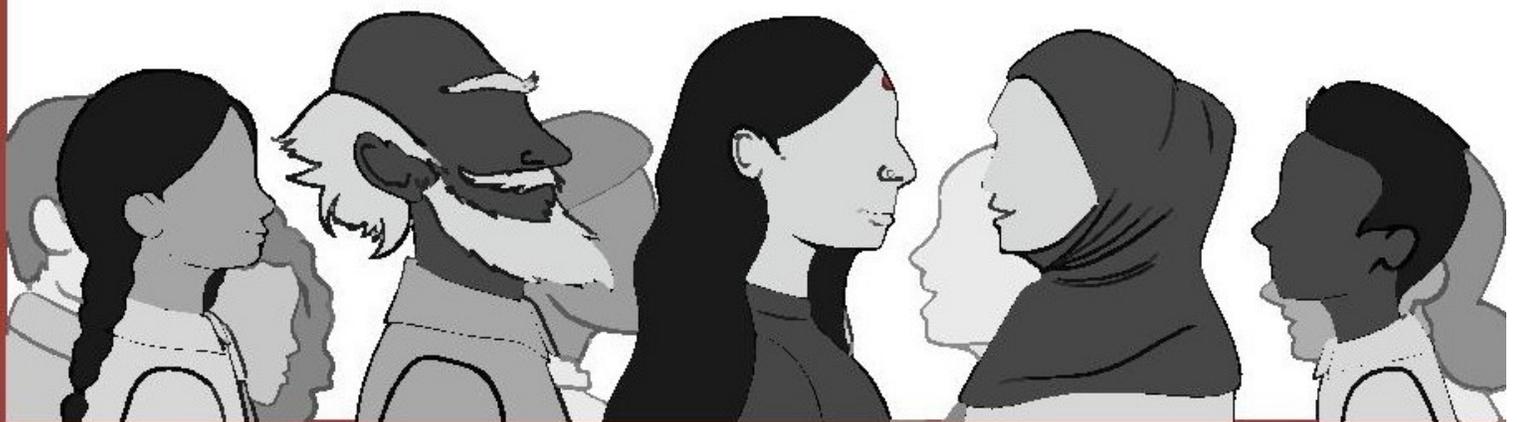


SRI LANKA

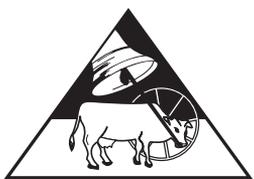
STATE  
OF  
HUMAN RIGHTS

2018



**SRI LANKA:  
STATE OF HUMAN RIGHTS 2018**

This report covers the period January to December 2017



LAW & SOCIETY TRUST

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Colombo 8

Sri Lanka

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*Assigned articles represent the view of the respective author, and are not necessarily those of their affiliated institution or employer, other contributors to this volume, nor of the Law & Society Trust.*

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## ABBREVIATIONS & ACRONYMS

<b>ABM</b>	Associated Battery Manufactures
<b>AG</b>	Attorney-General
<b>AI</b>	Amnesty International
<b>APRC</b>	All Party Representative Conference
<b>CAT</b>	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
<b>CED</b>	Committee on Enforced Disappearances
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination Against Women
<b>CERD</b>	Committee on the Elimination of Racial Discrimination
<b>CESCR</b>	Committee on Economic, Social & Cultural Rights
<b>CIFC</b>	Colombo International Financial City
<b>CMEV</b>	Center for Monitoring Election Violence
<b>ICRMW</b>	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
<b>CMW</b>	Committee on Migrant Workers
<b>COI</b>	Commission of Inquiry
<b>CPA</b>	Centre for Policy Alternatives
<b>CRC</b>	Convention on the Rights of the Child
<b>CRPD</b>	Committee on the Rights of Persons with Disabilities
<b>ICRPD</b>	International Convention on the Rights of Persons with Disabilities
<b>CTF</b>	Consultative Task Force on Reconciliation
<b>EPDP</b>	Eelam People's Democratic Party
<b>EU</b>	European Union
<b>FR</b>	Fundamental Rights

<b>HRC</b>	Human Rights Council
<b>HRCSL</b>	Human Rights Commission of Sri Lanka
<b>HRTF</b>	Human Rights Task Force
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICERD</b>	International Covenant on the Elimination of All Forms of Racial Discrimination
<b>ICES</b>	International Centre for Ethnic Studies
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>ICJ</b>	International Commission of Jurists
<b>ICPED</b>	International Convention for the Protection of All Persons from Enforced Disappearance
<b>IDPs</b>	Internally Displaced Persons
<b>JHU</b>	Jathika Hela Urumaya (National Sinhalese Heritage Party)
<b>JSC</b>	Judicial Services Commission
<b>JVP</b>	Janatha Vimukthi Peraumuna (People’s Liberation Front)
<b>LLRC</b>	Lessons Learnt and Reconciliation Commission
<b>LST</b>	Law & Society Trust
<b>LTTE</b>	Liberation Tigers of Tamil Eelam
<b>MOU</b>	Memorandum of Understanding
<b>NGOs</b>	Non-Governmental Organisations
<b>NPC</b>	National Police Commission
<b>OHCHR</b>	Office of the United Nations High Commissioner for Human Rights
<b>OMP</b>	Office of Missing Persons
<b>ONUR</b>	Office of National Unity and Reconciliation
<b>PA</b>	People’s Alliance
<b>PLOTE</b>	People’s Liberation Organization of Tamil Eelam

<b>PSO</b>	Public Security Ordinance
<b>PTA</b>	Prevention of Terrorism Act
<b>SC</b>	Supreme Court
<b>SGI</b>	Sub-Committee on Gender Issues
<b>SLFP</b>	Sri Lanka Freedom Party
<b>SLMC</b>	Sri Lanka Muslim Congress
<b>SLMM</b>	Sri Lanka Monitoring Mission
<b>SLT</b>	Sri Lanka Telecom
<b>SPT</b>	Subcommittee on Prevention of Torture
<b>TID</b>	Terrorist Investigation Department
<b>TNA</b>	Tamil National Alliance
<b>TULF</b>	Tamil United Liberation Front
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UN</b>	United Nations
<b>UNDP</b>	United Nations Development Programme
<b>UNHCHR</b>	UN High Commissioner for Human Rights
<b>UNHCR</b>	United Nations High Commissioner for Refugees (Also known as the UN Refugee Agency)
<b>UNHRC</b>	United Nations Human Rights Council
<b>UNICEF</b>	United Nations International Children’s Emergency Fund
<b>UNP</b>	United National Party
<b>UPFA</b>	United Peoples’ Freedom Alliance
<b>UPR</b>	Universal Periodic Review

## FOREWORD

In 2018, the Sri Lanka: State of Human Rights Report (SHR) marks its 25th anniversary since it was first published in 1993. Thus for a quarter century the SHR has been used by researchers, academics, human rights activists and students of human rights and law to determine Sri Lanka's compliance with international human rights standards and norms thereby comparing the country's performance in the light of these international norms in the application of its domestic law, policy and practices.

This landmark publication, spearheaded by the late Dr Neelan Tiruchelvam, himself a victim of the ethnic conflict that defined human rights in the country, was an important watershed in the history of human rights protection in Sri Lanka. Prior to its publication, there was no document that systematically surveyed the state of human rights in the country against its international commitments.

The SHR 2018 is divided into two main sections; the Historical section and the Review section. The Overview and Civil War, War Ending, and Dilemmas of Peace Building in Sri Lanka, 1983-2017 are historical in nature and look at events, processes and human rights issues debated and discussed from as far back as 1983.

*Judiciary Interpretation of Fundamental Rights, International Monitoring of Human Rights 2017, Old Wine in New Bottles: Returning of Old Authoritarianism in the Neo-Liberal Era and Human Rights and Income Tax in Sri Lanka*, fall under the Review section following the SHR format of previous years which describes and analyses the human rights situation of the preceding year and thus mainly limits its scope to a period of one year.



