://photos.state.gov/libraries/sri-lanka/5/pdfs/hr_report_2014_en.pdf>, p. 53; Asian NGO Network on National Human Rights Institutions, 'Sri Lanka: Lost Opportunities' in the 2015 *ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia* (FORUM-Asia, 2015)

14 Nineteenth Amendment to the Constitution, supra note 12, Article 41A and Article 41B

15 HRCSL, HRCSL *New Commission Starts Work*, News Release dated 02nd November 2015, found at <http://hrcsl.lk/english/2015/11/02/hrcsl-new-commission-starts-work/>

functions during the year 2016 while highlighting certain key issues and challenged faced by the HRCSL. The third, and final, part will explore and review measures taken by the HRCSL to respond to these issues and challenges, while making recommendations that the HRCSL may implement to enhance its performance and functioning to achieve its mandate and thereby restore public legitimacy in the HRCSL.

2. Part I: Review and Analysis of Statistics and Key Performance Indicators in Receiving and Processing Complaints**

2.1 Number of Complaints Received

The year 2016 has been recorded as the year in which the HRCSL received the highest number of complaints in the past five years. In the year 2016, it received a total number of 9,071 complaints. The increase in complaints is not necessarily a significant increase when compared to the year 2015; wherein the HRCSL received a total of 8,746 complaints, but the statistics for the years 2015 and 2016 indicate a quantum leap in the number of complaints received when compared to the years 2012, 2013 and 2014.

Statistics of Complaints Received by the HRCSL - Overall (2012 – 2016)

Year	No. of Complaints	Increase from Previous Year	Percentage of Increase from Previous Year
2012	4726	-	-
2013	4979	250	5.28%
2014	5074	95	1.9%
2015	8746	3,672	72.36%
2016	9071	325	3.71%

(Source: ANNI Report 2015; Quarterly Reports of the HRCSL for 2015 and 2016)

Regional Distribution of Complaints Received by HRCSL - 2016

Office	No. of Complaints Received
Head Office	4990
Ampara	189
Anuradhapura	689
Badulla	237
Batticaloa	332
Jaffna	296
Kalmunai	318
Kandy	845
Matara	666
Trincolamee	192
Vavuniya	317

(Source: Quarterly Reports of the HRCSL for 2016)

Of the total of 9,071 complaints received by the HRCSL in the year 2016, 4,990 complaints (55.02%) were received by the Head Office, while 4,081 complaints (44.98%) were received by the Regional Offices.[16]

It is to be noted that in the year 2015, the number of complaints received by the HRCSL rapidly increased, and further increased by 3.71% in 2016. Although there is no analysis conducted by the HRCSL to explain this rise in complaints, the most plausible explanation one could assume for this increase is the changing in the political climate of Sri Lanka following the Presidential Elections on the 8th of January, 2015 and the subsequent formation of the "Yahapalanaya" Government, which had campaigned on a political platform to strengthen accountability and promote human rights, at the 2015 General Elections..

However, this sudden increase in complaints submitted to the HRCSL has overburdened the cadre and the internal processes and

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[16] ** At the first instance, it is pertinent to note that at the time of writing this chapter the Annual General Report of the HRCSL for the year 2016 was not available. As such, all statistics and data presented herein were obtained by personal requests for the same from the administration of the HRCSL.

See HRCSL Response to LST Data Request dated 03/03/2017, found at<See HRCSL response to LST data request dated 3.3.2017, found at https://drive.google.com/open?id=1SKgHD7mg9Jaa9ePBNL6nyUeAgD8SAH57

Annual statistics of HRCSL- 2015 https://drive.google.com/open?id=1GAKgL16e8A2n0Av67gFC6tovATNm_khI

Annual statistics (Head Office and Regional offices): https://drive.google.com/open?id=1mKHrc4zs-5xDZSLGAm7NrTYn5bRf770l

Annual statistic (complaints): https://drive.google.com/open?id=1xVlmy8BjwCMMU_7oCqNaKP2JAbo_I3jW

systems of the HRCSL.[17]Since the HRCSL, over the last 15 years, displayed little or no enthusiasm in being proactive and assertive in fulfilling its mandate, and functioned in a perfunctory manner, all internal mechanisms and processes are wrought with systemic malaise and bureaucracy, which has made grappling with the high number of complaints even more challenging.[18] As such, institutional reform, as noted by the current administration of the HRCSL, is the need of the hour.

2.2 *Types of Complaints Received*

Despite NHRIs having to be strictly accountable in order to maintain public legitimacy, at the time of writing this Chapter, the data with respect to the types of complaints received by the HRCSL was inconclusive, in that only the types of complaints received by the Head Office were made available. Although the regional data was not available, the data pertaining to the types of complaints made to the Head Office in the year 2016 is pertinent to note.

[17] See HRCSL Response to LST Questionnaire, dated 03/03/2017, found at https://drive.google.com/open?id=1ewjS1LofxoTalVrno6e_Wgs6tsTB1yke

[18] Ibid.

Types of Complaints Received by the HRCSL in 2016

Category of Complaint	Type of Complaint	No. of Com-plaints	Head Office	
			Total	%
Personal Liberty	Physical Torture/Cruel Treatment or Punishment	261	1,012	20.66%
	Mental Torture/Cruel Treatment or Punishment	17		
	Harassment	193		
	Threats	263		
	Degrading Treatment	67		
	Arbitrary Arrest/Detention by Uniformed Police	179		
	Arbitrary Arrest/Detention by CID/TID	05		
	Arbitrary Arrest/Detention by Navy Officers	02		
	Arbitrary Arrest/Detention by STF Officers	01		
	Complaints against Detention Conditions	01		
	Death in Custody	02		
	Enforced/Involuntary Disappearance	02		
	Missing Persons/Abductions	10		
	Extra-judicial Killings	02		
	Prisoner's Rights	03		
	Complaints of Shooting Incidents	01		
	Complaints pertaining to the Right to Life	01		

Category of Complaint	Type of Complaint	No. of Com-plaints	Head Office	
			Total	%
Inaction Complaints			358	7.30%
Employment disputes	Recruitment	120	712	14.53%
	Retirement	82		
	Benefits	37		
	Promotions	121		
	Service Extensions	03		
	Service Conditions	36		
	Transfers	113		
	Termination of Employment	85		
	Interdiction	36		
	Payment Disputes	52		
	Access/Denial of Foreign Training/Scholarship	01		
	Harassment	07		
	Examination Disputes	07		
	Interviews	01		
	Lack of Adequate Facilities (including medical)	02		
	Disputes pertaining to Leave	02		
	Time Table Disputes	01		
	Reinstatement	01		
	Seniority Disputes	01		
	Disputes pertaining to Living Quarters	03		
	Demotions	01		

Category of Complaint	Type of Complaint	No. of Com-plaints	Head Office	
			Total	%
Education	Admission to Popular Schools	207	408	8.32%
	University Admission	41		
	Vidyapeeta Admission	35		
	Disputes in Diploma Courses	05		
	Inability to obtain Certificates	04		
	Student Disciplinary matters	09		
	Examination Disputes	24		
	Disputes with Principals/ Teachers	08		
	Unfair/Arbitrary Selection of Students to Posts	06		
	Scholarship Disputes	04		
	Lack of Adequate Facilities	01		
	Closure of Schools	01		
	Harassment	26		
	Admission to A/L Classes	08		
	Violation of Religion Rights	01		
	Miscellaneous	10		
Health			04	0.08%
Land & Property Rights			183	3.73%
Social Services & State Welfare			14	0.28%
Infrastructure & Utilities			49	1.00%
Environment			31	0.63%

Category of Complaint	Type of Complaint	No. of Com-plaints	Head Office	
			Total	%
Civil & Political Rights (*Freedom of expression, assembly, religion, movement*)			24	0.48%
Complaints related to Elections			04	0.08%
Child Rights			05	0.10%
Women's Rights			03	0.06%
Rights of Persons with Disabilities			00	0.0%
Elder's Rights			01	0.02%
Language Rights			01	0.02%
IDP's/Refugee Returnees			01	0.02%
Migrant Worker's Rights			20	0.40%
LGBTIQ Rights			01	0.02%
Administrative Complaints	Misuse/Abuse of Power	262	343	7.0%
	Permits/Licenses	37		
	Tax Disputes	03		
	Tender/Quota Disputes	04		
	Registration Disputes	07		
	Infringement of Local Government Procedures	27		
	Payment	01		
	Construction Matters	01		
	Inaction by State Authorities	01		
Housing			02	0.04%

Category of Complaint	Type of Complaint	No. of Com-plaints	Head Office	
			Total	%
Complaints Pending for want of more information			730	14.90%
Complaints that the HRCSL cannot proceed with	No Fundamental Right	91	1,083	22.11%
	Not within Mandate	397		
	Time Barred	95		
	Referred to other relevant Authorities	455		
	Pending a decision in court	45		

(Source: Year Report of the HRCSL 2016)

From this data it can be gathered that four types of complaints; allegations of human rights violations pertaining to deprivation of personal liberty, employment disputes, education (school admissions), and complaints of inaction of State authorities, constitute 50.81% of the complaints received by the Head Office of the HRCSL and, as such, are indicative of the human rights that are, allegedly, most widely and/or regularly infringed within the jurisdiction of the Head Office.

It is noted that as many as 1,012 complaints have been submitted to the Head Office of the HRCSL on the grounds of deprivation of personal liberty. These complaints include, *inter alia*, cases of torture, threats, sexual harassment, arbitrary arrest and detention, abductions, and reporting of missing persons. It alludes to the distressing fact that there exists a lack of appreciation for human rights *vis-a-vis* the personal liberty of individuals in the Sri Lankan society by the State authorities, despite the change of government in mid-2015, and that checks and mechanisms to curb arbitrary infringement on personal liberties are either still lacking or significantly inadequate.

Complaints regarding employment disputes; i.e., disputes between State employees and State authorities/institutions regarding recruitment, promotions, transfers, payments and retirement benefits, constituted 14.53% of the complaints received by the Head Office of the HRCSL, is reflective of a need for equitable administrative mechanisms within the public employment sector, and indicative of possibly a cause of the inefficiency and discontent that generally exists within the ranks of State employees. The number of complaints against inaction on the part of the Police and State authorities, and administrative complaints, combined, amount to 696 (representing 14.20% of all complaints). The fact that 28.73% of complaints received by the Head Office of the HRCSL (the collective percentage of public employment disputes, State inaction and administrative complaints) deal with public sector administration and management is symptomatic of failure of State administrative and management frameworks and mechanisms, on multiple occasions, to set in place systems that are transparent, accountable and protect the rights of State employees and society. It is, therefore, reflective of the need to revamp and enhance existing administrative mechanisms of State authorities/institutions towards facilitating public administrative and management systems that serve the rights of the public service, while preserving and promoting the human rights of society as a whole.

It is noted, however, that not all complaints received by the HRCSL will, following investigations, necessarily be an infringement of human rights. Nevertheless, the high number of complaints received, particularly those pertaining to deprivation of personal liberty and administrative infringement of rights, should be regarded as indicative of the dire need for checks and mechanisms, as well as a better appreciation of human rights and equitable administrative practices, within State authorities and institutions.

It is also relevant to note that 1,083 complaints (22.11%) received by the Head Office cannot be proceeded with. It is regrettable that as many as 95 cases have been time barred, while 855 complaints have either been beyond the mandate of the HRCSL or have been referred to other authorities, and they highlight that lack of knowledge and awareness among the general public of the procedure, framework and mandate of the HRCSL. Further, it has been previously alluded to that the imposition of a time bar to receive complaints by the HRCSL is unjustly self-imposed as the HRCSL Act imposes no such time bar[19], and it is regrettable that (the Head Office of) the HRCSL has dismissed 95 complaints (1.9%) it received in the year 2016 on the basis of this unreasonable self-imposed time bar.

2.3 Determining/Settling of Complaints

A criticism that has been continuously levelled against the HRCSL over the years is the slow rate of processing complaints by the HRCSL; and the same can be said of the year 2016.[20] In the year 2016, only a total of 2,522 complaints were settled by the HRCSL.[21] While this number, taken in isolation, can be regarded as being commendable, it falls woefully short of being substantial in light of the growing number of complaints received by the HRCSL and the back-log of cases yet to be determined or settled by the HRCSL.

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[19] Skanthakumar, *supra* note 2, pp.56-57

[20] U.S. Department of State, *Country Report on Human Rights Practices – Sri Lanka 2013 Report,* found at <https://www.state.gov/documents/organization/220616.pdf>, p.43; INFROM Human Rights Documentation Centre, Human Rights Situation in Sri Lanka: August 17, 2015 – August 17, 2016 (INFORM, 2016), p.5; R. Hofmann, Minority Rights in South Asia (Peter Lang, 2011), p.56-57; Skanthakumar, supra note 2, p.95

[21] HRCSL Response to LST Data Request, *supra* note 16

Statistics of Complaints Processed by the HRCSL (2014 – 2016)

Year	No. of Complaints Received	No. of Complaints Processed/Settled
2014	5074	1760
2015	8746	3465
2016	9071	2,805

(Source: ANNI Report 2015, Annual Reports of the HRCSL for 2015 and 2016)

Statistics of Cases Processed by the Head Office (2016)

Description	No. of 2016 Complaints that were Concluded	No. Complaints that were Concluded from Other Years	Total
No violation of rights	06	180	186
Complainant has not pursued the complaint	47	83	130
Recommendations were made	08	33	41
Entered into Settlement	11	71	82
Relief Granted	07	63	70
Withdrawn	44	141	185
Referred to other Authorities	03	66	69
Directives Given	01	29	30
Total	127	666	793

(Source: Year Report of the Head Office for 2016)

Statistics of Cases Processed by the Regional Offices (2016)

Office	No. of Complaints Processed and sent to the Head Office	No. of Complaints not within Mandate	No. of Complaints where Settlements have been entered into
Ampara	27	38	144
Anuradhapura	41	30	51
Badulla	08	43	20
Batticaloa	03	8	50
Jaffna	37	13	243
Kalmunai	09	-	263
Kandy	64	110	630
Matara	33	106	686
Trincomalee	01	14	87
Vavuniya	04	56	264
Total	***227***	***418***	***2,438***

(Source: Quarterly Reports of the Regional Offices for 2016)

From the available data, it can be seen that the Head Office, which received 4,990 complaints in the year 2016 alone, was capable of concluding only 127 (2.54%) complaints that arose in 2016. This has resulted in the creation of a backlog of complaints of 3,780 (excluding the complaints that cannot be proceeded with) spilling over into the year 2017. It is pertinent to note that out of the 127 complaints that were concluded by the Head Office, 91 complaints were either withdrawn or dismissed due to lack of interest by the complainant and, as such, only 36 complaints were concluded by the Head Office by delving into the merits of the complaints. In terms of the number

of complaints from other years that were concluded by the Head Office, the performance is far better, yet it pales in comparison with the backlog of the complaints that have accumulated over the years.