# I

## OVERVIEW OF THE SRI LANKA STATE OF HUMAN RIGHTS, 2018: REMINISCING THE PAST 25 YEARS

*Sumudu Atapattu\**

### 1. Introduction

The year 2018 marks the 70<sup>th</sup> anniversary of the Universal Declaration of Human Rights, the historic document that formed the foundation of international human rights law. As the international community celebrates this watershed moment, the Law & Society Trust is gearing up to celebrate its own milestone — the 25<sup>th</sup> anniversary of the *Sri Lanka: State of Human Rights* report.

This important publication spearheaded by the late Dr, Neelan Tiruchelvam — himself a victim of the ethnic conflict that defined human rights in the country — was an important watershed in the history of human rights protection in Sri Lanka. Before its publication, there was no document that systematically surveyed

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the state of human rights in the country against its international commitments. As the first *Sri Lanka: State of Human Rights* report noted:

*This report represents an important watershed with regard to human rights in Sri Lanka. This is the first attempt at an annual review of human rights in Sri Lanka undertaken by concerned human rights activists and scholars. This report is consequent to an initiative by INFORM, Nadesan Centre for the Study of Human Rights and the Law and Society Trust.*

While the initiative may have come from all three organisations, it was ultimately the Law & Society Trust (LST) that carried the project to fruition and has been doing so since 1993. Not only did LST start this report, it also translated the report into Sinhala and Tamil as it felt that the report should be accessible to everyone in the country in their own language. It is sold at a nominal price — just enough to cover the costs. Diakonia has been the primary funder of this project in recent years. Previous funders have included NORAD and SIDA.

When the report was first launched, the office had only one computer. I was involved in the report in some form or other in all but the first report. Dr. Tiruchelvam believed strongly that the first copy of the report should be handed over to the government. The day before the formal handing ceremony, we would work until the wee hours of the morning trying to finish the formatting and printing of the report. None of us were fully conversant in MS Word at that time and trial and error was the name of the game.

However, it was also a lot of fun. We would get down “wade”<sup>1</sup> for dinner, call home to say that we were getting late, and settle down for a long night of work over many cups of tea. With just one computer to do all the corrections and formatting, finalising the document was quite a herculean task. The computer would freeze many times. The printer would refuse to print anymore. Finally, exhausted, we would head home — after the final printout was taken — only to return the next day for the official presentation ceremony.

However, getting the report ready for the official ceremony was only the first step. We still had to get the report ready for publication. This was a huge task as none of the authors had been given a style guide. When I joined LST in May 1995, the 1994 report was in full swing.<sup>2</sup> Even though I was supposed to run the Law and Economy Program, I took it upon myself to make the report ready for publication. As no style guide had been given, this was quite a task. Little issues like punctuations, numbers and the footnote style consumed us. We wanted to make sure that the chapters were as consistent as possible. From the next report onwards, we gave a style guide to the authors when we commissioned each chapter which made our lives much easier.

While the production of the “SHR” as it was affectionately called by us was “fun”, nothing could conceal the grave human rights

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<sup>1</sup>A very popular savory vegetarian snack in Sri Lanka.

<sup>2</sup> The report was called State of Human Rights 1994 as it was looking at events in 1994 although the publication was done in 1995. This led to some confusion so from 1996, the year was changed to the actual year it was produced. As a result, there is a gap in the sequence — from SHR 1995 the report jumps to SHR 1997 with a note to say that it surveys events that took place in 1996.

violations taking place in the country. In January 1996, the year after I joined the LST, the LTTE bombed the Central Bank in Colombo. Many lost their lives and so many were maimed for life. Next year, a train carrying hundreds of workers during rush hour was bombed near Dehiwala, a city close to Colombo. A war was waging in the North and East between government forces and the LTTE. Many places of worship were attacked, including the sacred Temple of the Tooth in Kandy and the Sri Maha Bodhi (the sacred Bo tree considered the oldest tree in the world on record) in Anuradhapura. These attacks were clearly carried out to provoke the majority in the hope they would create another “black July”. But fortunately, sanity prevailed.

The human cost of the war was horrendous. So many young lives were lost on both sides to the conflict. In September 1998 alone, it is estimated that over 2,000 combatants from both sides were killed. In 2006, almost 4,000 people were killed. Many “disappeared.” At one point, Sri Lanka had the highest number of disappearances in the world.<sup>3</sup> Torture in custody was prevalent as highlighted by the large number of fundamental rights petitions filed in the Supreme Court. Illegal detention for unlimited periods of time at undisclosed places was widespread. The list of human rights violations unfortunately went on. Both sides to the conflict were guilty of massive human rights violations. The SHR reports could not have come at a more opportune time. Because the reports were done by a Sri Lankan NGO, and because the report used Sri Lanka’s international human rights obligations as a yardstick to measure Sri Lanka’s compliance, the reports were well-

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<sup>3</sup>Amnesty International, Enforced Disappearances, <https://www.amnesty.org/en/what-we-do/disappearances/>.

received by the government. There was a period of openness during which the government under President Chandrika Kumaratunga worked with many human rights NGOs to improve the human rights situation in the country. This, however, was short-lived.

This overview does not attempt to summarise the human rights situation in the country over the past 25 years. Rather, it will highlight some significant areas of concern, as well as some achievements. In compiling this overview, I have used mainly the overviews of the past Human Rights Reports prepared by LST. No independent research was carried out.

## **2. Twenty-five Years of Human Rights Reporting**

### **2.1. *The ethnic conflict***

The ethnic conflict that took place predominantly in the North and East since 1983 (although the entire country was affected) defined the human rights situation in the country. When parliamentary and presidential elections were held in 1994 and the People's Alliance (PA) and Chandrika Bandaranaike Kumaratunga were elected, it ushered in a period of much-needed respite from 17 years of authoritarian rule under the United National Party (UNP). During this time Sri Lanka witnessed the brutal suppression of the *Janatha Vimukthi Peramuna* (JVP) which itself was responsible for many acts of violence. Human rights came to the forefront of the election campaign. The elections themselves came under the spotlight with questions raised about political participation, election-related violence, misuse of state resources and the media, issues of electoral areas access in LTTE controlled areas and IDPs exercising their right to vote. Two weeks before the presidential

election, the UNP presidential candidate Gamini Dissanayake and over 50 others were killed by a suicide bomber at an election rally. The LTTE was the main suspect for the attack (although it never claimed responsibility) and this reminded everybody how fragile the situation was. The new government faced many challenges but improving the human rights situation in the country was a priority.

The PA government began talks with the LTTE soon after coming to power and both parties agreed to a cessation of hostilities in January 1995. Minority rights, language rights, and non-discrimination especially in relation to education, employment and access to health became contentious issues. However, the return to hostilities in April 1995 again led to the tightening of security measures throughout the country and in turn led to many human rights violations, including arbitrary arrests and detention, torture and disappearances.

The conflict intensified in 1996, leading to a large number of IDPs in addition to those who were already displaced. The gang rape and murder of Krishanthi Kumaraswamy and the subsequent murder of her mother, brother and neighbour by security forces led to widespread condemnation both nationally and internationally. Government responded swiftly, highlighting the importance of public mobilisation and attention. There was a marked rise in the number of disappearances, particularly on the Jaffna peninsula.

Attacks on civilians by the LTTE continued. Two of the most horrendous acts were the bombing of the Central Bank in Colombo which killed over 90 people and injured many more and the bombing of a crowded commuter train in the southern suburb of Colombo which killed 70 people and injured many more.

The assassination of Dr Neelan Tiruchelvam, MP — the founder of LST and ICES and partner of Tiruchelvam Associates — by a LTTE suicide bomber in July 1999 dealt a severe blow to not just the three institutions he headed, but to the entire human rights community in Sri Lanka. LST struggled to recover and even now — 19 years later — it is still hard to come to terms with this tragedy. His vision, his intellect and above all, his humility, is sorely missed. Dr Tiruchelvam was working on a constitutional solution to the ethnic conflict with the government when he was assassinated. He was an ardent crusader for the rights of Tamil civilians and it is ironic that he was killed by the very organisation that was claiming to fight for the rights of the Tamil minority. It took a long time for LST to come back to some semblance of normalcy and in many respects, it never recovered from this sad and senseless killing. At the same time, LST made a great effort not to give into terrorism and to continue the projects spearheaded by Dr Tiruchelvam, including the SHR. Without his direction and leadership, however, LST struggled to find its footing and no other person was able to fill the void created by his untimely demise. 2019 will mark his 20<sup>th</sup> death anniversary and it is an understatement that we greatly miss him.

Many issues that were dear to his heart were discussed regularly in the report. The topics included emergency rule, judicial protection of human rights, integrity of the person, IDPs, women’s rights, children’s rights, torture, and freedom of expression. For the first time, SHR 2000 carried a critical examination of the human rights institutions in Sri Lanka: the Human Rights Commission, the Ombudsman, the Official Languages Commission, and the Commission on Bribery and Corruption. In addition, the 2000 report examined the implications of an aging population and

attacks on democratic practice, including elections. The SHR has also evaluated the human rights of prisoners, plantation workers, persons with disabilities, persons with HIV/AIDS, environmental rights, right to health, and labour rights.

The fiftieth anniversary of independence from Britain was celebrated by Sri Lanka in 1998 amidst the continuing conflict in the North and East. Days before the anniversary and celebration that was due to be held in Kandy, the Temple of the Tooth — one of the most sacred places in the country for Buddhists — was bombed by the LTTE. Although many countries around the world had named the LTTE as a terrorist organisation, the Sri Lankan government did so only after this bombing, banning the LTTE under emergency regulations.

Needless to say, the ongoing ethnic conflict and the generalised environment of violence have had an impact on democratic processes in the country not just in the conflict zones but in other parts of the country as well. Elections to 17 local councils in Jaffna were scheduled for January 1998. However, the Mayor of Jaffna was assassinated by the LTTE and her successor was also killed just four months later when a bomb exploded at the Nallur Municipal Office in Jaffna.

## ***2.2 Impunity, extrajudicial killings, disappearances, and arbitrary arrests and detention***

One of the major issues that the SHR reports consistently discusses is impunity. Despite assurances given to the UN Human Rights Commission (as it was then called) the UNP government failed to investigate past human rights abuses. Fulfilling one of its election promises, the PA government established three presidential

commissions of inquiry in November 1994, each covering a specified area of the country. A further commission of inquiry was established to investigate the assassination of certain prominent political leaders in the country. Excavation of mass graves under the UNP did not progress beyond the preliminary haphazard activities. People in charge were threatened and the lawyer who reported the graves was shot at.

Closely tied to the issue of impunity is extrajudicial killings and disappearances. Reports of arbitrary killings and disappearances surfaced again in 1995 and ethnic tensions simmered in the South following LTTE attacks. But there were no outbreaks of violence. While new regulations were issued on the procedures to be followed when a person was arrested, these directives were not generally followed and no real attempt was made by the government to enforce them.

Very few cases reached the courts and those cases in which charges were brought dragged on for years. One exception was the *Krishanthi Kumaraswamy* case<sup>4</sup> which attracted widespread publicity and condemnation. In July 1998, six soldiers and a reserve policeman were convicted of the rape and murder of Krishanthi, and murder of Krishanthi's mother, brother and neighbour. Several more cases were under trial as 1998 came to an end. In the Bindunuwewa massacre case (*Munasinghe Arachige Sammy and others v. AG*)<sup>5</sup>, the Supreme Court acquitted all defendants accused of killing 27 Tamil detainees at the Bindunuwewa rehabilitation centre

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<sup>4</sup>*Somarathne Rajapakse Others v. Hon. Attorney General* (Krishanthi Kumaraswamy Rape Case)[2010] 2 Sri.LR, p. 113.

<sup>5</sup>[2007] 2 Sri L.R, p.216.

in October 2000. There were several concerns relating to this case — detention of people without being charged for over one year; juveniles being held in the same facilities as adults; and the inability of the state to rehabilitate former child soldiers.

A closely related area of concern is the forensic excavations of sites of suspected mass graves of those who had “disappeared”. In 1994, a mass grave was found in Suriyakanda, where it was speculated that the remains of the bodies of the schoolboys killed in the *Embilipitiya Abduction and Murder Case* were found, along with many others.<sup>6</sup> A mass grave at Chemmani on the Jaffna peninsula where the remains of hundreds of people who disappeared in 1996 were believed to be buried was revealed. The report called upon the government to use methods consistent with the UN Guidelines on the Disinterment and Analysis of Skeletal Remains in order to ensure that the evidence is handled in a proper manner and witnesses are adequately protected.

Philip Alston, the UN Special Rapporteur on Extrajudicial Summary or Arbitrary Executions, undertook a mission to Sri Lanka in 2005 at the invitation of the government. In his report, Alston focused on political killings relating to the ceasefire, the role

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<sup>6</sup> This case was heard in the Ratnapura High Court in 1995. Twenty-two schoolboys from Embilipitiya were kidnapped, tortured and all but three killed by soldiers of the Sri Lankan Army. The Government and the Sixth Artillery Regiment at the time denied the events until the UNP defeat in 1994, nearly five years after the abductions took place. Six soldiers and the principal of the school the boys attended were sentenced to 10 years imprisonment. Two high ranking officials were acquitted. The case, apart from its horror, represented another example of the State failing to adequately prosecute crimes committed by members of its armed forces.

of paramilitaries and the impact of the Karuna split and the use of civilian proxies by the LTTE in attacks on the Sri Lankan army. The report also referred to the use of violence particularly by the LTTE to control Tamil civilians. He pointed out that although the international community wanted to call on the LTTE to abide by human rights standards, it was reluctant to do so directly as that could be interpreted as treating it like a state. The report also pointed out that there had been a failure to investigate political killings, summary executions being carried out by the Police and reports of resurgence of enforced and involuntary disappearances especially of Tamil youth. At the Human Rights Council session in June 2008, Alston again drew attention to the use of allied paramilitary groups to carry out the government's counter-insurgency strategy and to maintain control in the East and in Jaffna. It was reported that the Eelam People's Democratic Party (EPDP) and the People's Liberation Organization of Tamil Eelam (PLOTE) were responsible for unlawful killings and enforced disappearances. The government's response to the spate of attacks and killings had been far from satisfactory. It has been slow to conduct investigations and bring perpetrators to justice. One notable incident involved the United Peoples Freedom Alliance candidate Duminda Silva: shots fired from his vehicle killed one person in the crowd. No investigation was carried out and the case was dropped shortly after.

According to the US State Department, while reliable statistics on the number of disappearances were difficult to obtain, estimates range between 300-400 for the year 2009 with the majority taking place in the North and East. The government noted the need to establish one authoritative source of information relating to these incidents in its report to the Human Rights Council in 2008 and to

maintain a database of reported incidents. However, at the end of 2009 this framework was hardly evident and little or no information was provided to the families regarding abductees. The Working Group on Enforced or Involuntary Disappearances also expressed their concern over the number of reported cases of enforced disappearance in the country.

The year 2013 marked a significant departure from previous years, as for the first time in years not a single enforced or involuntary disappearance was reported. Similarly, arbitrary arrests and detentions ended in 2013 with the notable exception of Azath Salley, who was the General Secretary of the National Unity Alliance. While a fundamental rights case was filed on his behalf, it never proceeded, as Salley was released soon afterwards.

In addition to the detention of thousands of IDPs in “welfare camps” the government routinely arrested and detained Tamil citizens. Some arrests, such as that of an astrologer who gave negative predictions concerning the President, appear to be “patently arbitrary.” Amnesty International in its submission at the Universal Periodic Review (UPR) session on Sri Lanka pointed to the lack of clarity over procedures following arrests. Arbitrary detention and mistreatment of prisoners by police and armed forces was an ongoing concern. This was mainly due to the draconian provisions of the *Prevention of Terrorism Act* which undermined accepted international human rights norms on due process. Some 18,000 people have been arrested under the PTA, which conflicts with Sri Lanka’s obligations under the International Covenant on Civil & Political Rights (ICCPR).