The Regional Offices of the HRCSL, have processed and sent only a total of 227 complaints to the Head Office for its recommendations in the year 2016 (5.56% of the total of 4,081 complaints received by the Regional Offices), have fared marginally better than the Head Office.[22] Although, only 5.56% of the complaints were processed, it is pertinent to note that a total of 2,438 complaints (59.7% of the total complaints received by the Regional Offices) have been concluded by the parties entering into settlements.

The data clearly represents the insufficiency of the rate of concluding complaints by the HRCSL, which undoubtedly will cause substantial delays in complainants being afforded relief. The HRCSL, thereby, runs the risk of denying justice to complainants and causing society to continuously be disillusioned with the public legitimacy of the HRCSL.

The HRCSL has stated that the failure to conclude complaints, in the face of the ever mounting number of complaints being submitted, has inundated it. The primary cause for this, as stated by the HRCSL, is that it is severely short-staffed. The existing number of cadre at the HRCSL, 159 officers, is barely adequate to process, investigate, determine and conclude the extraordinarily high level of complaints being submitted to the HRCSL.[23] The back log of complaints that has accumulated over the years further hampers the expedient conclusion and disposal of complaints.

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[22] HRCSL Response to LST Data Request, supra note 16

[23] HRCSL Response to LST Questionnaire, supra note 17

The shortage of staff is most telling by the fact that the Head Office had processed just 127 complaints (2.54%)in 2016, despite the Head Office receiving 4,990 and 4,724 complaints in 2016 and 2015, respectively. The Head Office is the most expansive of the offices of the HRCSL and has to engage in a multitude of other operations such as, *inter alia*, administration, visiting places of detention, engaging with civil society organizations, and engaging with State authorities on policy and law reform. As such, its capacity to conclude complaints is significantly hampered due to lack of an adequate cadre, resulting in meagre complaint conclusions rates such as 2.54%.

3. Part II: Effectiveness in Fulfilling the Mandate and Other Functions

Receiving, investigating, and determining complaints and making recommendations to the necessary State authorities to redress any violation of fundamental rights or to assist the parties to a dispute to come into a settlement is but one of the functions of the HRCSL. The performance of the HRCSL in receiving and concluding complaints has been dealt with in the previous part of this Chapter. This Chapter, therefore, will explore the other functions of the HRCSL within its mandate, and review its performance for the year 2016.

3.1 Advising and Assisting the Government in Formulating Legislation and Administrative Directives and Procedures.

The HRCSL Act lists one of the functions of the HRCSL as taking measures to advise and assist the government in formulating legislation and administrative directives and procedures, with a view to promote and protect human rights and harmonise international human rights law with municipal law – a function required of a NHRI by the Paris

Principles as well.[24] As such the HRCSL is granted the authority to independently comment and/or convey its observations on draft Bills and policies, so that the same will feed into legislative processes and policy formulation. This function is one of the most critical functions of any NHRI, as it is a means of establishing and strengthening cooperation between the government and the NHRI while promoting and preserving the rights and freedoms of the public by way of legislation and policy, while simultaneously supplementing treaty compliance of the government, and ensuring human development through active espousal of the promotion of economic, social and cultural rights.[25]

During the year 2016, the HRCSL issued many statements and reports expressing its views and observations on key legislation and policy issues.

One of the most commendable statements issued by the HRCSL during year 2016 was its strong objection to the amendment bill to the Criminal Procedure Code Act No. 15 of 1979, which was Gazetted on the 12th of August, 2016, wherein an amendment to the said Act was to be enacted that would have permitted an arrested person to access an Attorney-at-Law only after making a statement to the relevant police authorities or officer.[26] Apprehending the dire consequences

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[24] HRCSL Act, Sections 10(c) & 10(d); The Paris Principles, supra note 10, Articles 10(a) & 10(b); R. Carver, 'A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law', *Human Rights Law Review*, vol.10,issue 1 (2010), p.12

[25] B. Dickson, "The Contribution of Human Rights Institutions to the Protection of Human Rights", Public Law (Summer, 2003), 272-285, p. 278-279; C. R. Kumar, supra note 3, p. 273; C. R. Kumar, 'National Human Rights Institutions and Economic, Social, and Cultural Rights: Toward the Institutionalization and Developmentalization of Human Rights', *Human Rights Quarterly*, vol. 28, no. 3. p.755 ,2006, pp.767-771

[26] The Bill to amend the Code of Criminal Procedure Code Act No. 15 of 1979, gazetted on the 12th of August 2016 can be found here <http://www.slguardian.org/wp-content/uploads/2016/09/119-2016_E.pdf>. See Clause 2 of the Bill.

that would flow from denying an arrested person from gaining any legal assistance before making a statement to the State authorities, and understanding that a person's right to a fair hearing commences from the inception of an investigation against the said person and that such investigations will not be impartially conducted if the arrested person is denied access to legal counsel if s/he so desires, the HRCSL strongly objected to this amendment and called on the government to withdraw the amendment Bill immediately.[27] Subsequently, in the face of mounting pressure against the proposed Bill, it was withdrawn by the government.[28]

The HRCSL also submitted an interim report in response to the establishment of the *Office on Missing Persons (OMP) under the Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act* No. 14 of 2016, wherein the HRCSL made several recommendations such, *inter alia*, to establish a network of regional offices under the OMP, recruiting staff with impeachable integrity and no prior allegations of abuses of human rights or of public office, providing gender sensitivity training to the staff, calling for mechanisms for the OMP to widely and transparently disseminate information on its methodology and internal procedures and safeguards, and calling for mechanisms to foster public trust in the Witness Assistance and Protection Division of the OMP.[29]

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[27] HRCSL, *Proposed Amendment to the Code of Criminal Procedure Act Depriving Suspects of Access to Lawyers until their Statements are Recorded*, 21st September 2016, found at <http://hrcsl.lk/english/wp-content/uploads/2016/09/Letter-to-PM-on-21.09.2016.pdf>

[28] Anurangi Singh, 'CPC Amendments Shelved', *Sunday Observer*, 16th October 2016

[29] HRCSL, *Human Rights Commission of Sri Lanka Recommendations to the Government on the Establishment of the Office on Missing Persons*, 22nd August 2016, found at <http://hrcsl.lk/english/wp-content/uploads/2016/08/IMG_0011.pdf>

Recommendations had also been made by the HRCSL for the proposed national security legislation, which would repeal and replace the *Prevention of Terrorism Act* No. 48 of 1979, as amended (PTA), urging the government to ensure that any new national security or counter-terrorism legislation adheres to international human rights standards.[30]

The HRCSL has also exercised its mandate of feeding into legislative and policy formulation by presenting its observations at various stages of the constitutional reform process, ever since the Constitutional Assembly commenced the first phase of constitutional reform in January, 2016. The HRCSL submitted its proposals for constitutional reform to the Public Representations Committee in March 2016, wherein the HRCSL urged, *inter alia*, that principles of constitutionalism, an expanded Bill of Rights, and checks and balances within the arms of government be the cornerstones of the new Constitution.[31] Further, the HRCSL made submissions to the Sub-Committee on Law and Order appointed by the Constitutional Assembly, wherein it made several proposals and recommendations relating to the present public security regime, with a view of enhancing the protection of human rights and strengthening due process.[32] In a separate recommendation, the HRCSL also made a recommendation to the President that economic, social and cultural rights be enshrined in the new Constitution along

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[30] HRCSL, *Public Statement by the Human Rights Commission of Sri Lanka dated 22nd of June 2016,* found at <http://hrcsl.lk/english/wp-content/uploads/2016/06/Public-Statement-by-HRCSL.pdf>

[31] HRCSL, *Human Rights Commission of Sri Lanka Proposals for Constitutional Reform – 2016,* found at <http://hrcsl.lk/english/wp-content/uploads/2016/06/Proposals-for-Constitutional-Reform-by-HRC-in-English.pdf>

[32] HRCSL, *Submission to the Sub-Committee on Law & Order by the Human Rights Commission of Sri Lanka – August 2016,* found at <http://hrcsl.lk/english/wp-content/uploads/2016/08/HRCSL-proposals-to-Sub-Comm-on-Law-Order.pdf>

with civil and political rights,[33] a commendable achievement given the role NHRIs ought to play in promoting economic, social and cultural rights – a role exemplified by the practice of NHRIs such as the Human Rights Commissions of South Africa and India.[34]

The HRCSL also issued recommended directives to be followed by State officials when making arrests and causing the detention of any person under the PTA, inclusive of operational procedures to be followed during and after arrest, as well as special procedures to be followed relating to the arrest and detention of women and minors, and the said directives were later approved by the President.[35] Additionally, the HRCSL has made recommendations to President to abolish the imposition of the death penalty in Sri Lanka by ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights.[36]

Although the HRCSL has made attempts to submit its observations pertaining to key legislation and policy documents, these observations and views have often made far too late in the legislative/drafting process

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[33] HRCSL, *The Need to Incorporate Economic, Social & Cultural Rights in the Future Constitution of Sri Lanka,* found at <http://hrcsl.lk/english/wp-content/uploads/2016/10/Need-to-Incorporate-Economic-Social-and-Cultural-Rights-in-the-Future-Constitution-of-Sri-Lanka-E.pdf>

[34] M. Kjærum, *National Human Rights Institutions Implementing Human Rights* (DIHR, 2003), pp.12-15; Commonwealth Conference of National Human Rights Institutions, Protecting Human Rights: The Role of National Institutions (Cambridge, Commonwealth Secretariat, 2000), p.20; OHCHR, Economic, Social & Cultural Rights: Handbook for National Human Rights Institutions (United Nations, 2005), pp.43-92

[35] HRCSL, *Directives Issued by the Human Rights Commission of Sri Lanka on Arrest and Detention under the Prevention of Terrorism (Special Provisions) Act No. 48 of 1979,* 18th May 2016, found at <http://hrcsl.lk/english/wp-content/uploads/2016/05/Directives-on-Arrest-Detention-by-HRCSL-E-.pdf>

[36] HRCSL, *Recommendation to Abolish the Death Penalty in Sri Lanka,* dated 1st January 2016, found at <http://hrcsl.lk/english/wp-content/uploads/2016/01/RECOMMENDATION-TO-ABOLISH-THE-DEATH-PENALTY-IN-SRI-LANKA-E-1.pdf>

to meaningfully feed into the final drafts. This, however, is not due to a lack of competence on the part of the HRCSL, but rather due to the failure of the State authorities to meaningfully engage in an exchange of views with the HRCSL in due course. The position of the HRCSL, quite rightly, is to be independent and, thereby, removed from being directly involved in legislative or policy formulation process – to do otherwise would be to compromise the independence of the HRCSL, making it an arm of the legislature or State administration.[37] Thus, the HRCSL proceeds to feed into legislative and policy formulation processes by requesting State authorities and institutions to forward any draft legislation or policy to the HRCSL so that it may revert with its independent observations and views in time.[38]

Despite the HRCSL consistently making requests for copies of draft Bills and policy documents from State authorities such as the Ministry of Justice and the Legal Draftsman's Department in the year 2016, the HRCSL did not receive any positive responses. As such, the HRCSL is limited in exercising its mandate, in that it can make observations on draft legislation and policy documents only after they have been made public. This is evident from the fact that the HRCSL was able to present its observations on the proposed amendment to the Criminal Procedure Code Act only after it was gazetted, while the recommendations on the OMP were presented after the Office on Missing Persons Act was passed.

The lack of engagement on the part of State authorities with the HRCSL renders its function to advise and assist the government in the formulation of legislation and policy virtually nugatory, thus rendering legislative and policy formulation processes in Sri Lanka void of any

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[37] A. Smith, supra note 3, pp.935-937

[38] See HRCSL Response to LST Questionnaire, *supra* note 17

independent input through the lens of protecting and promoting human rights.

3.2 *Monitoring the Welfare of Persons Detained either on a Judicial Order or otherwise, by Regular Inspection of their Places of Detention*

NHRIs, as well as the HRCSL, are generally empowered to monitor the welfare of persons in detention of custody.[39] The need for robust monitoring processes of places of detention in Sri Lanka was highlighted by the United Nations Committee Against Torture (CAT) during the consideration of the fifth periodic report of Sri Lanka in November 2016, when it concluded that torture, harassment and cruel and degrading treatment of detainees/persons was "routine" in places of detention or custodial centres in Sri Lanka.[40] At the same time, it was also reported that prisons and places of detention in Sri Lanka were wrought with deaths, overcrowding, and lack of prisoner/detainee complaining mechanisms.[41]

The HRCSL received 488 complaints of arbitrary arrest/detention, 08 complaints against the conditions of detention centres, and 07 complaints of deaths in custody in the year 2015.[42] Thus, there were at least 605 incidents in the year 2015 which required officials of the HRCSL to visit and investigate places of detention and custody centres, in addition to conducting regular visits for monitoring purposes. The

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[39] HRCSL, Section 11(d)

[40] UN Committee Against Torture, *Concluding Observations on the Fifth Periodic Report of Sri Lanka,* U.N. Doc. CAT/C/LKA/CO/5, (submitted on 30th November 2016, published on 27th January 2017), p.9

[41] U.S. Department of State, *Country Report on Human Rights Practices – Sri Lanka 2016 Report,* found at <https://www.state.gov/documents/organization/265760.pdf>, p.5

[42] HRCSL, Details of Complaints Received by Type of Complaints and Complaint Category – 2015

HRCSL, therefore, was compelled to conduct a large number of visits to places of detention for the purposes of monitoring and investigating them.

Number of Visits by the HRCSL to Places of Detention in 2015 and 2016

Place of Detention	2015		2016(01/01/2016 – 30/09/2016)	
	Head Office	Regional Offices	Head Office	Regional Offices
Police Stations	75	1804	373	1484
TID/CID Offices	-	01	09	06
Army Camps	-	-	-	01
Prisons	02	36	07	43
Boosa Detention Camp	-	-	02	10
Rehabilitation Centres	-	02	-	05
Child Care Centres	-	33	-	33
Elders Homes	-	-	-	13
Total	77	1876	391	1595

(Source: HRCSL Report to Committee Against Torture 2016)

Considering the data, it is evident that the HRCSL has increased its efforts in visiting places of detention in the year 2016, at least in the first three quarters of 2016. It is noteworthy that the Regional Offices of the HRCSL have also expanded the monitoring processes to rehabilitation centres, child care centres and elders homes.

While the HRCSL has stated that the performance of the Regional Offices in visiting and monitoring places of detention covers a

significant portion of all places of detention within their areas of control, the Head Office has struggled to effectively monitor the high number of places of detention and custodial centres within its area of control; a problem that is only compounded by the increased number of complaints received by the Head Office.[43]

The major hindrance of the Head Office in effectively monitoring all the detention centres within its area of control is the shortage of staff in the Head Office. The HRCSL has stated that, being short-staffed, a monitoring officer is required to conduct each stage of the monitoring process; responding to a complaint, visiting the place of detention, monitor or investigate the place of detention, and compile and report any findings.[44] The fact that each monitoring officer is burdened with carrying out this laborious procedure on his/her own, without the opportunity of having the labour of this procedure being distributed amongst specialized units within the HRCSL to increase efficiency, results in a significant amount of time and effort being required, making it virtually impossible to effectively monitor all places of detention and respond rapidly to a complaint with the existing cadre. The HRCSL states that although it has established a hotline so that complainants may lodge complaints easily, monitoring officers are unable to respond rapidly due to continuous logistical and administrative constraints.[45]

3.3 Conducting investigations, suo motu, into infringements of fundamental rights

The powers of investigation given to the HRCSL include the authority to carry out investigations into infringements or imminent infringements of Fundamental Rights as enshrined in the Constitution,

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[43] See HRCSL Response to LST Questionnaire, *supra* note 18

[44] Ibid.

[45] Ibid.

by executive or administrative action or under and in terms of the PTA.[46]In carrying out these investigations, the HRCSL may make its findings and present them to the relevant State authorities along with recommendations.

There were several investigations launched by the HRCSL, *suo motu*, in the year 2016. One of the most controversial incidents relating to which the HRCSL has launched an investigation into in its own accord is the assault on demonstrators and journalists at the Magampura Mahinda Rajapaksa Port in Hambantota. The incident received wide coverage in Sri Lanka, particularly the assault mounted against journalists at the Port by senior officials and armed personnel of the Sri Lanka Navy. Despite there being several allegations that this incident amounts to an unjustified affront to the right of peaceful assembly, the freedom of expression, and the freedom to engage in one's employment, there have been no disciplinary measures taken against any of the personnel of the Sri Lanka Navy as at the time of writing.[47] The HRCSL, however, launched an investigation on its own accord into the infringements of Fundamental Rights that occurred during the demonstrations at the Hambantota Port, which is still ongoing during the time of writing.[48]

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[46] HRCSL Act, section 14

[47] Sandun Jayawardena & Chandani Kirinde, Navy Intervenes to Evict Strikers from Ship, The Sunday Times, 11th December 2016, found at <http://www.sundaytimes.lk/161211/news/navy-intervenes-to-evict-strikers-from-ships-219876.html>; Kavindya Chris Thomas, *Navy Commander in Alleged Fracas with Protesters Defense Secretary calls for Full Report, Ceylon Today,* 12th December 2016, found at <http://www.ceylontoday.lk/print20161101CT20161231.php?id=11025>

[48] See HRCSL Response to LST Questionnaire, *supra* note 18

The HRCSL has also undertaken investigations on its own accord into the shocking deaths while in custody at the Pussellawa Police in September 2016, as well as a custodial death in Trincomalee.[49]

An investigation was also initiated into the assault of a hair-dresser in Hatton by the OIC and officers attached to the Hatton Police Station.[50]

The HRCSL has also commenced investigations into the allegations that the Matugama Meegahatenne Primary School had wrongfully denied admission to 10 children residing within the Matugama area, and the subsequent demonstrations in front of the Matugama Zonal Education Office.[51] Investigations were also conducted into the incident of denial of school admission to a child on account of the child's parent's HIV positive status.[52]

The HRCSL has stated that the latter two investigations were concluded as the matters were resolved administratively and by way of Order by the Supreme Court. However, the investigations into the incidents of deaths in custody and assault by the Police are still ongoing.[53]

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[49] Sandasen Marasinghe & Disna Mudalige, 'Comprehensive probe into youth's death in Police custody: Sagala', *DailyNews*, 21st September 2016, found at <http://www.dailynews.lk/?q=2016/09/21/law-order/93664>

[50] AselaKuruluwansa, 'Special Probe into Attack on Barber', *Daily News*, 26th September 2016, found at <http://dailynews.lk/2016/09/26/law-order/94123>

[51] 'Thewarapperuma in Satyagraha protest in Matugama', Daily News, 29th June 2016, found at <http://dailynews.lk/2016/06/29/local/86043>

[52] '6 year-old boy denied school admission because parents 'rumoured' to be HIV positive', *The Sunday Times*, 28th February 2016, found at <http://www.sundaytimes.lk/160228/news/6-year-old-boy-denied-school-admission-because-parents-rumoured-to-be-hiv-positive-184637.html>

[53] See HRCSL Response to LST Questionnaire, *supra* note 18

It is regrettable, however, that the HRCSL has not conducted independent investigations into the alleged infringements and violations of fundamental rights and freedoms and disputes that may imminently result in infringements of fundamental rights and freedoms that were reported during 2016, such as the killing of two undergraduates of the University of Jaffna by the Police,[54] the alleged violation of the labour rights of the Sri Lanka Telecom manpower workers who commenced and maintained trade union action in December 2016,[55] the harassment of Tamil journalists by law enforcement officers in April 2016,[56] and continued heightened tensions between Sinhala and Muslim communities, as well as public officials, over land disputes in the Wilpattu area.[57]

It is also unfortunate that the HRCSL has not taken any measures to investigate alleged incidents of harassment of human rights defenders,

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[54] Kurulu Koojana Kariyakarawana, Romesh Madusanka and Pradeep Kumara, ' Two Jaffna Uni students killed in police shooting', Daily Mirror, 21st October 2016, found at <http://www.dailymirror.lk/article/Two-Jaffna-Uni-students-killed-in-police-shooting—117862.html>

[55] Nushka Nafeel, 'Manpower Employees demand SLT Recruitments', *Daily News,* 28th December 2016, found at <http://dailynews.lk/2016/12/28/local/103137>

[56] U.S. Department of State, *Country Report on Human Rights Practices – Sri Lanka 2016 Report,* found at <https://www.state.gov/documents/organization/265760.pdf>, p.11

[57] Ayesha Zuhair, *Dynamics of Sinhala Buddhist Ethno-Nationalism in Post War Sri Lanka,* Centre for Policy Alternatives, 2016), p.22; Dr. M. S. Asees, 'Resettlement of Muslim IDPs and issues of Wilpattu', *Daily FT,* 6th January 2017, found at <http://www.ft.lk/article/589620/ft>

such as the detention of Balendran Jeyakumari* and the repeated threats received by Sandya Ekneligoda**, during the year 2016.[58]

4. Intervening in Fundamental Rights Proceedings in the Supreme Court

The HRCSL has the power to intervene in proceedingsbefore the Supreme Court in the capacity of *amicus curiae*, where a violation or imminent violation of fundamental right is complained of.[59]

Despite having the authority to intervene in court proceedings, there wasn't a single instance in the year 2016 when the HRCSL intervened in proceedings before the Supreme Court to present its independent submission of any alleged infringements or imminent infringements of fundamental rights. The HRCSL has stated that it may explore the possibility of intervening in proceedings that take the form of public interest litigation.Yet, regrettably, the HRCSL has no standard operating policy or framework to intervene in fundamental rights proceedings in the Supreme Court.

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[58] * Ms. Balendran Jeyakumari is a human rights defender and activist who has and continues to be at the forefront in campaigns for the rights of Tamil families of persons who went missing/disappeared during the armed conflict in Sri Lanka, particularly during the final stages of the conflict.

** Ms. Sandya Ekneligoda is an activist who has campaigned against the enforced disappearances that occurred during and after the final stages of the armed conflict. The wife of disappeared journalist, Prageeth Eknaligoda, Ms. Ekneligoda was recently awarded the International Women of Courage Award for her efforts in campaigning for the prosecution of those responsible for the abduction of her husband and others in Sri Lanka.

Amnesty International, *State of the World's Human Rights: World Report 2016/2017,* found at <https://www.amnesty.org/en/documents/pol10/4800/2017/en/>, pp.340-341

[59] HRCSL Act, Section 11(c)

The HRCSL does, however, advise complainants on possible legal action that can be pursued against infringements of their fundamental rights but does not provide any legal aid.[60] In fact, the Regional Offices of the HRCSL have given advice in a consultative capacity to 7,029 persons during the year 2016, and have referred many of these persons to the Legal Aid Commission of Sri Lanka.[61]

5. Promoting Research and Awareness of Human Rights

In addition to investigations into allegations of human rights, monitoring places of detention and feeding into national legislative and policy formulation processes, the HRCSL is also empowered to conduct research and awareness on human rights with a view to promote and foster the appreciation and comprehension of human rights.[62]

In the year 2016, the HRCSL took measures to commemorate International Days of Human Rights, such International Women's Day and the International Day in Support of the Victims of Torture, and Universal Human Rights Day.[63] Additionally, the HRCSL has also conducted many awareness and training programs with the participation/ support of civil society groups and public officials, on its own accord or upon the request of such groups and public institutions.[64] Awareness programs have also been conducted by the Head Office and

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60 See HRCSL Response to LST Questionnaire, *supra* note 17

61 See HRCSL Responses to LST Data Request, *supra* note 16

62 HRCSL Act, sections 10(f) and 11(f)

63 HRCSL, *International Women's Day* 2016<http://hrcsl.lk/english/2016/03/30/international-womens-day-2016/>, HRCSL, HRCSL Starts Anti-Torture Campaign <http://hrcsl.lk/english/2016/07/05/hrcsl-starts-anti-torture-campaign/>; *HRCSL, International Human Rights Day* 2016<http://hrcsl.lk/english/2016/12/14/international-human-rights-day-2016/>

64 See HRCSL Response to LST Questionnaire, supra note 17

Regional Offices for military personnel. The HRCSL has also taken measures to cooperate with the Sri Lanka Institute for Development Administration so that securing/ensuring human rights and equitable administrative practices are included in training modules for public officials.[65]

However, the HRCSL, admittedly, stated that these measures are insufficient as currently the HRCSL's awareness programs cover only a fraction of all public officials, and do not include demographic and professionals such as the youth, media houses, and journalists.[66]

In terms of the research conducted by the HRCSL for the year 2016, the only research which is of some distinction is the research program conducted on the theme of 'children deprived of liberty', which was concluded in late 2016. The report of this research program is expected to be published shortly.

The research and awareness capacity of the HRCSL is, however, hardly functioning at its maximum given the pressing need for an increased cadre. The HRCSL has stated that its Research and Monitoring Division of the HRCSL has a staff of just two officers, making it unfeasible to undertake multiple large-scale research and awareness programs within any given period of time.

6. Part III: Key Issues and Measures taken by the HRCSL, and Recommendations

In analysing the performance of the HRCSL in 2016 it is apparent that there are several key issues and challenges faced by the HRCSL, and they continue to erode its public legitimacy. These issues will be

[65] See HRCSL Response to LST Questionnaire, supra note 17

[66] Ibid.

addressed in this part, with a commentary on any measures taken by the HRCSL, if any, addressing to these issues, while also exploring possible recommendations that can be made.

6.1 Lack of Sufficient Cadre

In analysing the performance in the functioning of the HRCSL during the year 2016,an issue that arises, across the board, is the major shortage of staff of the HRCSL. At present the HRCSL has 159 officers, which is barely sufficient to effectively exercise its mandate. The lack of cadre, compounded by the malaise and bureaucracy that had crept into its machinery due to the lack of dynamism and minimum productivity of the HRCSL over the last ten years, has substantially curtailed the capacity of the HRCSL to effectively carry out its mandate. As such, the lack of sufficient cadre is the most substantial hindrance, at present, to boosting its efficiency.

6.2 Measures taken by the HRCSL

The present administration of the HRCSL has undertaken to set in place robust recruitment procedures for the purposes of recruiting skilled officers and increasing its cadre. As such, the HRCSL has drafted a Scheme of Recruitment (SOR), which aspires to expand the number of administrative officers and specialised officers of the HRCSL, and has forwarded the same to be approved by the relevant State authorities.[67] The said SOR has been pending approval for the last year, and the HRCSL has stated that the scheme is currently in its final stages of approval, and expects that it would be finalized and given force shortly.

[67] See HRCSL Response to LST Questionnaire, *supra* note 17

6.3 Recommendations

Before delving into possible recommendations, it must be noted that the HRCSL itself has admitted that the enforcement of the new SOR alone will not bring about a skilled and productive staff. The HRCSL has noted, distressingly, that being employed in the HRCSL is not viewed with great enthusiasm by public officers due to the fact that the HRCSL itself has, over the years, relegated itself to a status of low public legitimacy and even lower public influence owing to the lack of cooperation with the HRCSL by successive governments, and due to the lack of incentives/commitments as well.

Over the last ten years the employees of the HRCSL received low wages and minimal benefits. Additionally, employees of the HRCSL are not even pensionable.[68] As such, the financial incentives to join the HRCSL are hardly attractive. The fact that the HRCSL was virtually defunct over the ten years has resulted in many potential recruits being further dissuaded from being joined to the HRCSL due to public conceptions that postings in the HRCSL will not expose recruits to meaningful work.

In light of these systemic problems, *vis-a-vis*, the cadre of the HRCSL, the following recommendations are proposed:

- The issue of a lack of competent staff is a problem generally faced by several independent commissions in Sri Lanka. As such, it is recommended that special schemes of recruitment be crafted by the Government with a view to establishing a specialised cadre within the public service with the skills required for the functioning of independent commissions such as the HRCSL.

[68] See HRCSL Response to LST Questionnaire, *supra* note 17

- While it must be noted that the Government had allocated Rs. 181 million in 2016 to the HRCSL, and has committed to increasing the allocation to the HRCSL by a further Rs. 10 million in 2017, the budget of the HRCSL is pale in comparison to the budgets of NHRI's in other jurisdictions such as New Zealand (NZD 9.496 million, approximately Rs. 977 million),[69] South Africa (ZAR 146.411 million, approximately Rs. 1.610 billion),[70] and Malaysia (MYR 11 million, approximately Rs. 363 million).[71] As such, it is recommended that the Government increase budgetary allocations to the HRCSL and design schemes of recruitment that include enhanced financial incentives and benefits to attract and retain a competent cadre with the capacity to deal with and effectively execute the various functions of the HRCSL;

- The Government must make significant investments in training and equipping the cadre of the independent commissions with a view of enhancing investigative capacities, language proficiency, IT skills, administrative efficiency, and gender and youth sensitivity. As such, it is recommended that budgetary grants to the HRCSL must include allocations for conducting training and development programs for its officers. It is further recommended that the Government also revamp existing administrative training and development programs for public officers for the purpose of enhancing the level of engagement of

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[69] Human Rights Commission of New Zealand, *Annual Report 2015/2016,* found at <https://www.hrc.co.nz/files/8314/8529/3642/Final_HRC_Annual_Report_15-16.pdf>, p.39

[70] Human Rights Commission of South Africa, *Annual Report 2016,* found at <http://www.sahrc.org.za/home/21/files/SAHRC%20Annual%20Report%202016%20full%20report%20low%20res%20for%20web.pdf> , p.76

[71] Human Rights Commission of Malaysia, *Annual Report 2015,* found at <https://drive.google.com/file/d/0B_iu0JnOJclBQW5OZTRhTF9XTnc/view?pref=2&pli=1>, p.273

State authorities with the HRCSL, as NHRIs cannot function effectively if they are isolated from the State apparatus.