The use of enforced disappearances started with the insurrection in the 1970s and continued throughout the armed conflict and the

insurrection in the South in the 1980s and 1990s. In 2015, Sri Lanka signed the International Convention for the Protection of All Persons from Enforced Disappearance and ratified it in May 2016. To give effect to this, the International Convention for the Protection of All Persons from Enforced Disappearance Bill was gazetted in February 2017. It was passed by Parliament in 2018. Article 2 of the Act defines the crime of “enforced disappearance”. Aiding and abetting are also offences. It is hoped that this new law will contribute to the elimination of enforced disappearances in the country.

### ***2.3 Torture***

The widespread use of torture in custody and impunity associated with it was a major concern during the conflict. The Supreme Court, the UN Committee against Torture, as well as local and international human rights organisations have called upon the government to end the culture of impunity relating to torture. Despite several awards of compensation against police officers in fundamental rights cases, only a few indictments have been filed by the Attorney-General. The Special Rapporteur on Torture in his report, while acknowledging the action taken by Sri Lanka to adopt domestic legislation to give effect to the Convention against Torture pointed out that more prosecutions and convictions will be required to “significantly affect the problem of impunity...”

Despite the fact that torture is illegal and a criminal offence, torture continues to take place particularly in the context of criminal investigations and in police custody. The Human Rights Commission revealed that it had received 413 complaints of torture in 2015, indicating that torture is not a thing of the past — we did not see the end of torture with the end of the war. The PTA gave

a good pretext for torture under the guise of interrogation and investigation. The methods of torture reported were inhumane and degrading and many detainees died in custody as a result.

#### **2.4 Emergency rule**

The country was under emergency rule for much of the civil war with only brief periods without it. Emergency regulations suspended basic safeguards against abuse and the Human Rights Task Force (HRTF), which was charged with registering and monitoring the welfare of the detainees, was deprived of its powers. In September 1995, emergency regulations imposed censorship on the reporting of all military activities for three months, which also hindered the activities of humanitarian organisations. In 1996 emergency rule, which was hitherto restricted to the North, East and Colombo, was extended to the entire country. Numerous emergency regulations were adopted, including a ban on May Day processions. Illegal detention led to the landmark case of *Wimalenthiran*, which significantly altered the trajectory of human rights abuses in detention.

With the ceasefire in 2002, emergency rule was lifted. This had a beneficial effect not only in relation to the integrity of the person but also in relation to freedom of expression. However, no effort was made to repeal the *Prevention of Terrorism Act* or to amend the *Public Security Ordinance*. The government, however, repealed the defamation provisions in the *Penal Code* and the *Press Council Law* and consultations were set in motion to draft a Freedom of Information Act.

## **2.5 Internally displaced persons (IDPs)**

One of the saddest results of the ethnic conflict was a generation of thousands of IDPs, many of whom were displaced multiple times. According to the Ministry of Rehabilitation and Reconstruction, at the end of 1996 there were close to 770,000 IDPs in Sri Lanka. These numbers were contested by NGOs and humanitarian agencies who argued that the actual number is higher by at least 70,000. Standard of living was not improved, camps were overcrowded, families were separated, poor sanitary conditions prevailed and mobility was restricted with little or no access to health services and education. The situation of IDPs remained dire and the UN Committee on Economic, Social and Cultural Rights highlighted their plight in its report on Sri Lanka in 1999. Access to food, shelter and education was limited and reports of forced labor in conflict zones emerged. The SHR 1999 report called upon the government to adhere to the UN Guiding Principles on Internal Displacement and incorporate them into policy concerning IDPs.

The plight of IDPs continued to be a cause for concern throughout the conflict. UNHCR estimated that 800,000 people were internally displaced at the end of 2001. Sanitation and health, malnutrition, education, sexual harassment, prostitution, rape and abuse were all major concerns. In addition, there were 144,000 Sri Lankan refugees in India. By the end of 2006, UNHCR reported that there were 469,200 IDPs and 89,400 returnees. Areas most affected were Trincomalee, Batticaloa, Jaffna, Killinochchi and Mullaitivu. The government was unable to cope with the speed of displacement and local NGOs, church groups, the World Food Program and the UNHCR assisted with the provision of food and shelter.

In September 2008, although it ordered the UN and NGOs to leave the Vanni region due to security risks, the government allowed UN personnel to accompany food convoys even when humanitarian access remained extremely limited. According to Amnesty International, tens of thousands of families were forced to live in the open during the rainy season in November 2009. It was alleged that the government deliberately under-estimated the numbers of civilians trapped behind LTTE lines, leading to a severe shortage of food and medicine. It is not clear how many civilians may have died due to the shortage of food and medicine during the last few months of the military offensive.

Following the conclusion of military operations in May 2009, approximately 280,000 civilians were placed in camps located in Vavuniya. About 245,000 were detained in “welfare centers” and were not allowed to leave on the ground that remaining separatist elements may have infiltrated the group. Many international observers and local legal experts questioned the long-term detention of IDPs which also violated the UN Guiding Principles on Internal Displacement.

Many of those released were unable to return to their homes due to damage from war or uncleared landmines. IDPs remaining in the Menik Farm were not allowed to move freely until December 2009 when a system of temporary exit passes was implemented. By early 2010, most of the detained IDPs were released to their relatives.

## ***2.6 Rights of children and child soldiers***

One of the most serious issues concerning children’s rights was the continued conscription of children by the LTTE as combatants

despite the assurances given to the UN Secretary General's Special Representative Olara Otunu. Following the visit by the Deputy Director of UNICEF to the Northern part of Sri Lanka where he met with LTTE representatives, the LTTE took a series of measures to not recruit children and to allow the UN to monitor compliance with these undertakings. Amnesty International appealed to the LTTE in October 2001 urging an end to the ongoing recruitment of children as "children have no role to play in war."

Another grave concern relating to children was the alarming rates of school drop-outs in the North and East. Two main reasons were contributing to this — an acute shortage of trained teachers in these areas and the need for children to contribute to the family income.

The UN Special Advisor to the Special Representative on Children in Armed conflict, Alan Rock visited Sri Lanka in November 2006. He reported on the practice of recruiting child soldiers by both the LTTE and the Karuna faction as well as signs that complicity existed between the government forces and the Karuna faction. The army denied allegations and the President promised an immediate investigation. However, no action had been taken by the end of the year.

Despite the assurances given at various times and the government's policy of 'zero tolerance' the LTTE and TMVP continued to recruit child soldiers in 2008 and 2009. Unconfirmed reports suggest that the LTTE greatly increased the recruitment of children in the face of government military operations in Killinochchi. It was reported that both boys and girls as young as 12 years were

forced to join. By the end of 2009, these children were held in government-run detention centres which sought to provide rehabilitation. Rehabilitation and reintegration of former combatants including children was identified by the government as a key priority in its report to the UN Human Rights Council.

**2.7 Attacks on the right to vote and democratic processes**

One of the worrying trends which had a direct bearing on democratic governance was the increasing militarisation of elections themselves. Elections became a site for widespread violence, intimidation, various malpractices — including voter fraud and misuse of state resources by the ruling party — and even murder of opponents. As the Overview of one of the reports noted: “It is a great irony that the public is placed at greater risk of violence and intimidation during election periods than at other times, violating the right to free expression through the vote.”<sup>7</sup>

Many displaced people were effectively disenfranchised as they were unable to register to vote or reach a polling station. In addition, elections were held under emergency rule and due to the censorship of military news, voters were denied information on important issues. On the positive side, the number of civil society organisations that monitor elections increased, as did the scope of their work. The Centre for Policy Alternatives filed a petition before the Human Rights Commission on the issue of politicisation and intimidation of state institutions. The HRC requested the Commissioner of Elections to direct the IGP to make public all directions, circulars and instructions issued to police to ensure free and fair elections. Despite the call to the

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<sup>7</sup> Overview, Sri Lanka: State of Human Rights 2001, p 3.

government to ensure that people were free to exercise their franchise without fear, no such action was taken: “It is most regrettable that the right to vote freely — a right so fundamental to the democratic process — remains vulnerable in Sri Lanka, despite the relatively high voter turn-out.”<sup>8</sup>

The 17th Amendment to the Constitution was passed in October 2001. It gave the Commissioner of Elections additional powers to ensure free and fair elections and to annul a poll where the vote has not been free, equal and secret. In the landmark case of *Egodawala and Others v. Dayananda Dissanayake and Others* the Supreme Court emphasised that the “mere semblance of a poll is not enough...” Violence continues to be a feature of the most democratic process in a democratic country — elections. The Centre for Monitoring Election Violence (CMEV) reported 4,208 incidents and 73 deaths during a period of 2 months immediately preceding the parliamentary elections held in December 2002. By any measure, this is a very high incidence of election-related violations. It is a real cause for concern that something as basic and fundamental as elections have become so militarised.