- It is also recommended that the HRCSL implement mechanisms to regularly train its cadre so that it is exposed to contemporary trends in human rights and urged to train them in effective investigating, monitoring and engagement with State actors.

7. Slow Rate of Processing and Concluding Complaints

Given that receiving and investigating into complaints is one of the primary functions of the HRCSL, the slow rate of processing and concluding complaints by the HRCSL substantially hinders it from exercising its mandate effectively and thereby disillusions the public as to the efficiency and, in turn, its reputation and legitimacy. While the slow rate of processing and concluding complaints by the HRCSL can be attributable to the lack of a sufficient cadre, it can also be attributed, to a certain extent, to the outdated and unproductive internal processes and mechanisms that had been prevalent in the HRCSL over the last ten years.

7.1 Measures taken by the HRCSL

The HRCSL has undergone significant institutional reform with a view to enhance its capacity to respond to complaints faster and, thereby, conclude any investigations in a shorter period of time. One of the major reforms of the HRCSL is the restructuring and revamping of its Inquiry & Investigation Division, with the assistance of Commissioners from the Human Rights Commission of New Zealand. As part of this restructuring of the Inquiry and Investigation Division, five specialised units were set up within the Division; the General Complaints Unit, the Torture/Custodial Violations Complaints Units, the Education Sector Complaints

Unit, the Economic, Social and Cultural Rights Complaints Unit, and the *Suo Motu* and Non-Compliance Unit. The creation of these specialised units will help to restructure the administration within and reallocate the experts and specialist officers of the HRCSL to units that deal with specific types of complaints, thereby increasing the efficiency with which inquiries and investigations can be conducted.[72]

The HRCSL has further re-drafted their standard Complaint and Summons forms, to ensure that all complaints are submitted in a standard form, to ensure ease of processing the complaints.[73]

A Pamphlet, with detailed instructions on how to make proper complaints and append supporting documentation, as well as details of the internal processes and procedures of processing complaints, has also been drafted by the HRCSL for the benefit of complainants.[74]

The HRCSL has also taken steps to provide training to its officers in identifying complaints that fall within its mandate. Owing to a large number of complaints being rejected by the HRCSL, due to them falling outside the mandate of the HRCSL, its officers have been instructed on the mandates of other commissions and State institutions such as the Public Service Commission, the Consumer Affairs Authority, and the Ombudsmen, so that those complaints that fall beyond the mandate of the HRCSL can be redirected to the relevant authority in the first instance.[75]Training on settling disputes between parties through mediation has also been given to the officers of the HRCSL, while its operating manuals have also been updated.

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[72] See HRCSL Response to LST Questionnaire, *supra* note 17

[73] Ibid.

[74] Ibid.

[75] Ibid.

7.2 Recommendations

While the sweeping institutional reforms ushered in by the HRCSL during the year 2016 are noteworthy, the following are recommended:

- Maintain publicly accessibly databases on pending complaints and regularly update the said databases as per their progress, while maintain confidentiality of the complainants, so that the HRCSL is accountable to the complainants as well as the public;

- Expedite complaint processing proceedings by promptly disseminating information in fact-finding and investigative reports and publications of the HRCSL, without permitting State authorities to delay the proceedings;

- Compile recommendations and findings when processing complaints in standard forms to enable them for easy dissemination and comprehension of the same;

- Cooperate with civil society organisations and journalists in lobbying for increased cooperation by the State *vis-à-vis* in assisting investigations, constructive engagement over findings, and implementation of recommendations.

8. Lack of Engagement with the HRCSL by the Government

The lack of substantive engagement by the Government with the HRCSL has restricted the mandate and effectiveness of the latter to a great extent. The lack of a proper response by the Government to requests of the HRCSL to permit submitting its independent observations and views of draft legislation and policy documents has

already been highlighted. However, the HRCSL has stated that the Government has, on several other occasions, refused to constructively engage with it or has dismissed its work in manner that undermines its authority and legitimacy in the eyes of the public.

One such incident was the dismissal of the HRCSL's observations on the proposed Amendment to the Code of Criminal Procedure Act No. 15 of 1979 by Hon. Wijeyadasa Rajapakshe, the incumbent Minister of Justice. In a public statement, Minister Rajapakshe dismissed the observations of the HRCSL, without any manner of meaningful engagement, and proceeded to label the stance of the HRCSL as that of "taking up cudgels for suspects".[76] It is noted with regret that Minister Rajapakshe was equally dismissive of the HRCSL's recommendation to President Maithripala Sirisena to abolish the death penalty in Sri Lanka by ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights.

Alarmingly, the Deputy Inspector General of Police (Legal) Mr. Ajith Rohana, had also, while appearing on the TV show, dismissed the entire report submitted by the HRC to the United Nations Committee against Torture without any constructive engagement or reasoning.

These comments made against the HRCSL are symptomatic of a deep lack of understanding of the mandate and functions of the HRCSLand a dismissive attitude that prevails amongst State offices and public officials with respect to the work of the HRCSL. The HRCSL, being a NHRI, is an independent institution that is intended to work with and in cooperation extended by State institutions and officials; instead the HRCSL has been forced to operate in isolation, without any form of

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[76] Shamindra Ferdinando, *Justice Minister flays BASL, HRC for ignoring crime victims' rights*, The Island, 2nd October 2016, found at <http://island.lk/index.php?page_cat=article-details&page=article-details&code_title=153086>

worthwhile engagement and support from the State apparatus, posing an insurmountable hindrance in the functionality of the HRCSL.

8.1 Recommendations

- Make calls on the Government to increase its engagement with the HRCSL in compliance with its obligations *vis-a-vis* the Fundamental Rights and Directive Principles of State Policy and Fundamental Duties of the Constitution, and Sri Lanka's international human rights obligations;

- Civil society and non-governmental organisations must work in collaboration with the HRCSL to shed light on instances of lack of cooperation/dismissal by State authorities and officers with respect to the recommendations/investigations of the HRCSL and publicly make demands for more cooperation with the HRCSL by the said State authorities and officers;

- The HRCSL must make use of the media and journalism to give publicity to the lack of cooperation by the Government, thereby creating public support to call for increased cooperation with it by the latter with respect to drafting of legislation and policy, engagement with its recommendations and observations, and international human rights reporting;

- The HRCSL must actively attend and monitor parliamentary proceedings in relation to human rights issues;

- Make available all Annual Reports and Official Publications of the HRCSL to the public in a prompt and timely fashion to maintain a high level of accountability.

9. Failures in Monitoring the Treatment of Detainees and Places of Detention

Torture and inhuman treatment being meted out to detainees while in State custody is one of the gross human rights violations that successive Sri Lankan governments have been criticised for over the last few years.[77] The United Nations Committee Against Torture, in consideration of the Fifth Periodic report of Sri Lanka in November 2016, stated that torture and inhuman treatment of persons in custody was "systematic, routine, and widespread"[78] and, as such, the HRCSL, as an independent institution with the mandate to monitor and report on the treatment of detainees and conditions of places of detention, must take immediate steps to ensure that routine torture and inhuman treatment of detainees is curbed.

9.1 Measures taken by the HRCSL

The HRCSL has taken a number of measures to increase its capacity to monitor the treatment and detention conditions of detainees of the Police and other law enforcement institutions. One of the major reforms introduced was the creation of the Torture/Custodial Violations specialised unit within the Inquiry and Investigation Division of the HRCSL. The HRCSL also plans to establish a Rapid Response Unit with the capability of responding to complaints of detention and/or custodial violations and take appropriate steps to

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[77] UN Committee Against Torture, *Concluding Observations on the Fifth Periodic Report of Sri Lanka*, U.N. Doc. CAT/C/LKA/CO/5, (submitted on 30th November 2016, published on 27th January 2017), p.9; U.S. Department of State, *Country Report on Human Rights Practices – Sri Lanka 2016 Report*, found at <https://www.state.gov/documents/organization/265760.pdf>, pp.3-8; Human Rights Watch, *World Report* 2017: Events of 2016, found at <https://www.hrw.org/sites/default/files/world_report_download/wr2017-web.pdf>, p.530

[78] OHCHR, *Committee against Torture considers report of Sri Lanka*, found at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20880&LangID=E#sthash.zJV5QXBU.dpuf>

investigate and report the said complaints within a short-span of time.[79]

Among the reforms introduced to the operating procedures of the staff of the HRCSL, its standard operating procedures for monitoring and investigating places of detention and custodial violations is also in the process of being revamped by the HRCSL, and is expected to be finalised and implemented shortly.[80]

9.2 Recommendations

- Publish quarterly reports that will be made available to members of the Government and the public on the number of complaints received by the HRCSL pertaining to torture and custodial violations, and the number of visits it made to places of detention;

- Establish systems to disseminate the HRCSL's findings and/or recommendations of investigations and/or monitoring processes of complaints of torture and custodial violations;

- In light of State authorities failing to implement the recommendations of the HRCSL due to differences in standards of proof required to take disciplinary/legal action against perpetrators of torture and custodial violations, invest more resources into inquiring and investigating complaints of torture and custodial violations so that the collection of information and evidence becomes more substantial and credible;

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[79] See HRCSL Response to LST Questionnaire, *supra* note 17

[80] See HRCSL Response to LST Questionnaire, *supra* note 17

- Work in cooperation with civil society and non-governmental organisations, by sharing findings and information, to exert pressure on the government to take measures to facilitate prison and custodial centre reform, training of law enforcement officials, and revamping the conditions of places of detention;

- Promote awareness amongst the general public of their rights and freedoms while in detention and/or custody, as well as the institutions and mechanisms that detainees can reach out to in order to report custodial violations or torture.

10. The Status of Complaints on Missing Persons

Having consistently failed to effectively investigate into and conclude numerous complaints of missing persons and/or enforced disappearances, the HRCSL was downgraded to "B Status" by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights in 2007.[81] Since 2007, the HRCSL was the subject of much criticism owing to its continued failure to investigate into and conclude the said complaints of missing persons, and despite other institutions being established to deal with missing persons, such as the Presidential Commission to Investigate into Complaints Regarding Missing Persons (Paranagama Commission)[82], the status of the bulk of the complaints into missing persons filed with the HRCSL still remains pending.

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[81] International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, *Report and Recommendations of the Sub-Committee on Accreditation* (Geneva, proceedings of 22nd to 26th October 2007), see section 5.3

[82] Meera Srinivasan, 'Missing persons commission has received 20,000 complaints', *The Hindu*, 14th August 2014, found at <http://www.thehindu.com/news/international/south-asia/sri-lanka-missing-persons-commission-has-received-20000-complaints/article6319149.ece>

10.1 Measures taken by the HRCSL

Given that the issue of several complaints into missing persons still pending with the HRCSL is one of the major factors that led to the HRCSL being regarded as being only partially in compliance with the Paris Principles, it had taken steps over the years to expedite the conclusion of these complaints. In 2012, for instance, the HRCSL conducted vast public hearings to gather information regarding the said complaints of missing persons, but was unable to acquire sufficient information to reach findings that would lead to the conclusion of the matters owing to the lack of cooperation and support by other State institutions.[83] Since then, however, the HRCSL had not taken any additional measures to expedite the conclusion of the complaints of missing persons.

However, with the establishment of the OMP, the HRCSL has stated that it has plans to work in cooperation with the OMP to expedite the processing and conclusion of complaints into missing persons. The HRCSL has stated that it intends to enter into a Memorandum of Understanding with the OMP, wherein the HRCSL and OMP will set in place a framework through which complaints of missing persons received by the HRCSL; both new complaints and pending complaints, will be transferred to the OMP. The HRCSL has stated that the OMP, being a specialised independent institution with a mandate that strictly relates to tracing missing persons, is far better equipped to process complaints into missing persons and, as such, there was no requirement of the HRCSL to replicate the work of the OMP.[84]

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[83] See HRCSL Response to LST Questionnaire, *supra* note 17

[84] See HRCSL Response to LST Questionnaire, *supra* note 17

10.2 Recommendations

While the plans of the HRCSL to enter into a Memorandum of Understanding with the OMP is welcome as being proactive, it must be recommended that the HRCSL continues to follow up with the OMP on the processing of the complaints so transferred, especially the complaints received during the period of conflict, and ensure that the HRCSL also makes its independent findings and recommendations *vis-a-vis* any infringements and/or violations of fundamental rights and freedoms.

11. Accessibility of HRCSL Mechanisms to Complainants

The HRCSL, for many years, operated only through its Head Office and its ten Regional Offices.[85] However, many areas in the Central and Southern regions were not served with Regional Offices of the HRCSL, thereby drastically restricting access to the HRCSL by the people in these areas.

While the increased penetration of digital telecommunication and internet services in rural Sri Lanka have increased the ease of communication and accessibility, the HRCSL has not taken steps to serve the people in areas not served by a Regional Office by way of expanding its digital telecommunication and accessibility mechanisms.

11.1 Measures Taken by the HRCSL

It is pertinent to note that the HRCSL has taken measures to establish seven new Regional Offices within the course of the next year. The Regional Offices are to be set up in Polonnaruwa, Monaragala,

[85] The said 10 Regional Offices are in Kandy, Vavuniya, Jaffna, Badulla, Kalmunai, Anuradhapura, Trincomalee, Matara, Batticaloa, and Ampara.

Mathugama, Ratnapura, Nuwara-Eliya, Kilinochchi and Puttlam.[86] The HRCSL hopes that these new Regional Offices will enhance the accessibility to the HRCSL.

While the HRCSL has received a number of complaints via fax and emails addressed to the Secretary and Commissioners of the HRCSL, there is no formal online complaint submitting mechanisms in place.[87] The HRCSL has, however, made its complaint and application forms available on its official website.

11.2 Recommendations

- Establish web-based complaint portals, where complainants can lodge complaints remotely without having to submit complaints in person with an office of the HRCSL;

- Make available all guidelines and manuals for complainants published by the HRCSL on the official website of the HRCSL;

- Take measures to increase the accessibility of the website and online portals of the HRCSL, focusing on making the website and online portals disability friendly.

12. Engagement & Interaction with Non-State Parties

Engagement with non-State parties by any NHRI, such as local and international civil society organisations (CSOs), non-governmental organisations (NGOs) and the media, is crucial for the protection and promoting of human rights and freedoms, owing to the possibility of such engagement becoming a platform for lobbying for human rights,

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[86] See HRCSL Response to LST Questionnaire, *supra* note 17

[87] Ibid.

disseminating information, and creating a forum for public discussion and discourse of key issues and challenges.[88] In Sri Lanka, given the minimal engagement of the Government with the HRCSL at present, it is vital that the HRCSL maintains constant association with non-State parties to consolidate support for human rights issues while attempting to invite the Government to strengthen its cooperation with the HRCSL.

12.1 Measures taken by the HRCSL

In the year 2016, the HRCSL went to great lengths to establish proper channels of engagement and discussion with CSO's and NGO's. The HRCSL has established nine thematic sub-committees for the purposes of facilitating discourse on specific human rights issues. The themes of the said nine sub-committees are Rights of Migrant Workers, Rights of the Differently-abled, Education Policy, Rights of Elders, Gender Issues, Custodial Violations, Rights of Plantation Workers, Economic, Social and Cultural Rights, and Rights of LGBTIQ Persons. The membership of the said sub-committee includes representatives of CSOs and NGOs. Additionally, the Regional Offices of the HRCSL have set up civil society networks. The said sub-committees and networks meet on a monthly basis along with the Government Coordination Committee, so that a public forum for the expression of different views, concerns and recommendations by CSOs and NGOs, as well as the HRCSL, is created.[89]

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[88] E. M. Hafner-Burton & K. Tsutsui, 'Human Rights in a Globalizing World: The Paradox of Empty Promises', *American Journal of Sociology*, vol. 110, 1373 (2005), p.1386

[89] See HRCSL Response to LST Questionnaire, supra note 17

The HRCSL also has plans on engaging with journalists and media outlets as stated in its Strategic Plan 2016- 2019, while presently engaging with organisations such as the Young Journalists Association.[90]

12.2 Recommendations

The measures taken by the HRCSL in 2016 to enhance its engagement with non-State parties are indeed commendable, yet the following is recommended:

- Make available information pertaining to the nine thematic sub-committees to the public, including any reports or findings submitted to the said thematic units, as well as any finding, resolutions, memorandums or recommendations formulated by the said thematic sub-committees;

- Increase engagement with media organisations to both disseminate information on and give publicity to key human rights issues;

- Use CSOs and NGOs expertise and resources for the promotion and protections of economic, social and cultural rights, and to lobby support in urging State authorities to enhance human development and the quality of economic, social and cultural rights in Sri Lanka;

- Take concrete measures to investigate cases of harassment of human rights defenders.

[90] Ibid.

13. Conclusion

In the year 2016, the HRCSL, with a fresh leadership and a political climate that is, more or less, favourable toward the protection and promotion of human rights and freedoms, received increased amounts of complaints, engaged with the Government on more issues, conducted more custodial visits, carried out several investigations into alleged violations of fundamental rights and freedoms, and increased its engagement with CSOs and NGOs, on a larger scale than it had in the last ten years. In doing so, it must be noted that the HRCSL has made significant efforts in restoring faith and public legitimacy in the HRCSL.

Given the sweeping reforms introduced by the present administration of the HRCSL to revamp its administration, internal mechanisms and operating procedures with a view of enhancing the efficacy of the HRCSL, it is to be noted that the year 2016 can be regarded as an year of revamping, restructuring and reforming the HRCSL. Much of these reforms are expected to be put into force within the course of the year 2017 and, as such, it is only with time that it will be revealed whether the widespread reforms ushered in by the present administration of the HRCSL constitute the long awaited catalyst that leads to the transformation of the HRCSL into an independent, accountable and efficient institution that is proactive and vigilant in the protection and preservation of fundamental rights and freedoms. While these reforms are commendable, there are still many issues that are yet to be addressed, as have been highlighted through the recommendations made herein. Therefore, it is imperative that the HRCSL does not fall into complacency subsequent to enforcing the said reforms, but rather regularly evaluates the newly introduced measures and take prompt steps to address any inefficiency or issues that may arise, while also considering the recommendations made herein.

Finally, it must be noted that the HRCSL, even with a gamut of reforms, will not be able to effectively function as a protector of human rights and freedoms if the government fails to meaningfully engage with the HRCSL. NHRIs are not meant to function in isolation, divorced from engagement with the State. On the contrary, it is through engagement and discourse with the State that the HRCSL can input its views, observations and recommendations with respect to key human rights issues. The failure of the present Government to engage with the HRCSL in a purposeful manner is detrimental to the full functioning of the HRCSL and, therefore, it is urged that the Government, if it is genuine in its claims to be committed toward the protection and preservation of the human rights and freedoms of the Sri Lankan citizenry, take steps to foster sustainable avenues of cooperation and engagement with the HRCSL.

VII

THE RIGHT TO INFORMATION IN SRI LANKA

Sankhitha Gunaratne[*]

This chapter outlines the concept, use and principles underpinning the Right to Information (RTI). It goes on to trace the historical unfolding thereof, in an attempt to crystallize the process adopted in reaching this point of time where the exercise of a Sri Lankan citizen's RTI has been made possible. It examines the international law in relation to the right and relates international best practice to the law that has been enacted in Sri Lanka. It then elucidates in some detail the provisions set out therein, with the purpose of leaving the reader conversant with the scope of the right, and context in which it operates. The chapter ends with the recommendations of the author in terms of improvements to and implementation of the right.

1. Introduction

The natural question that arises when one speaks of RTI is, "Why is information so important?" A former President of the United States of America, James Madison stated:

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* LLB (Hons) (Colombo), Attorney-at-Law. Manager, Right to Information, Transparency International Sri Lanka. The author wishes to thank Dinithi Wijayasekera, Harini Jayawardhana, Daniel Ferdinandusz and Archana Heenpella for the research and other assistance provided in the writing of this article.

> "A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps both. Knowledge will forever govern ignorance: and a people who mean to be their own governors, must arm themselves with the power which knowledge gives."[1]

The free flow of information from the state to the citizen is a cornerstone of a democracy. Information ushers in with it open government – a government that renders itself open to public scrutiny. It allows people to make informed decisions, and is thus intrinsically connected to all their other rights. A state allowing its citizens access to information is an acceptance of two major factors – first that the government that owes its power to the sovereignty of the people remains accountable to the same people, and second that the people have a further right to see and question the manner in which their tax money is spent. It is an acknowledgment of the true owners of the information held by government – the people.

The right to information is not necessarily about the information sought or obtained. It is also about the act of questioning democratic processes. It allows stakeholders in the democracy, the ability to participate therein and to scrutinize and monitor public actions.[2]

The social contract

On electing its representatives, the people conditionally transfer their power to the State. The condition is that such power must therefore be used for the benefit of the people. The relationship established is one

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[1] The Founders' Constitution, "Epilogue: Securing the Republic," at http://press-pubs.uchicago.edu/founders/documents/v1ch18s35.html

[2] *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* [1993] 1 QAR 60, para. 59

of agency. This reality is oft forgotten when power has been transferred by the people. It has been stated[3] that there is a belief that information is power, and power if given away, would be lost. Whilst such a concession of power back to the people must indeed be uncomfortable for those wielding such power, the right to information resets the equation to its intended and original position. The principle of maximum disclosure underlies the right to information – on the basis that information being in the hands of the public serves the public interest best.

2. Right to Freedom of Information in the World

The phrase 'right to information' is often used interchangeably with the 'freedom of information' (FOI). While FOI describes more of a passive obligation upon a State to allow such freedom – such as through free and uncensored media – RTI imposes a positive obligation to actively ensure that information is provided.[4] The language of a 'right' carries with it a corollary duty on the part of the State to provide information.

The international law to which RTI is most often linked is that of the freedom of speech and expression. The United Nations at its first meeting, recognized the right to freedom of information as a fundamental right.[5]

Article 19 of the International Covenant on Civil and Political Rights provides as follows[6]:

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[3] Speech by Mr. Rohan Edrisinha at the Consultation on Securing the Right To Information (RTI) Legislation in Sri Lanka, November, 2010.

[4] Gehan Gunatilleke, *The Right to Information as a Fundamental Right,* pp. 177-180

[5] Calling of an International Conference on Freedom of Information,Resolution 59(I) adopted by the General Assembly during its first session (1946-1947)

[6] International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 19 December 1966, Article 19(2)

> "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regard less of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

The Universal Declaration of Human Rights also recognizes the right to freedom of opinion and expression, including the right to seek and receive information.[7]

It has also been argued that the foundation for RTI lies within the right to private and family life as well as the right to freedom of thought.[8] In India, the right to know has been seen to be an element of the right to life.[9]

When referring to best practice on RTI legislation, the Tshwane Principles,[10] the Model Freedom of Information Law[11] and the Principles on Freedom of Information Legislation[12] are considered the standards to which States aspire. Each of these will be referred to in hereinafter, when considering the RTI Act in Sri Lanka.

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7 Universal Declaration of Human Rights, adopted by the General Assembly on 10th December 1948, Article 19

8 Toby Mendel, "Freedom of Information as Internationally Protected Human Right" at https://www.article19.org/data/files/pdfs/publications/foi-as-an-international-right.pdf

9 *Reliance Petrochemicals Ltd. vs Proprietors of Indian Express* [1998] AIR 1989 SC 190.

10 *The Global Principles on National Security and the Right to Information,* June 12, 2013.

11 "A Model Freedom of Information Law" at https://www.article19.org/data/files/pdfs/standards/modelfoilaw.pdf

12 Toby Mendel, "The Public's Right to Know" at https://www.article19.org/data/files/pdfs/standards/righttoknow.pdf

3. Sri Lanka's RTI Law

The fundamental right

Sri Lanka is one country where the Right to Information has been constitutionally enshrined.[13] While the right of access to information had not been constitutionally recognized before May 2015, the existence of an implicit right to information within Sri Lanka's fundamental rights jurisdiction is undisputable. In three seminal judgments, the Supreme Court has recognized the right as an element of the freedom of speech and expression.

Visuvalingam v. Liyanage[14] was a matter where the newspaper called Saturday Review was banned from publication by the Competent Authority, and this act was challenged by the Petitioner. Court held that the right of the reader to receive information is included in the freedom of speech and expression:

> "The freedom of expression is an essential prerequisite for the communication of ideas. ... Public discussion is not a one sided affair. Public discussion needs for its full realisation the recognition, respect and advancement, by all organs of government, of the right of the person who is the recipient of information as well. Otherwise the freedom of speech and expression will lose much of its value. I am of the view that the fundamental right to the freedom of speech and expression includes the freedom of the recipient."

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[13] Article 32 of the Constitution of South Africa, Article 16 of the Constitution of Nepal, Constitution of Ghana in Article 21(1)(f).

[14] *Visuvalingam v. Liyanage* [1984] 2 Sri LR 123, pp 131-132

The Petitioner in *Fernando v. Sri Lanka Broadcasting Corporation*[15] (SLBC) took issue with the fact that a Non-Formal Education Programme named 'Kamkaru Prajawa' broadcast on SLBC was suddenly halted mid-programme, and never was broadcast thereafter. The Petitioner's argument was summarized as follows:

> "freedom of speech is the right of one person to convey views, ideas and information to others; communication is the essence of that right; such communication necessarily postulates a recipient, because without a recipient the right is futile; and therefore freedom of speech implies and includes the right of the recipient to receive the views, ideas or information sought to be conveyed. So, he argues, the Petitioner as a regular listener to the NFEP had the freedom of speech to receive whatever was broadcast on the NFEP, and when it was suddenly stopped that freedom was impaired."

Court went on to hold that Article 14 of the Constitution of Sri Lanka includes every form of expression, and extends not only to express guarantees, but also to implied guarantees necessary to make the express guarantees meaningful, including the right to obtain and record information.[16] However, Court stopped short of recognizing the right to information as having been fully recognized in the Constitution.

The third case that deals with the right to information is the *Galle Face Green Case*,[17] where the Petitioner requested specific information from the Urban Development Authority, which was refused. While

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[15] *Fernando v. Sri Lanka Broadcasting Corporation* [1996] 1 SLR 157, pp 166-167

[16] *Constitution of the Democratic Socialist Republic of Sri Lanka*, Article 14, p 179.

[17] *Galle Face Green Case*, SC (F.R.) Application No. 47/2004 [2005], p 130.

noting that the right to information was not guaranteed under the Constitution at the time, court held:

> "...I am of the view that the "freedom of speech and expression including publication' guaranteed by Article 14(1)(a), to be meaningful and effective should carry within its scope an implicit right of a person to secure relevant information from a public authority in respect of a matter that should be in the public domain. It should necessarily be so where the public interest in the matter outweighs the confidentiality that attaches to affairs of State and official communications."

It is interesting to note that the *Right to Information Act* enacted in 2016 emulates this language and thinking in totality.

The fundamental right of access to information, enshrined in the Constitution in May 2015 reads as follows:

> 14A. (1) Every citizen shall have the right of access to any information as provided for by law, being information that is required for the exercise or protection of a citizen's right held by:-
>
> (a) the State, a Ministry or any Government Department or any statutory body established or created by or under any law;
>
> (b) any Ministry of a Minster of the Board of Ministers of a Province or any Department or any statutory body established or created by a statute of a Provincial Council;
>
> (c) any local authority; and

(d) any other person, who is in possession of such information relating to any institution referred to in sub-paragraphs (a) (b) or (c) of this paragraph.

(2) No restrictions shall be placed on the right declared and recognized by this Article, other than such restrictions prescribed by law as are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals and of the reputation or the rights of others, privacy, prevention of contempt of court, protection of parliamentary privilege, for preventing the disclosure of information communicated in confidence, or for maintaining the authority and impartiality of the judiciary.

(3) In this Article, "citizen" includes a body whether incorporated or unincorporated, if not less than three-fourths of the members of such body are citizens.

The Right to Information Act No. 12 of 2016 is the law that provides for the right of access to information that was enshrined in the Constitution by Article 14A, which was incorporated in the 19th Amendment to the Constitution on 15th May, 2015.[18] This was the delivery of a promise made in the presidential election manifesto of the then presidential candidate Maithripala Sirisena which stated:

> "An efficient regulatory mechanism will be instituted on the basis of encouraging public service communication services while consolidating to the maximum freedom of the mass media and the Right to Information."

[18] *Constitution of the Democratic Socialist Republic of Sri Lanka,* 19th amendment

> "I will also introduce a Right of Information Act so that people can access all information relating to development activities."

In its long title, the *Right to Information Act* No. 12 of 2016 refers to the fundamental right of access to information. It therefore seems clear that the 'law' referred to in Article 14A is the RTI Act. While the fundamental right in the Constitution relates to information "required for the exercise or protection of a citizen's right", the RTI Act sets out a broader right – a right of access to information which is in the possession, custody or control of a public authority.[19] According to the Act, a citizen has no obligation to provide reasons for an information request.[20] She does not need to indicate that the information is required for the protection of another right. Therefore, while the fundamental right is limited to that extent, the statutory right is broader, and allows for the obtaining of information even where no personal interest is demonstrable.

It follows therefore, that the fundamental right of access to information gives rise to the jurisdiction of the Supreme Court of Sri Lanka, which a citizen can petition directly in the instance of an infringement or imminent infringement of her right of access to information by executive or administrative action,[21] provided that she can demonstrate the information is "required for the exercise or protection of a [her] right". The ambit of the RTI Act is broader, and sets out an administrative process for the access of information. Decisions made can be appealed against at several levels, and are subject to judicial oversight.