### ***2.8 Women’s rights, sexual violence and war widows***

Another issue of concern has been sexual violence against women in the context of the ongoing war in the North and East, although incidents of this kind were by no means confined to those areas. Indeed, a widely publicised event was the gang rape of a Tamil woman at a security check point in Colombo. Following several reports of rape by security forces in many parts of the North and East, Amnesty International called upon President Kumaratunge to take action to stop rape by security forces and to bring

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<sup>8</sup> Ibid., p 5

perpetrators to justice. However, the slow pace of investigations and the pressure exerted on medical personnel to cover up cases of rape have resulted in massive delays in bringing perpetrators to justice.

The end of the war in 2009 brought new challenges for the protection of women's rights in the North and East. Militarisation of the area compounded the challenges and women heads of households were affected by the slow pace of post-war recovery efforts. Loss of breadwinners due to the war (sometimes disappearances) threw women into a web of debt and their livelihoods were affected because of the increased use of machinery in harvesting and farming. Another issue was the lack of adequate housing and transfers of land title ownership. Increased sexual violence was another concern in the North and East.

On the positive side, attempts were made to improve the status of women in the country by adopting a law on Domestic Violence as well as one on Women's Rights. The Women's Rights Law sought to convert the National Committee on Women into a Commission with enhanced powers. A National Action Plan for the Protection and Promotion of Human Rights 2011-2016 contained a chapter dedicated to rights of women. A National Action Plan on Women 2014-18 was also drafted and a national committee was appointed to formulate an action plan for women-headed households as 23% of households are headed by women. Steps were also taken to formulate an action plan on gender-based violence.

## **2.9 Ceasefire, MOU and peace talks**

While Norway sought to initiate peace talks between the two parties in 2001, no formal talks took place and the unilaterally declared ceasefire by the LTTE in the early part of the year was rescinded by the LTTE itself. One of the most daring attacks by the LTTE outside the main conflict zone was its attack on the Bandaranaike International Airport. This had a huge economic and political impact on the country. In a separate suicide bomb attack, the Prime Minister Ratnasiri Wickramanayake escaped narrowly.

The general election in December 2001 brought the United National Front government to power under the leadership of Ranil Wickremasinghe and a sense of cautious optimism prevailed during 2002. The ceasefire agreed to between the LTTE and the Government was central to this. Despite some breaches, the ceasefire lasted throughout the year. The cessation of hostilities and the lifting of the embargo on the transport of numerous goods to the North East brought considerable improvement to the lives of those living within the conflict zones. As the ceasefire held and some checkpoints in the South began to be eased, it was generally felt that the ceasefire would hold. Resettling and rehabilitating the displaced and reconstructing the North East became the central issue of the peace talks. Another grave issue was the continued conscription of children by the LTTE, which involved both abductions and voluntary recruitment. Intensive lobbying by women's organisations led to the establishment of a sub-committee on gender issues (SGI) to advise on the inclusion of gender concerns in the peace process. Its first meeting took place in early 2003. During the second round of peace talks, the two parties agreed to invite Ian Martin, a former Secretary General of Amnesty International, to provide expert advice on the

incorporation of human rights into the peace process. Despite the signing of an MOU by the two parties, LTTE continued to recruit children and extort money and land from residents in the North and East. Moreover, the Sri Lanka Monitoring Mission (SLMM) — established to inquire into any violations of the terms of the MOU — seemed to be turning a blind eye to the abuses. In any event, their activities were confined to government-controlled areas and not LTTE-controlled areas. In April before the formal peace talks had started, the leader of the SLMC, Rauf Hakeem, met with the LTTE leader, V. Prabhakaran, to discuss issues relating to lands belonging to Muslims. While Mr. Prabhakaran promised to return these lands as soon as possible and the issue was taken up in the context of formal talks, no resolution was reached by the end of the year.

Soon after the MOU was signed, several restrictions on travel were lifted. So were the embargos on certain goods. These decisions were made in an effort to establish trust and to restore normalcy in the North and East. Later, through Norwegian facilitation, the LTTE agreed to open the A9 highway through Vanni which remained under LTTE control. In addition to easing restrictions on travel, restrictions on fishing in the North and East were also lifted. While there were periodic meetings between the government and the LTTE representatives, the LTTE was unwilling to enter into formal peace negotiations while it remained a proscribed organisation. In September 2002, the government lifted the ban and soon thereafter formal peace talks began with two sides exchanging prisoners of war. The MOU contained several provisions on protecting civilians from attacks as well as from torture, intimidation, abduction, extortion and harassment. They agreed that the head of the SLMM would be appointed by the

Norwegian Government and the members would come from Nordic countries. In addition, local monitoring committees were to be established in Jaffna, Mannar, Vavuniya, Trincomalee, Batticaloa and Ampara. While the SLMM was thought to have a strong proactive mandate, it did not appear to interpret its role that way and seemed to take a passive stand in relation to abductions, intimidation and other violations. Human rights organisations expressed concern that human rights provisions in the MOU were being overlooked. When Amnesty International officials visited the country in June 2002, it urged the Norwegian government to ensure that the SLMM and local committee members received human rights training.

The first round of talks, facilitated by the Norwegian government, was held in September 2002 in Thailand. It ended on a positive note with both parties affirming their determination to move forward to create conditions for lasting peace. At the second round of talks in October, again in Thailand, the parties agreed to invite Ian Martin to advise on human rights in the peace process. Several sub-committees were established relating to de-escalation and normalization, and on political matters. The third round of talks was held in Norway in December with talks focusing on the consolidation of the ceasefire, humanitarian and rehabilitation work, and political matters. The parties also acknowledged the need to ensure that women's priorities and needs were taken into consideration in the peace process and that the need to improve the lives of children affected by the conflict was also recognised. The LTTE agreed to work with UNICEF on an action plan to restore normalcy to children's lives. The parties also agreed to explore federal solutions to the conflict as the basis for their proposals.

Although the ceasefire between the government and the LTTE remained in force through 2004, no progress was made with regard to the peace talks. In November in his Heroes Day speech, the LTTE leader threatened to return to hostilities if peace talks did not resume on their terms. However, no hostilities had resumed when another disaster struck the war-ravaged country: the Indian Ocean tsunami hit the island on December 26, 2004 killing over 30,000 people and rendering over 400,000 people homeless. Those on the east coast were the hardest hit. Much of the year in 2005, the country tried hard to cope with the aftermath of the tsunami in addition to dealing with a disintegrating peace process.

On January 16, 2008, the Ceasefire Agreement between the government and the LTTE was officially terminated. State of emergency was enforced throughout 2008 and beyond the end of the military operation in May 2009. In May 2009 the armed forces militarily defeated the LTTE, capturing all LTTE-controlled territory and killing its leadership including Velupillai Prabhakaran. Both parties to the conflict were accused of committing gross violations of humanitarian and human rights law and there were increased calls to hold the government accountable for war crimes.