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[19] *Right to Information Act,* No. 12 of 2016, Section 3

[20] *Right to Information Act,* No. 12 of 2016, Section 24(5)(d)

[21] *Constitution of the Democratic Socialist Republic of Sri Lanka,* Article 126.

The RTI Act

The year 2016 marked a great victory in the decades-old struggle for a Right to Information (RTI) law in Sri Lanka. On 24th June, 2016, the Parliament adopted the Right to Information Bill into law, without a vote. It was then certified by the Speaker on the 4th of August, 2016, setting in motion the specific implementation timelines provided for in the Act.

The Act provides for a staggered rollout of RTI, with certain provisions[22] coming into effect immediately, and others after the passage of 6 months. At the outset, it was intended to ensure that the infrastructure to operationalize RTI – the appointment of information officers, designated officers and the RTI Commission, as well as the promulgation of the necessary Rules and Regulations under the Act – took place. The ability to use the right in its full ambit would come into effect as the Minister in charge of the subject of mass media gazetted the names of public authorities or categories of public authorities that would then be liable to RTI requests by citizens. While this would appear problematic on the face of it, the law provides that even in the event that the Minister does nothing to gazette the relevant public authorities, upon the passage of one year – i.e. on the 4th of August 2017 – all public authorities would be liable to RTI requests.

4. History of RTI in Sri Lanka

The movement for the Right to Information in Sri Lanka has been long and arduous. Interestingly, while a statute was called for, this was always linked with the need to have an accompanying constitutional guarantee. It is no surprise therefore, that the current framework

[22] *Right to Information Act*, No. 12 of 2016, Part IV, Sections 23, 36, 40, 41, 42, 43 and 44.

was first introduced by amending the Bill of Rights in the 1978 Constitution for the first time since its introduction.

A significant feature in this struggle is that it was largely driven by the media, with politicians, academics and civil society organizations joining ranks. As a result, a lasting impression has been left in the minds of the people, that the benefit of RTI accrues only or mainly to the media. Unlike in India, it was not a demand of the general populace of the country.

The need for RTI was first brought into public conversation with the parliamentary election of 1994, where there was much discussion on media reform. In 1995, the RKW Goonesekere Committee was appointed with the mandate to:

> " Study all existing legislation and regulations affecting media freedom, freedom of expression and the public's right to information, with a view to identifying the areas which need to be rescinded, amended or reformed in order to ensure media freedom, freedom of expression and the public's right to information; and to make recommendations as to the amendments and/or repeal of existing legislation as well as new legislation required to strengthen media freedom in general and to ensure freedom of expression and the public's right to information." [23]

Published in 1996, the report recommended that the Right to Information be introduced, both in the form of specific legislation, as well as by amending the Constitution for Sri Lanka to fall in line with its obligations under section 18 and 19 of the ICCPR. It set out

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[23] Report of the Committee to Advise on the Reform of Laws Affecting Media Freedom and Freedom of Expression, 1995

basic standards that were recommended, including that providing information and not denial should be the norm, the need to list types of information that could be withheld, that information should be available equally and without a need to provide reasons for requests and also that there should be a right of appeal against the rejection of information.

The Sri Lanka Law Commission, with the leadership of Justice A.R.B. Amarasingha, drafted a Freedom of Information Bill in 1996, which fell short of international best practices. This Bill never found its way to Parliament.

During the deliberations for a new Constitution in the lead up to the year 2000, RTI was introduced to the Bill of Rights as part of the freedom of speech and expression. However, this draft Constitution was never brought into force.

A few years later, the need for the freedom of information was highlighted to both of the main political parties by media groups during the Bandaranaike-Wickremasinghe cohabitation government from 2002 to 2004. As a result, a Committee, headed by Prime Minister Ranil Wickramasinghe was appointed. Two drafts that had been created, one by the media with civil society, and another by the government, were discussed, and a third compromise draft was agreed upon. The committee that finalised this Bill included the then Attorney General, the late Mr KC Kamalasabeyson, P.C and the then Justice Secretary, the Legal Draftsman, senior editors and public interest advocates.[24] The draft recognized an Information Commission and after much negotiation, included provisions to protect whistleblowers.

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[24] Kishali Pinto-Jayawardena and Venkatesh Nayak, "SRI LANKA's Right to Information Bill 2015 – Clearing Up Misconceptions and Recommending Revisions" at http://dbsjeyaraj.com/dbsj/archives/39033

It was referred to the Legal Draftsman, and was approved by Cabinet in 2004.[25] However, due to the Parliament being dissolved by President Chandrika Kumaratunga, this draft was not enacted into law.

In 2010, the then Justice and Legal Reforms Minister Milinda Moragoda made another move to introduce RTI legislation, which also failed. Later, then United National Party opposition parliamentarian Karu Jayasuriya also attempted to bring in an RTI law[26] as a private member's Bill, which was not allowed in light of the government's own stated intention of introducing such legislation.[27]As such legislation was not introduced, in June 2011 Karu Jayasiruya, MP brought a private member's Bill again in Parliament, which was defeated with 34 members voting for, and 97 against the Bill.

While the attempts to introduce RTI legislation have been fraught with challenges, it was the 2003/2004 draft Bill that eventually formed the basis for the drafting of the Act that was passed in August 2016.

5. The Enactment Process

The legislative process adopted in drafting the RTI Act is often seen as having been done with an appropriate level of consultation and openness - with diverse voices heard and suggestions incorporated. There was a twenty-member technical drafting committee appointed for the purpose of drafting the Bill. The unique feature in this

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[25] Gehan Gunatilleke, "Right to Information: A Guide for Advocates" at http://unesdoc.unesco.org/images/0024/002441/244113E.pdf

[26] Kishali Pinto-Jayawardena and Venkatesh Nayak, "SRI LANKA's Right to Information Bill 2015 – Clearing Up Misconceptions and Recommending Revisions" at http://dbsjeyaraj.com/dbsj/archives/39033

[27] Gehan Gunatilleke, "Right to Information: A Guide for Advocates" at http://unesdoc.unesco.org/images/0024/002441/244113E.pdf

committee was that several members were those who had also been involved in the process of drafting the RTI Bill in 2003. Other members included media personnel, secretaries of Ministries, civil society and representatives of the Attorney-General's Department.[28]

On 24th March, 2016, the RTI Bill was placed on the Order Paper of Parliament. By the 31st March, five petitions had been filed in the Supreme Court of Sri Lanka, challenging the constitutionality of the Bill on different bases. The matter was heard on consecutive dates from the 5th April 2017 onward, with several petitioners intervening in the matters before Court. The Petitioners contested the Bill on several grounds stating that the scope of the RTI Act was wider than the scope of the fundamental right enshrined in the Constitution,[29] that the Commissioners on the RTI Commission having access to certain restricted information was unconstitutional as they were appointed from civil society and other sectors and would act in a judicial capacity. Moreover, it was contended that the Commission having its own fund was unconstitutional as it could leave room for foreign interests to take hold.[30] The other petitions stated that the sections in the RTI Bill dealing with confidentiality of overseas trade agreements in certain circumstances was done purely to hide the contents of the Economic and Technical Cooperation Agreement (ETCA) which Sri Lanka was negotiating with India, at the time.[31] Several intervenient petitioners including Transparency International Sri Lanka maintained that the Bill was not unconstitutional because all possible exceptions were subject to the overarching public interest override. Further arguments

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[28] Sabrina Esufally and William Ferroggiaro, *Right to Information Discourse and Compliance in Sri Lanka,* 2017, p.6.

[29] Petition No. S.C. (S.D.) No.22 of 2016.

[30] Petition No. S.C. (S.D.) No.22 of 2016.

[31] Petition Nos. 23, 24, 25, 26/2016.

were also made on this count. The Supreme Court referred its decision to the Speaker on 3rd May, 2016.[32]

In its Special Determination, the Supreme Court held that the RTI Bill could be passed with a simple majority in Parliament provided that certain provisions that were found to be unconstitutional were amended as per the direction of Court.

In response to the contention that the 'economic integrity' exception was unconstitutional as it was not recognized in article 14A(2) of the Constitution the Court in its Determination chose to accept the submission of the Attorney General regarding the term 'national security'. The Attorney General relied on the judgment in *Ex-Armymen's Protection Services Private Limited v. Union of India and others*,[33] which defined 'national security' to include "socio-political stability, territorial integrity, economic solidarity and strength, ecological balance, cultural cohesiveness, external peace, etc." The Supreme Court in accepting this overbroad definition has not taken cognizance of the fact that the Indian judgment went on to hold that the question of determining what constitutes national security is the province of Executive policy, and not judicial interpretation. While Special Determinations of the Supreme Court are not binding upon future courts, this interpretation still raises concerns as to the application of the 'national security' exception in the implementation of RTI.

Parallel to this process, the Ministry of Parliamentary Reform and Mass Media invited several persons to act on a Task Force which was charged with providing advice to the Minister on the implementation

[32] S.C.(S.D.) No.22/2016.

[33] Ex-Armymen's Protection Services Private Limited vs. Union of India and others (2014) No.2876/141.

of RTI. In addition to developing a nine-month plan for the way in which RTI implementation should take place, the Task Force also organized and moderated a program for all Members of Parliament to discuss the provisions of the proposed RTI law, with the input of foreign resource persons, ahead of the Bill being taken up for debate. Over 70 Members of Parliament attended, and voiced appreciation at the opportunity to engage with the contents of a law prior to the debate.

The Drafting Committee incorporated into the Bill the changes communicated in the Special Determination of the Supreme Court. The Northern,[34] North Central and Sabaragamuwa Provincial Councils made written submissions to the drafting committee, proposing certain amendments.[35] The author is also aware that the Election Commission,[36] as well as the International Committee of the Red Cross also made submissions.

During this period, by virtue of being a member of the Right to Information Advisory Task Force,[37] Transparency International Sri Lanka was allowed to sit as observers to the Drafting Committee, and to make submissions – some of which were also incorporated.[38]

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[34] The Northern Provincial Council proposed that section 25(3) should be available to be invoked by any citizen, not limited to the citizen whose life or personal liberty is at stake. This submission was made specifically in the context that the families of disappeared persons should be able to use the provision.

[35] Chandani Kirinde, "RTI Bill Now Before Parliament, Northern Pc Proposes Amendments" at https://www.rti.gov.lk/media/news/106-rti-bill-now-before-parliament-northern-pc-proposes-amendments

[36] It would appear that section 5(1)(n) of the Act was incorporated as a result of these submissions.

[37] Convened by the Minister for Parliamentary Reform and Mass Media.

[38] Right to Information Act, No. 12 of 2016, Sections 5(5), 7(4), 8(4), 10, 25(3), 26(1) and 40

The Bill was subsequently taken up for debate in Parliament on the 23rd and 24th of June, 2016. While there were many objections raised during the debate, when it was time to vote, the Bill was adopted unanimously without a vote. Following the adoption of the Bill, there still was an unexplained delay in the Bill receiving the Speaker's certificate[39] – which was ultimately done on 4th August, 2016, drawing to an end the advocacy of over 20 years calling for RTI legislation in Sri Lanka.

6. The RTI Law & International Standards

After the RTI law was enacted, the ranking of Sri Lanka's RTI law by the Centre for Law and Democracy (CLD) based in Canada was at 9th place among the world's freedom of information legislation.[40] In an unprecedented improvement[41] post-enactment, the rules and regulations promulgated by the Ministry of Mass Media, with the RTI Commission, propelled Sri Lanka's ranking to 3rd place.[42] The CLD ranking developed with Access Info Europe has 61 indicators, assessing countries on the basis of the right, the scope thereof, request procedures, exceptions, appeals, sanctions and promotional measures,[43] and is widely accepted as the authoritative source for RTI ranking in the world. Due caution must be had, however, in

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[39] Transparency International Sri Lanka, "TISL Urges Speaker's Action on RTI" at http://www.tisrilanka.org/tisl-urges-speakers-action-on-rti/

[40] Centre for Law and Democracy, "Congratulations Mexico for the World's Best Right to Information Law" at https://www.law-democracy.org/live/congratulations-mexico-for-the-worlds-best-right-to-information-law/

[41] Centre for Law and Democracy, "Sri Lanka Jumps to Third Place Globally on the RTI Rating" at https://www.law-democracy.org/live/wp-content/uploads/2012/08/17.02.10.Sri-Lanka-RTI.PR_.pdf

[42] Published in Gazette No. 2004/66 - Friday, February 03, 2017.

[43] Global Right to Information Rating - Sri Lanka at http://www.rti-rating.org/view_country/?country_name=Sri%20Lanka

distinguishing the ranking of the legal framework, as opposed to its implementation – which remains to be assessed at a later date.[44]

The right

The RTI Act provides for any citizen to have access to information held in the possession, custody or control of public authorities. A citizen is defined to mean any individual citizen, as well as any incorporated or unincorporated entity, as long as three fourths of its membership hold Sri Lankan citizenship. While circuitous in its definition, one could argue that the scope of the definition is expansive. However, progressive RTI laws[45] in the Commonwealth as well as elsewhere have done away with the limitation of merely a 'citizen' being able to access information, and extended the right to all 'persons'. Between the two, lie States which make information accessible to citizens as well as 'residents', provided certain conditions of residency are met.[46]

'Information' under the law has an expansive definition, and includes anything that is recorded in some form. A 'public authority' encompasses public institutions (central and provincial), private institutions carrying out a public function, non-governmental organisations to the extent of their public activities, courts, tribunals and other bodies administering justice, private and public educational institutions, and any entity where the state and/or a state corporation holds over 25 percent of shares. The definition of a 'public authority'

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[44] Tracking implementation of RTI has been a challenge across the world, and few methods exist to assess it, across the world. Carter Centre, "Tracking Implementation Tool" at https://www.cartercenter.org/peace/ati/iat/index.html

[45] S. 11 of the Queensland Right to Information Act 2009, Australia, S. 1(1) of the Freedom of Information Act 2000, S. 11, s.50 of the Promotion of Access to Information Act 2 of 2000, South Africa.

[46] S. 4(1) of the Access to Information Act, Canada, Article 2, 3 of the Act XVI of 2008, Malta.

from whom information can be requested, therefore, is broad and not limited to public institutions. Wherever there is a public function or public financial interest, a citizen may request information, in keeping with the principle of maximum disclosure.[47]

RTI to Prevail over Other Laws

The *Right to Information Act* No. 12 of 2016 is of great significance because it ushers in with it not only a different legal regime, but also a culture that values openness, and leaves no doubt about it. The law clearly states that in the event of inconsistency with any other written law, the RTI Act would prevail.[48] This is an unequivocal reversal of other contradictory laws and regulations such as the *Official Secrets Act*[49] and the Establishment Code. Even though the drafting committee of the RTI law was apprised of the possibility of specifically mentioning such existing contradictory legislation for perfect clarity of its intent,[50] this request was not accepted due to the need to have a comprehensive analysis of the entire legal system to ascertain such contradictions. It was felt at the time that the language of the provision was clear enough to dissipate any doubt. Since its passage, though, arguments have been made using the legal maxim of *generalia specialibus non derogant*, also referred to as the rule of implied exception, which means that the provisions of a general statute must yield to those of a special one. This maxim has received judicial interpretation in numerous cases,[51] it remains to be seen how the RTI Commission, the Court of Appeal

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[47] https://www.article19.org/data/files/pdfs/standards/righttoknow.pdf p. 2.

[48] *Right to Information Act,* No. 12 of 2016, Section 4.

[49] *Official Secrets Act,* No. 32 of 1955.

[50] *Right to Information Act,* No. 22 of 2005 (India), Section 22.

[51] *Thilanga Sumathipala v. Inspector-General Of Police And Others,* [2004] 1 Sri L.R 210, Registrar of Companies & Ors. Vs Dharmendra Kumar Garg & Anr., W.P. (C) 11271/2009.

and the Supreme Court, each of which may be presented with the issue of interpreting the provision.

Any subsequent legislation that seeks to introduce provisions that may contradict the RTI law, can in theory be challenged before the Supreme Court for unconstitutionality, due to the RTI law being constitutionally underpinned.[52] As the time period for a legal challenge is very limited, this would require diligent watchfulness on the part of proponents of open government, as judicial review of legislation is only permissible before a law is enacted.

Reasons for Rejection

As alluded to above, the RTI law does away with the servility required from a citizen when they have to encounter the State. Access to information held by public bodies often involves a combination of delays, excuses, refusals, inefficiency and corruption, leading to a general degradation of the principle of agency - whereby state derives its power from the sovereignty of its citizens, whom they are in turn bound to serve.

The law specifically states that a citizen cannot be asked to provide reasons for a request.[53] Importantly, and on the contrary, if an information request is rejected, specific reasons limited to those set out in the law must be given,[54] with an additional obligation to explain why the use of such reason is justified.[55]

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[52] *Constitution of Democratic Socialist Republic of Sri Lanka,* Article 14A

[53] *Right to Information Act,* No. 12 of 2016, Article 24(5)(d).

[54] *Right to Information Act,* No. 12 of 2016, Regulation 09, and Section 5, and Constitution of the Democratic Socialist Republic of Sri Lanka, Article 14A.

[55] Gazette No. 2004/66 - Friday, February 03, 2017, Form 05.

Limited Scope of Exceptions and the Public Interest Override

Exceptions to disclosure – i.e. instances where information may be refused – must be narrow, and specifically laid out in a good RTI law.[56] It is also important that no public authority should be excluded from the obligation to provide information under the law. For example, India's RTI law exempts a list of public authorities from coming under the RTI regime,[57] exempt in limited circumstances.[58] Sri Lanka's law does not contain this negative feature. It merely provides for fourteen specific instances where information that can be refused. In order to be ajudged a reasonable ground for refusal, it must pass a three-part test[59]:

- the information must relate to a legitimate aim listed in the law;
- disclosure must threaten to cause substantial harm to that aim; and
- the harm to the aim must be greater than the public interest in having the information.

In this context, the public interest override[60] in the RTI Act is of particular importance. The provision calls for a weighing of the harm caused by disclosing the information against the public interest served by doing the same. In the event that the latter is greater, the information must be released. All of the exceptions are subject to this override. This provision is arguably the most important section in the RTI Act, and gives unequivocal importance to the public interest above all else.

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[56] https://www.article19.org/data/files/pdfs/standards/righttoknow.pdf p.5.

[57] *Right to Information Act,* No. 22 of 2005 (India), Section 24 and Schedule II.

[58] Alleged human rights or corruption related violations - *Right to Information Act,* No. 22 of 2005 (India).

[59] "The Public's Right to Know - Principles on Freedom of Information Legislation", Principle 4, Article XIX, June 1999, p 5.

[60] *Right to Information Act,* No. 12 of 2016, Section 5(4).

The permitted exceptions in the Act include personal information that constitutes an unwanted invasion of privacy if it is not related to a public activity or interest, would undermine national security or defence of the State, would prejudice Sri Lanka's relations with another State (if the information) was given in confidence, where the premature disclosure of information would cause serious prejudice to Sri Lanka's economy when the information relates to exchange rates, the regulation of banking or credit, taxation etc. Information protected under the *Intellectual Property Act,*[61] medical records, information that must be kept confidential due to the existence of a fiduciary relationship, information that would harm the integrity of an examination or information is of a cabinet memorandum that remains undecided.[62]

The provisions contained in 'A Model Freedom of Information Law' by Article XIX sets out the best practice standards to be followed by States in drafting their legislation.[63] Sri Lanka's law follows suit except in a few instances. The exception with respect to the contempt of court, integrity of examinations, privileges of parliament and information regarding cabinet memoranda fall outside the ambit of the provisions set out in the Model law.

In addition to the provision on privileges of parliament in the exceptions, section 3(2) of the Act – introduced at the Committee Stage of parliament – states that:

> "The provisions of this Act, shall not be in derogation of the powers, privileges [sic] and practices of Parliament".

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61 *Intellectual Property Act,* No. 36 of 2003.

62 *Right to Information Act,* No. 12 of 2016, Section 5(1).

63 "A Model Freedom of Information Law" at https://www.article19.org/data/files/pdfs/standards/modelfoilaw.pdf

This amendment was proposed to section 5 by the Hon. Dinesh Gunwardana M.P. However, the then Minister of Parliamentary Reform and Mass Media Gayantha Karunathilaka chose instead to incorporate this provision to section 3, thereby exempting it from the application of the public interest override. The concern expressed by the proponent was that Parliament should be able to obtain access to any information if it so pleases. However, the alteration was made to section 3 in order to ensure supremacy of Parliament was maintained, as evidenced by the problematic statement by the Hon. Prime Minister Ranil Wickramasinghe, "Parliament is going to be supreme...It applies to all Clauses throughout the Bill."[64] It may be argued, therefore, that there appears to be an additional restriction included through this section. This view of parliamentary supremacy is cause for great concern in the context of checks and balances between the three arms of government – the executive, the legislature and the judiciary.

It must be reiterated that the exceptions framed in the RTI Act contain strict checks which call for a high standard to be established by the public authority.

For example, information merely *relating* to national security would not suffice. It must be demonstrated that the disclosure would *undermine* national security. The Regulations impose a further requirement to demonstrate the reasons to justify the decision to apply the exception.[65] All exceptions are subject to the public interest, which means that even where there may be an undermining of national security, information must be disclosed if the public interest outweighs that harm.

[64] Hansard of 24 June, 2016. Pp. 1663 - 1664.

[65] Gazette No. 2004/66 - Friday, February 03, 2017, Form 05.

While Sri Lanka's RTI Act in its national security exception mirrors the language of the Model Freedom of Information Law, it is important to note that the Tshwane Principles set out a higher standard, to establish certain conditions that must be met if information is to be refused on the ground of national security. It must be demonstrated that the restriction is prescribed by law and is necessary in a democratic society in order to protect a legitimate national security interest. It is also required that the law provides for adequate safeguards against abuse, including prompt, full, accessible, and effective scrutiny of the validity of the restriction by an independent oversight authority and full review by the courts.[66]

When an information officer receives an RTI request, it has been stated by Kishali Pinto-Jayawardena, RTI Commissioner, as follows:

> "If there is a denial of information, the Information Officer is duty bound to show that the harm caused by releasing the information is greater than the public interest."[67]

In keeping with the principle of maximum disclosure, this would appear to make the refusal of information based on frivolous, unspecified or unsubstantiated grounds untenable before the RTI Commission.

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[66] *The Global Principles on National Security and the Right to Information,* June 12, 2013, Principle 3.

[67] Haadiyah Marikkar, "RTI: Rocky Road to Sri Lanka's Transparency Culture" at http://www.dailymirror.lk/article/RTI-Rocky-road-to-Sri-Lanka-s-new-transparency-culture-128574.html

Certain principles have been set down for consideration when deciding on the public interest. In *Eccleston*[68] Court quoted *Commonwealth of Australia v. John Fairfax & Sons Limited and Others*[69] which held that,

> "Unless disclosure is likely to injure the public interest, it will not be protected."

It has been further held that :

> "The public interest in disclosure is particularly strong where the information in question would assist public understanding of an issue that is subject to current national debate."[70]

What constitutes the public interest has not been defined in the RTI Act. The writer has found many citizens to be perturbed by this, as the discretion of making the decision as to whether certain information merits disclosure on this ground then remains with the official dealing with the request at a particular time.[71] There is little faith that such a provision will be used to the benefit of the citizen.

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68 *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* [1993] 1 QAR 60.

69 *Commonwealth of Australia v. John Fairfax & Sons Limited and Ors* [1980] 147 CLR 39, paragraph 43.

70 Freedom of Information: Balancing The Public Interest, May 2006, p.9.

71 The Information Officer, the Designated Officer or the Commission - Right to Information Act, No. 12 of 2016.

However, across the world, the majority of RTI or FOI legislation intentionally leaves the 'public interest' undefined.[72] The reason is that each situation deserves individual consideration, without being limited by definition. Therefore, RTI decision-makers are naturally given considerable discretionary leeway. In *O' Sullivan v. Farrer* the High Court of Australia held:

> "Indeed, the expression "*in the public interest*", when used in a statute, classically imparts a discretionary value judgment to be made by reference to undefined factual matters, confined only in so far as the subject matter and the scope and purpose of the statutory enactments may enable." [73]

In certain situations, however, legislators and policymakers have chosen to set out guidelines to be used in applying the public interest test. Australia is one such example where they chose not to define public interest in the law, but the Attorney General's Department has guidelines on the same.[74] Factors such as informing a debate on a matter of public importance and promoting effective oversight of public expenditure are to be considered, while factors such as the causing of embarrassment to government, loss of confidence in the government, whether the information may be misinterpreted, the seniority of the author of the document or whether the disclosure could result in

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[72] Canada, New Zealand, Australia, Scotland, Ireland the United Kingdom and India are countries where the law does not define 'public interest'. Kenya in section 6(6) sets out certain considerations to be taken into account when deciding the public interest, such as to (a) promote accountability of public entities to the public; (b) ensure that the expenditure of public funds is subject to effective oversight; (c) promote informed debate on issues of public interest; (d) keep the public adequately informed about the existence of any danger to public health or safety or to the environment; and (e) ensure that any statutory authority with regulatory responsibilities is adequately discharging its functions.

[73] O' Sullivan v Farrer [1989] 168 CLR 210 at 216.

[74] Attorney General's Department (Australia), Freedom of Information Guidance Notes, July 2011 pp 10-11 at https://www.ag.gov.au/RightsAndProtections/FOI/Pages/Freedomofinformationguidelinesbefore1November2010.aspx

confusion or unnecessary debate are factors which are not permitted to be considered.

The introduction of such guidelines should be considered in Sri Lanka. Due to the novelty of the culture sought to be introduced by the RTI framework and the emphasis on secrecy and seniority, guidance of this sort would prove useful to officers to break away from the norm in exercising their discretion, through implementation of the law.

Proactive Disclosure

Proactive disclosure is another principle which is a cornerstone of freedom of information legislation worldwide. The Principles on Freedom of Information Legislation[75] sets out the 'obligation to publish' as one of its nine principles.[76] To 'proactively' disclose means that information is disseminated by public bodies on their own motion, without having received an RTI request. A perfect system of proactive disclosure would therefore mean that there would be no further need for RTI requests, as all information would be given to the people in a perfectly transparent manner. In Sri Lanka's RTI Act, proactive disclosure is recognized to a limited extent, and is further expounded in great detail in the Regulations.[77]

The Act requires a Minister in charge of any project undertaken exceeding the value of Rs. 500,000 or USD 100,000 to make all available information regarding that project proactively available to the general public and to persons that may be affected by the

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[75] "The Public's Right to Know - Principles on Freedom of Information Legislation" at https://www.article19.org/data/files/pdfs/standards/righttoknow.pdf

[76] "The Public's Right to Know - Principles on Freedom of Information Legislation", p 3 at https://www.article19.org/data/files/pdfs/standards/righttoknow.pdf

[77] Gazette No. 2004/66 - Friday, February 03, 2017, Reg. 20.

project, three months before the commencement of the project. Even on urgent projects, advance notice of one week is required.[78] Furthermore, the Act sets up an annual reporting obligation on the part of all public authorities, as well as biannual reporting by Ministries, to be submitted to the RTI Commission and made available to the public. These reports also form a part of proactive disclosure, and must be made available in electronic format. The reports cover information such as the powers, duties, mandate, organizational structure and budget allocation Ministries and other public authorities, as well as details in respect of compliance with the RTI request-response procedure, such as the number of requests received, fees charged, rejections and appeals.[79]

The Regulations go much further in expounding on proactive disclosure obligations, requiring public authorities to routinely disseminate some of the above information as well as information regarding decisions and acts, public service provision, actual spending, information on meetings held including where the public can participate in such meetings, public procurement information, publications and lists, registers and databases. Interestingly, they are also required to publish a register of the types of information held at the public authority, as well as information that has been disclosed as a response to other RTI requests that may be of interest.[80] It is noteworthy that the then Ministry of Parliamentary Reform and Mass Media – in consultation with the RTI Commission – used its powers under section 41 of the Act, which empowers Regulations to be made to 'give effect to the *principles* and provisions of this Act'. Apart from this instance, the RTI Act is silent on expanding the scope of proactive disclosure beyond the limits of the Act. Proactive

[78] *Right to Information Act,* No. 12 of 2016, Section 9.

[79] *Right to Information Act,* No. 12 of 2016, Sections 8 & 10.

[80] Gazette No. 2004/66 - Friday, February 03, 2017, Reg. 20.

disclosure is one area that was significantly improved, allowing Sri Lanka to rise to No. 3 in the global ranking.[81]

Other Salient Features

The law sets out time limits for public authorities to comply. In the event of non-compliance, lack of completeness, or simply refusal, the first appeal is available to the citizen, within the same public authority. From there she may go on to appeal to the RTI Commission, and to the Court of Appeal thereafter. Therefore, even in the event of a complete lack of will, knowledge or competence on the part of the public authority, there is recourse available to the citizen.

In the event that the information is requested because it concerns the life or personal liberty of a person, it must be given within forty eight hours.[82]

The citizen obtaining information is permitted unrestricted use of such information for any lawful purpose.[83] This is also seen as a hallmark of good RTI legislation.[84]

Another important factor is that the duty to give reasons for decisions has been codified with respect to persons, in the RTI Act, allowing a person to seek it in writing from a public authority making such a decision.[85]

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[81] Global Right to Information Rating - Sri Lanka at http://www.rti-rating.org/view_country/?country_name=Sri%20Lanka

[82] *Right to Information Act,* No. 12 of 2016, S. 25(3)

[83] Gazette No. 2004/66 - Friday, February 03, 2017, Regulation 19(02)

[84] https://www.law-democracy.org/live/wp-content/uploads/2012/08/17.02.10.Sri-Lanka-RTI.PR.pdf

[85] *Right to Information Act,* No. 12 of 2016, S. 35.