### ***2.10 Political climate and the decline in human rights protection in the country***

The election of Mahinda Rajapaksa as President in November 2005 on an anti-peace and pro-unitary state platform was a turning point in relation to the armed conflict and human rights in the country. The LTTE prevented the Tamil population in the North and East from voting. Mahinda Rajapaksa formed a coalition with JVP and *Jathika Hela Urumaya* (JHU) — both ultra-Sinhala nationalist parties. This, coupled with the hard-line stance taken by the LTTE,

led to the collapse of the ceasefire agreement. The President appointed his brothers to two top cabinet posts and also appointed the heads of, inter alia, the National Police Commission, Judicial Services Commission and the Human Rights Commission in total disregard of the 17<sup>th</sup> Amendment to the Constitution, signaling a constitutional crisis. The human rights situation worsened in 2006 with the North and East being badly affected by the increased hostilities and the increase in impunity. Forced disappearances were increasingly carried out which pointed to the complicity of the security forces. The most high profile instance was the abduction of the Eastern University's Vice Chancellor who remained missing at year's end.<sup>9</sup>

Due to the heavy fighting between government forces and the LTTE, in early August 2006 the government closed the A9 road that links Jaffna peninsula to the rest of the country causing severe hardship to civilians in the North. This led to a severe shortage of essential items and prices escalated beyond the reach of ordinary people. Both sides restricted civilian movement to safer areas. However, many civilians including 32,000 IDPs remained trapped, despite poor humanitarian and security conditions.

After the assassination of Foreign Minister Lakshman Kadirgamar in August 2005, emergency rule was reinstated. Provisions of the PTA were reintroduced after an assassination attempt against Defence Secretary Gotabhaya Rajapaksa. Despite the end of war in May 2009, which resulted in a massive loss of life on both sides to the conflict, the human rights situation in the country continued to deteriorate. The ensuing battle with the international community

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<sup>9</sup> Sri Lanka: State of Human Rights 2007, p.3.

and the generalised culture of terror and violence are discussed in the next section. Lack of accountability and a culture of impunity prevailed during the Rajapaksa administration.

In November 2014, President Rajapaksa issued a proclamation under the Constitution seeking a further term. In a surprising move, Maithripala Sirisena, the Minister of Health, announced his intention to contest the election. His candidacy was supported by the UNP, defectors from the SLFP and civil society organisations. Few thought it was possible to topple the Rajapaksa dynasty that had taken root in Sri Lanka. However, within a short span of six weeks, that became a reality. Many believe that social media activism contributed to this change. Sri Lankan Electoral Commissioner Mahinda Deshapriya was praised for his leadership during this time, using electoral laws and regulations effectively to protect the integrity of what was a heavily contested, but free and fair election. Trust in the institution of the Electoral Commission rose significantly in this period.<sup>10</sup>

As SHR 2016 noted, “the election of Maithripala Sirisena as president in January 2015 heralded a new era for Sri Lankan civil society and media.”<sup>11</sup> His campaign was on a platform of good governance and was in sharp contrast to the modus operandi of the Rajapaksa administration rampant with corruption, media repression and gross human rights violations. In keeping with his election promise of good governance and transparency, the government announced plans to draft a right to information law

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<sup>10</sup>*Democracy in Post-War Sri Lanka*, CPA, 2015 p3.

[https://www.cpalanka.org/wp-content/uploads/2015/06/Democracy-survey-June-2015\\_Final-Report.pdf](https://www.cpalanka.org/wp-content/uploads/2015/06/Democracy-survey-June-2015_Final-Report.pdf)

<sup>11</sup>Sri Lanka: State of Human Rights (SHR), 2016, 2.

and established a committee to do so. It was formerly gazetted as a Bill in December 2015 and was hailed as one of the best in the world by many organisations including ARTICLE 19.

In addition, the 19<sup>th</sup> Amendment to the Constitution was adopted in May 2015. Discussions on the prospects for constitutional reform have been ongoing in Sri Lanka since Independence. Most recent discussions have been largely concerned with finding a solution to the ethnic conflict and reducing the powers of the Executive Presidency which were introduced in the 1978 Constitution and which inclined the presidency towards authoritarianism.

Expectations for constitutional reform were high when Sirisena was elected President. During the election, the public mobilised around his campaign to abolish the Executive Presidency, which consequently extended to further promises of reform once the 19th Amendment was passed. Termed a historic piece of legislation, the 19th Amendment did limit the authoritarian scope of the President's office and the President's powers of appointment. It restored term limits on the presidency (which were originally there but were removed under the Rajapaksa administration). It also included a new fundamental right — the right to access information, formally constitutionalising it. However, its wording has been criticised as overly restrictive in scope. Once it was passed, there were expectations for a transparent and consultative process to help draft a new Constitution, which would consequently strengthen the country's democratic institutions and bring a sustainable political solution to the ethnic conflict.

A Public Representations Committee on Constitutional Reform (PRCCR) was appointed in December 2015. The PRCCR requested submissions and held public for a during this time. The recommendations were received with varying levels of agreement. However, undeniable consensus arose in support for the expansion of human rights protection in the Constitution. This included calls for protection against discrimination and special provisions for disenfranchised groups. Women’s groups were particularly strong in advocating for the socio-economic rights of women, particular with respect to Article 16 of the Constitution and its emphasis that personal laws would prevail in spite of their conflicts with the Constitution. A consensus resolution was passed in early 2016, which laid the groundwork for the drafting of a new constitution and saw all 225 members of Parliament become members of the Constitutional Assembly responsible for its drafting.

The Steering Committee was led by the Prime Minister, aided by six sub-committees which prepared reports on different areas relevant to the drafting. The committees have so far recommended their support for the expansion of fundamental rights. Favour has generally tended towards a stronger inclusion of economic, social and cultural rights than in previous constitutions, though considerable backlash to this proposal exists — those in opposition suggest that such rights could place an unnecessary burden on the state and judiciary. The inclusion of a broad equality clause which prohibits discrimination based on “gender, sex, sexual orientation, gender identity” is a positive step, even when Sri Lanka’s *Penal Code* still criminalises same-sex relations. Reform of Article 16 continues

to face strong opposition.<sup>12</sup> Observers have continued to criticise the influence of Sri Lanka’s security sector in undermining civilian oversight of the military and for clarifying the role of intelligence groups in the country. Much of the deadlock around issues of constitutional reform now seems a product of political manoeuvring.<sup>13</sup>

### **3. International Treaties and Scrutiny of the International Community**

Despite ratifying several international treaties in 2000, Sri Lanka was tardy in submitting several country reports due under various treaties it had ratified: CEDAW, CAT, ICCPR CERD and ICESCR. Sri Lanka’s human rights record came under scrutiny when it sought to renew its Generalized System of Tariff Preferences status with the European Union. The Generalised Scheme of Preferences (GSP) is a series of trade concessions granted to certain countries by the European Union should they choose to abide by a series of core human rights conventions. The GSP offers duty concessions on exports in situations where countries commit to 27 core international conventions on human and labour rights, sustainable development and good governance.<sup>14</sup> In August 2010, Sri Lanka was removed from the GSP Plus trade concessions for non-compliance and non-effective implementation, particularly with reference to a lack of adherence to the International Covenant on Civil and Political Rights

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<sup>12</sup>Article 16 is a clause that suggests all written and unwritten laws existing prior to 1978 are both valid and operative. It has the effect of validating certain laws that conflict with the fundamental rights granted to all citizen. An example of one such law is the *Muslims Marriage and Divorce Act 1954*.

<sup>13</sup>Sri Lanka: State of Human Rights, 2017, p31.

<sup>14</sup>‘GSP Plus impact’, *Daily FT*, <http://www.ft.lk/opinion/GSP-Plus-impact/14-661186>

(ICCPR) — a Supreme Court Advisory Opinion in 2008 concluded that Sri Lanka’s legal regime failed to test ICCPR implementation in content and substance (particularly the right to access legal-counsel, individual communication to the UN Human Rights Committee and reforming the PTA)<sup>15</sup>. But with Sirisena’s election in 2015 and his government’s seeming commitment to human rights through the enactment of the 19th Amendment and adoption of Resolution 30/1, a path was paved for Sri Lanka’s re-acceptance in the EU’s trade scheme.<sup>16</sup> The GSP was reinstated in May of 2017. The GSP provides an important space for stakeholders (civil society and business) to monitor the state’s treatment of its obligation and advocate for certain improvements if they see fit.<sup>17</sup> The GSP Plus provides a strong financial incentive for Sri Lanka to uphold and implement its human right responsibilities under international conventions — revenue loss during the period of removal was estimated to be Rs 150-250 billion.<sup>18</sup>

As the war intensified, the government also intensified its crackdown on dissenters, including media personnel, aid workers,

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<sup>15</sup>See Gunatilleke (2016) here:

[https://www.academia.edu/29101698/GSP\\_A\\_Revaluation\\_of\\_Benefits.pdf](https://www.academia.edu/29101698/GSP_A_Revaluation_of_Benefits.pdf)

<sup>16</sup>Resolution 30/1 Promoting reconciliation, accountability and human rights in Sri Lanka was adopted on 1 October, 2015. The Resolution recalled previous human rights commitments, reaffirmed Sri Lanka’s commitment to uphold the human rights and fundamental freedoms of all its citizens and put forward a number of requests and recommendations to encourage the success of the country’s transitional justice process.

<sup>17</sup>GSP+ AND SRI LANKA; BENEFITS AND CHALLENGERS, *Sri Lanka Brief*, 29 April 2017 <http://srilankabrief.org/2017/04/gsp-and-sri-lanka-benefits-and-challengers/>

<sup>18</sup>GSP Plus impact’, *Daily FT*, <http://www.ft.lk/opinion/GSP-Plus-impact/14-661186>

UN personnel and even diplomats. In 2007 several high-level UN officials visited Sri Lanka. In August, the UN Under-Secretary General for Humanitarian Affairs, Sir John Holmes undertook a four-day mission to Sri Lanka. He announced that the government had promised to increase access to aid agencies to newly resettled and conflict areas. He called upon the LTTE to allow aid workers to carry out their work and stressed that the Karuna group had to be disarmed. His remark that Sri Lanka was one of the most dangerous places for aid workers raised an outcry in Sri Lanka.

In October, the UN High Commissioner for Human Rights, Louise Arbour visited the country. Although she paid a brief visit to Jaffna under military escort, she was not able to visit either the Eastern Province or Killinochchi. She expressed grave concern and alarm about the armed conflict, the emergency measures taken against terrorism, the weakness of the rule of law and the prevalence of impunity. She called for an independent monitoring mechanism to investigate the alarming number of abductions and disappearances because of the failure of the government to investigate and provide relief to the families of the victims.

The Special Rapporteur on Torture, Manfred Nowak, also undertook a visit in October. While noting the measures taken by the government to combat torture, he pointed out that these cannot be regarded as fully effective. He referred to the high number of complaints to the Human Rights Commission and successful fundamental rights cases, illustrating that torture was still widely practiced in Sri Lanka. He expressed shock at the brutality of the methods used.

In December, the Representative of the UN Secretary General on the Human Rights of Internally Displaced Persons, Walter Kalin undertook a mission to Sri Lanka. He too was not permitted to visit Killinochchi. He noted the complexity of the IDP situation in Sri Lanka due to both the conflict and the tsunami but pointed out that the government bore the primary responsibility for protecting and assisting IDPs. He also stressed the need to find a balance between humanitarian and security concerns so that people could live in dignity and safety. The plight of female headed households and widows was highlighted as needing special attention.

In May 2008, Sri Lanka lost its bid for re-election to the UN Human Rights Council due to strong objections by states and NGOs on account of its poor human rights record and the failure to meet past commitments to the Council. The government's attitude was quite high handed during this time, describing eminent people, including the UN Secretary General, as LTTE supporters and sympathisers. In its report to the Human Rights Council, the government had to reconcile its position with the Supreme Court's decision in the *Singarasa* case, which sent shockwaves through the human rights community where it opined that the President could not cede judicial powers to an outside body. The government also rejected the recommendation to establish an independent human rights monitoring mechanism, in cooperation with the UN High Commissioner for Human Rights and to provide technical assistance to the National Human Rights Commission. An attempt to adopt a strongly worded resolution condemning the government for the final stages of the military campaign against the LTTE failed in the UN Human Rights Council. Instead, a much-watered down resolution was adopted "welcoming the conclusion of hostilities...."

In mid-2010 the UN Secretary General appointed a Panel of Experts to advise him on the implementation of the Joint Commitment included in the Joint Statement. The Panel comprising three members was merely to advise the Secretary General on the extent of allegations and whether they were based on credible information. This mandate was misunderstood by many as including an investigation. The Panel's report was issued in March 2011. It placed accountability at the helm and found credible allegations of war crimes and crimes against humanity committed by both parties to the conflict during the final stages of the war.<sup>19</sup> The report pointed to several grave breaches of humanitarian law: systematically shelling of hospitals by the government despite knowing well their locations; systematically depriving people in the conflict zone of humanitarian aid in the form of food and medical supplies especially surgical supplies; and purposely underestimating the number of civilians who remained in the conflict zone. The report was met with a negative response from the government while civil society groups remained largely silent, except for the strong critique by the Marga Institute. The report contributed to an adversarial discourse on accountability in Sri Lanka.

President Rajapaksa appointed the Lessons Learnt and Reconciliation Commission (LLRC) in May 2010 amidst domestic and international pressure to address accountability issues and present a framework for national reconciliation. The Commission issued its report in December 2011 and presented 180 distinct recommendations to the government on a range of issues including, displacement, land, detention, media freedom,

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<sup>19</sup>Sri Lanka State of Human Rights 2009-10, 8.

investigations into extra-judicial killings and enforced disappearances, and the independence of public institutions. With regard to the conduct of security forces during the last stages of the war, the report concluded that it was “exemplary” except for some isolated incidents. This met with heavy criticism by many parties both domestically and internationally.

In March 2012, a resolution on Sri Lanka sponsored by the US was tabled at the UN Human Rights Council session. Eight categories of constructive recommendations made in the LLRC were identified in the resolution: investigating widespread allegations of extrajudicial killings and enforced disappearances; demilitarising the North; re-evaluating detention policies; promoting freedom of expression; implementing impartial land dispute resolution mechanisms; strengthening independent civil institutions; reaching a political settlement on devolution of power; and adopting rule of law reforms. The resolution was passed by a majority, which included India.

The Human Rights Council at its 22<sup>nd</sup> session adopted another resolution on Sri Lanka titled “Promoting Reconciliation and Accountability in Sri Lanka.” It reiterated the government’s responsibility to effectively implement the recommendations of the LLRC and conduct an independent investigation into alleged violations of human rights and humanitarian law. Both resolutions defined a specific role for the Office of the High Commissioner for Human Rights. Navanethem Pillay, the UN High Commissioner for Human Rights, visited Sri Lanka in August 2014. The OHCHR termed the visit a ‘success.’ She visited Jaffna, Killinochchi, Mullativu and Trincomalee during her visit and

expressed her thanks to the Sri Lankan government for its cooperation.

The framework of monitoring coupled with international advocacy and information sharing seemed to have contributed to a noticeable improvement in human rights in 2013. The overall number of extrajudicial killings decreased and the alternative media started playing a greater role. Despite this, in January 2013 the Chief Justice Shirani Bandaranayake was impeached by a Parliamentary Select Committee in complete disregard for due process. It also ignored a Supreme Court decision which held that the impeachment was in violation of the Constitution.

The 23<sup>rd</sup> Commonwealth Heads of Government meeting was scheduled to be held in Sri Lanka in November 2013. A number of states expressed concern over the human rights situation in the country and Canada, India and the Mauritius boycotted the Summit. The delegations were under pressure from human rights groups to condemn the government for failing to curb impunity and to ensure accountability for crimes committed during the war and its aftermath. The British Prime Minister David Cameron visited Jaffna and issued an ultimatum to the government of Sri Lanka to complete the investigation by March 2014. The failure to do so would result in a call for an international inquiry.