The Act and Regulations have done away with many of the excuses that could potentially have been used by Public Authorities. If an information officer has not been appointed, the head of the Public Authority is automatically deemed to be the information officer.[86] The information officer is expected to prioritize their RTI-related duties over their other duties.[87] They are expected to afford reasonable assistance to citizens in filing requests, as well as to forward misdirected information requests to relevant Public Authorities, if the information officer is aware of the Public Authority to which the request should have been made.[88]

The RTI Commission

The RTI Commission is a body appointed under the RTI Act, vested with numerous powers. The appointment of the Commission is provided for, and entails the submission of nominations by several sectors – civil society, media, and the Bar Association of Sri Lanka[89] – from which the Constitutional Council sends its recommendations to the President. The appointment is made by the President, and the Commissioners hold office for a period of five years.

In terms of the Tshwane Principles, the term 'independent' has been defined to mean "institutionally, financially, and operationally free from the influence, guidance, or control of the executive, including all security sector authorities."[90] The process of appointment of members to the RTI Commission – while commendably participatory - can

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[86] *Right to Information Act,* No. 12 of 2016, S. 23(1)(b).

[87] Gazette No. 2004/66 - Friday, February 03, 2017, Regulation 21(04).

[88] Gazette No. 2004/66 - Friday, February 03, 2017, Regulation 04(06).

[89] *Right to Information Act,* No. 12 of 2016, Section 12.

[90] *The Global Principles on National Security and the Right to Information,* June 12, 2013, p.11.

be said to be open to interference of the Executive, given the formal appointment by the President (which can be delayed) and the constitution of Constitutional Council. Moreover, by the end of 2016, there was no budgetary allocation made towards the RTI Commission. The Commission can only raise funds in two ways: first through the approval of Parliament, and second through donations, gifts or grants from any source in or outside Sri Lanka, provided the source and purpose of such funds are made available to the public.[91] The fact that Sri Lanka's Commissions are compelled to seek budgetary allowances from Parliament can significantly undermine their independence.

On the same date the Bill was enacted on 4th August 2016, a notice was published in the newspapers calling for nominations. Following some confusion, three members[92] out of five were appointed on the 31st of September, 2016. As two positions were still vacant, the Commission were wary of meeting formally. After several calls to action,[93] a second round of nominations was called, and the Commission was fully constituted on 22nd December, 2016.[94]

In addition to hearing and dispensing of appeals from or against Public Authorities, the Commission has been granted advisory[95] and monitoring powers over information officers and Public Authorities with respect to compliance with the RTI Act. It is also the Commission that is empowered to prosecute[96] alleged offenders in terms of the

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91 *Right to Information Act,* No. 12 of 2016, Section 16.

92 Mr. Mahinda Gammanpila, Ms. Kishali Pinto-Jayawardena and Mr. S.G. Punchihewa.

93 "Government Called on to Fully Constitute RTI Commission" at http://www.rtiwatch.lk/government-called-on-to-fully-constitute-rti-commission/

94 The remaining members appointed were Justice A. W. A. Salaam and Dr. Selvy Thiruchandran

95 *Right to Information Act,* No. 12 of 2016, Section 5(5).

96 *Right to Information Act,* No. 12 of 2016, Section 39(4).

offences recognized by section 39(1) of the Act, including deliberately obstructing the provision of information, the destruction, alteration or concealing of the same, refusing to appear before the Commission, refusing to give effect to an order of the Commission, or giving false information before the Commission. The Commission has the power to hold inquiries and to examine persons under oath.[97] A person is found guilty at summary trial in the Magistrate's Court is liable to a fine of up to fifty thousand rupees and/or imprisonment of up to two years.

It is clear that the Commission has far reaching powers, as well as the teeth with which to bite. Concerns remain, however, about several factors. If the Commission is to be taken seriously by Public Authorities – especially in an unfavourable political atmosphere – it may need to use its prosecutorial powers effectively and without hesitation, should the need arise. Furthermore, from the angle of access to justice, the Commission must be conscious of the need to remain accessible to the citizen. An overly legalistic process like that of a court of law could discourage citizens from engaging in appeals. Another problem that could arise is that the multifarious nature of the powers, duties and functions of the Commission may lead to an inability to cope with the large number of cases that are bound to come up as appeals or complaints before the Commission.

[97] *Right to Information Act*, No. 12 of 2016, Section 15.

7. Conclusion

While the RTI framework set out in the Act and the Regulations have created a strong mechanism for access to information in Sri Lanka, there remain a few provisions that can be improved.

Section 40 – often cited as the whistleblower protection provision - is one such example. The language of the law still requires any officer willing to expose information disclosing corruption or other wrongful act, to make a calculation as to whether that information is permitted to be disclosed under the Act. It flows therefore, that such a person would have to carefully consider each of the exception clauses in the Act, as well as engage in weighing the information in relation to the public interest it serves. This view was affirmed by the Supreme Court in its special determination regarding the RTI Bill.[98] This weak whistleblower provision may not act as a catalyst to potential whistleblowers and could have been formulated more strongly in order to give effect to the Act's stated purpose of fostering a culture of transparency and combatting corruption.[99] An unqualified, positive formulation of whistleblower protection would be recommended. This should potentially extend to incentives for whistleblowers. In the absence of an amendment to the law, and in any case, a complementary law for the protection of whistleblowers would be encouraged.

Another key concern as enumerated above is the mindset change that needs to occur in the public sector. The Act indeed allows honest officials to seek its protection. However, the actual conversion of corrupt, inefficient or apathetic officials into proactive, efficient

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[98] Sripavan, J. held, "...in deciding whether or not to disclose the contents of a particular document, a Judge must balance the competing interests and make his final decision depending upon the particular facts involved in each individual case.", S.C.(S.D.) No.22/2016.

[99] *Right to Information Act,* No. 12 of 2016, preamble to the Act.

upstanding officials takes much more than just a legal framework. This system requires a majority of administrative officers to understand and implement an extremely nuanced law that is in fact constitutionally underpinned. Therefore, change can only take place with careful training, guidance and compliance monitoring, along with political will. This will in turn result in faith in the administrative system being reinstated, in the citizens.

The oft forgotten factor is that mindset change is not necessarily limited to the public sector. The citizen who has for years been steeped in a society that sees government opacity as the norm, cannot by the wave of a wand – or the enactment of a single law – be galvanized into action. The realization of the fruits of this law will take long term investment and retraining towards the values captured therein.

It must be emphasized that at this early stage of the implementation of RTI in Sri Lanka, it would be dangerous to allow the Act to be amended. As the Act comes into force, politicians and public officials alike will begin to feel its sting – both in terms of apprehending issues that have taken place and deterring future occurrence. It is at that point that the Act must be best protected from proposals for amendment or 'improvement', at any cost.

It is no secret that this type of legislation has been proposed elsewhere with much gusto, only to have the same proponents realize the full potential of its scope. The ever looming threat of amendment is as true in India or in the United Kingdom, as it is in Sri Lanka. Tony Blair, Prime Minister of the United Kingdom and an ardent advocate for the freedom of information at its inception famously wrote:

> "Freedom of Information. Three harmless words. I look at those words as I write them, and feel like shaking my head till it drops off my shoulders. You idiot. You naive, foolish, irresponsible

> nincompoop. There is really no description of stupidity, no matter how vivid, that is adequate. I quake at the imbecility of it.
>
> Once I appreciated the full enormity of the blunder, I used to say - more than a little unfairly - to any civil servant who would listen: Where was Sir Humphrey when I needed him? We had legislated in the first throes of power. How could you, knowing what you know have allowed us to do such a thing so utterly undermining of sensible government?"[100]

This type of realization will be inevitable, in Sri Lanka. Sri Lanka has been afforded an inimitable opportunity, and that is why citizens must be allowed a taste of the potential that RTI unfolds and be emboldened by it, so that at any future point when amendment or any weakening of their rights is proposed the people can be the watchful protectors of their right to information.

[100] Tony Blair, *A Journey*, September 2010.

SCHEDULE I

UN Conventions on Human Rights & International Conventions on Terrorism Signed, Ratified or Acceded to by Sri Lanka as at 31st December 2016

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

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

Ratified on 8th February 2016

Convention on International Trade in Endangered Species of Wild Fauna and Flora

Acceded on 4th May 1979

Convention on the Rights of the Child (CRC)

Ratified on 12 July 1991

Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation

Acceded on 6th September 2000

International Convention against the Taking of Hostages
Acceded on 6 September

International Convention for the Suppression of Acts of Nuclear Terrorism
Acceded on 14 September 2005

International Convention for the Suppression of Financing of Terrorism
Ratified on 6 September

International Convention on the Elimination of All Forms of Racial Discrimination(ICERD)
Acceded on 18 February 1982

International Convention on the Protection of All Migrant Workers and Members of their Families
Acceded on 11 March 1996

International Convention for the Protection of All Persons from Enforced Disappearance
Signed on 10 December 2015

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

Paris Agreement on Climate Change

Ratified on 21 Sep 2016

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 II as amended on 03 May 1996) annexed to the Convention on Prohibitions or Restrictions on Use of certain Conventional Weapons

Acceded on 24 September 2004

Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children – Supplementing the United Nations Convention against Transnational Organised Crime

Signed on 15 December 2000

Protocol on Prohibitions and Restrictions on the use of Mines, Booby-traps and Other Devices (Protocol II as amended on 03rd May 1996) annexed to the Convention on Prohibitions or Restrictions on Use of certain Conventional Weapons

Acceded on 24 September 2004

The Ramsar Convention on Wetlands

Acceded on 15 October 1990

United Nations Convention against Transnational Organised Crime

Signed on 15 December 2000

United Nations Convention on the Law of the Sea

Acceded 19 July 1994

Vienna Convention on Consular Relations

Acceded on 4 May 2006

Vienna Convention for the Protection of the Ozone Layer

Acceded 15 December 1989

SCHEDULE II

ILO Conventions Ratified by Sri Lanka as at 31 December 2016

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
C7	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	
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	

No	Convention Name	Ratified Date	Present Status
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	
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
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	

No	Convention Name	Ratified Date	Present Status
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	
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	
C122	Employment Policy Convention	3 Feb 2016	
C131	Minimum Wage Fixing Convention, 1970	17.03.1975	
C135	Worker's Representatives Convention, 1971	16.11.1976	

No	Convention Name	Ratified Date	Present Status
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	
C185	Seafarers Identity Documents Convention	02 12.2016	

SCHEDULE III

Humanitarian Law Conventions Ratified by Sri Lanka as at 31st December 2016

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 2016

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 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), 11 July 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 II)- 8 June 1977 (date of adoption), 7 December 1978 (entered into force)

Protocol to the Convention relating to the Status of Refugees - 16 December 1966 (date of adoption), 4 October 1967 (entered into force)

Rome Statute of the International Criminal Court (ICC) – 17 July 1998 (date of adoption), 1 July 2002 (entered into force)

SCHEDULE V

Fundamental Rights (FR) Cases Decided during the year 2016

Alawala v Inspector General of Police SC (FR) 219/2015, SC Minutes 15 February 2016.

Ameer Ismail v Former Director General CIABOC SC (FR) 277/ 2010, SC Minutes 7 September 2016

Aravinda v Police Sergeant, Police Station, Pitabeddara SC (FR) 26/2009, SC Minutes 2 August 2016

Athukorala v Secretary, Ministry of Education SC (FR) 232/2012, SC Minutes 28 October 2016

Ceylon Electricity Board Accountants' Association v Minister of Power and Energy SC (FR) 18/2015, SCM 03 May 2016

De Silva v Principal, Visakha Vidyalaya SC(FR) 19/2015, SC Minutes 11 July 2016

De Soyza v Chairman, Public Service Commission SC (FR) 206/2008, SC Minutes 9 December 2016.

Gamini v Inspector of Police, CID SC (FR) 81/2011, SC Minutes 22 August 2016.

Gammanpila v Inspector of Police Special Investigation Unit, Police Headquarters SC (FR) 207/2016, SC Minutes 11 July 2016.

Hettiarachchi v Principal, Mahamaya Balika Vidyalaya SC (FR) 41/2016, SC Minutes 2 November 2016.

Kobindarajah v Eastern University of Sri Lanka SC (FR) 24/2016, SC Minutes 21 June 2016.

Laknidu v Principal, Dharmashoka College, Ambalangoda SC (FR) 136/2015, SC Minutes 10 November 2016.

Liyanage v Chairman Pradeshiya Sabha, Kelaniya SC (FR) 573/2010, SC Minutes 28 November 2016.

Manel Dassanayake v Secretary, Ministry of Agricultural Development and Agrarian Services SC (FR) 267/2010, SC Minutes 9 February 2016;

Manohari Pelaketiya v.*Secretary, Ministry of Education* SC (FR) 76/2012, SC Minutes 28 September 2016.

Noble Resources International Pte v. Minister of Power and Renewable Energy SC (FR) 394/2015, SC Minutes 24 July 2016.

Premalal Perera v Minister of Indigenous Medicine SC (FR) 891/2009, SC Minutes 31 March 2016.

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Shereffdeen v Principal, Visakha Vidyalaya SC (FR) 01/2015, SC Minutes 3 October 2016.

Sri Lanka Telecom PLC v Telecommunications Regulatory Commission of Sri Lanka SC (FR) 194/ 2016, SC Minutes 7 October 2016.

Tilekeratne v Sergeant Ellepola SC (FR) 578/2011, SC Minutes 14 January 2016.

Tirathai Public Co Ltd v CEB SC (FR) 108/2016, SC Minutes 8 August 2016.

Wickramaratna v University Grants Commission SC (FR) 13/2015, SC Minutes 20 July 2016.

Wijotmanna v OIC, Police Station, Katugastota SC (FR) 138/2007, SC Minutes 31 March 2016.

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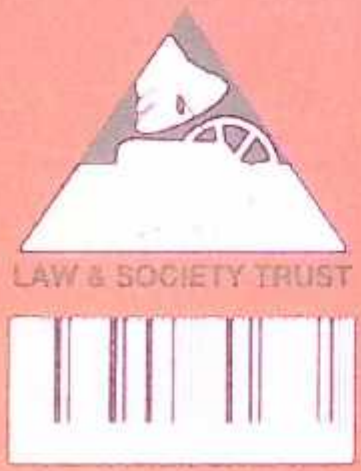

Law & Society Trust
#3, Kynsey Terrace
Colombo 8

Tel : +94 11 2691228/2684845/2684853
Fax : +94 11 2686843
Email : lstadmin@sltnet.lk
Website: www.lstlanka.org

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