In contrast to previous resolutions, the 2014 resolution of the Human Rights Council gave a specific role to the OHCHR, given “the absence of a credible national process with tangible results.”<sup>20</sup> It requested the OHCHR “undertake a comprehensive

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<sup>20</sup>Sri Lanka: State of Human Rights 2015, 8.

investigation into alleged serious violations and abuses of human rights and related crimes by both parties in Sri Lanka..... with assistance from relevant experts and special procedures mandate holders.”<sup>21</sup> Predictably, this was met with huge resistance from the government. In a departure from the previous year, the government renewed its attacks on human rights defenders and several vocal critics of the government were taken into custody, including LST’s own staff member Ruki Fernando just days before the HRC resolution was adopted. Another was Balendran Jeyakumari who was campaigning against disappearances. While Ruki was released the next day, Jeyakumari was held in detention without charge for the rest of the year. The government also indicated that it was not concerned about the pressure from the international community, choosing instead to get close to China. It also increased arbitrary arrests and detention of dissenters. It was in this context that anti-Muslim riots erupted in several places in June 2014, resulting in three deaths and destruction of property. Witnesses claimed that many of the attackers wore boots and helmets raising suspicion of government involvement in the attacks. The OHCHR reported 88 incidents of violence against Muslims and 55 against Christians.<sup>22</sup> While the government promised to investigate, no progress was made in this regard. At the UNHRC session, the government sought to shift the blame to the Muslim community for starting the attacks. Sinhala Buddhist rhetoric continued to dominate at the expense of ethnic and religious minorities, giving rise to a culture of fear yet again.

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<sup>21</sup> UN Human Rights Council Resolution 25/1 26 March 2014.

<sup>22</sup>Sri Lanka: State of Human Rights (SHR) 2015, 15.

#### 4. Tsunami and its Aftermath

According to World Bank figures, 35,322 Sri Lankans lost their lives in the tsunami and 516,150 people were displaced. In addition, 150,000 people lost their source of livelihood and US\$ 900 million worth of assets were lost.<sup>23</sup> A disaster of this magnitude had not struck the island in living memory and families struggled to cope. Within a few minutes many had lost their loved ones, their houses, their possessions, and their livelihoods. Many frantically searched for missing persons. Children had lost their parents and the days following the tsunami much confusion and chaos prevailed. Many foreigners who were holidaying in Sri Lanka also lost their lives. The largest NGO in Sri Lanka — Sarvodaya — galvanised into action as did many philanthropists. The government followed, rather than led, relief efforts. There were also allegations of government inefficiency and a lack of transparency with regard to the aid that poured into the country. The public and civil society in Sri Lanka was overwhelming with many people including Sri Lankan diaspora coming forward to assist the victims.

The government enacted the *Tsunami (Special Provisions) Act* in June 2005 to address the issues that arose such as the issuing of death certificates for missing persons, custody of children and issues affecting young persons and property issues. The Bill was challenged in the Supreme Court by the JVP on the grounds that it was an effort to bypass the Provincial Councils established under the 13<sup>th</sup> Amendment to the Constitution. The Supreme Court stated that during times of disaster “it becomes incumbent upon the state to formulate and provide direct National policy to meet the consequent contingencies....” and that it was untenable that

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<sup>23</sup>Sri Lanka: State of Human Rights (SHR) 2005, 22.

the state be precluded from doing so under such catastrophic conditions. In addition, the Government and the LTTE signed an agreement in June to establish a mechanism to disburse aid and speed up construction and rehabilitation in the North and East. However, due to various reasons this Agreement was never implemented.

As SHR 2005 highlighted, the tsunami also brought other tensions to the fore — between development and environmental protection and the right to a livelihood. Questions relating to land rights and right to livelihood of fishermen had to be addressed even though some of the structures that were destroyed were illegally constructed. Instead of addressing these tensions, the government seemed to totally ignore them and favoured big businesses in reconstruction efforts “with little regard paid to either the civilian population or the protection of the environment.”<sup>24</sup> Of the 10 members of the Taskforce to Rebuild the Nation that was established, six were heads of companies which operate in the coastal tourism industry.

After the immediate aftermath of the tsunami when there was an outpouring of goodwill between the different ethnic communities — which led to some optimism that relations would improve — tensions surfaced with fears about encroachments, land grabbing, and the potential loss of land when the government allocated land to those affected by the tsunami. While a coastal buffer zone of 100-200 metres was announced and the government prohibited construction of houses within this zone, hotels were allowed to

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<sup>24</sup>Sri Lanka: State of Human Rights: (SHR) 2005, 25.

rebuild if they were partially damaged and if the cost of repair was below 40% of the replacement value of the building.

More women lost their lives in the tsunami than men. Those who survived endured much hardship as they lost their main breadwinner. Women reported a sense of insecurity and complained of incidents of sexual harassment. Cash allowances were paid only to the “head of household” although women were able to collect household items. The Human Rights Commission expressed concern about Muslim widows being unable to collect the cash allowance as they had to observe the mourning period and thus unable to leave their residences. Another issue was land rights of women in the Eastern Province where 60% of the land is owned by women.

## **5. Attacks on the Media and Media Personnel**

During the time of the Rajapaksa presidency, freedom of expression and media freedom suffered, with newspaper editors being harassed and with the media facing verbal attacks. Censorship was the final straw. Even humanitarian organisations that expressed their concerns about the war were verbally attacked by the government. Throughout the conflict, media came under fire with censorship imposed from time to time. Information coming from the North and East was constantly subject to censorship as was war-related information. Media personnel were attacked and some were assassinated. While attacks on media and media personnel were not new, the assassination of Lasantha Wickrematunge, the editor of Sunday Leader in January 2009, sent shockwaves throughout the country. He was a “prominent figure in the media and described as a ‘virulent critic of the Mahinda

Rajapaksa government.”<sup>25</sup> He was killed by two assailants on a motorcycle just days before he was due to give evidence against the then Defence Secretary (who was also the brother of the then President Mahinda Rajapaksa) Gotabhaya Rajapaksa. While a number of suspects, many of whom were linked to the armed forces, were taken into custody, no formal charges had been brought even by the end of the year. The Committee to Protect Journalists lists the names of 15 media personnel<sup>26</sup> that were killed during this time, but many believe the number killed and disappeared to be higher. In an open letter to the President, International Press Freedom Mission to Sri Lanka expressed its grave concern “over the ongoing spate of violent attacks against the media”<sup>27</sup> and urged the government to adopt an 11-point plan to redress the perilous press freedom environment. The plan included combating impunity, releasing journalists held under the Emergency Regulations and later charged under the *Prevention of Terrorism Act*, providing unconditional access to IDP camps, and releasing the preliminary results of the investigation into the murder of Lasantha Wickrematunge. It noted that since 2007, security forces had been allegedly responsible for kidnapping, beating and threatening at least 30 journalists and media personnel.<sup>28</sup>

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<sup>25</sup> SHR 2009-10, 19

<sup>26</sup>[https://cpj.org/data/killed/asia/sri-lanka/?status=Killed&motiveConfirmed%5B%5D=Confirmed&type%5B%5D=Journalist&cc\\_fips%5B%5D=CE&start\\_year=2003&end\\_year=2009&group\\_by=location](https://cpj.org/data/killed/asia/sri-lanka/?status=Killed&motiveConfirmed%5B%5D=Confirmed&type%5B%5D=Journalist&cc_fips%5B%5D=CE&start_year=2003&end_year=2009&group_by=location)

<sup>27</sup><https://rsf.org/en/news/open-letter-his-excellency-president-mahinda-rajapaksa>

<sup>28</sup>Ibid.

While restrictions on war reporting were relaxed in May, the restriction on access to areas under LTTE control remained. The International Bar Association (IBA), following a brief mission to Sri Lanka, submitted recommendations to the Bar Association of Sri Lanka to repeal criminal defamation law and encourage freedom of speech: “The IBA report noted that criminal defamation laws were contrary to the fundamental human rights set out in the constitution and were an affront to a free media.”<sup>29</sup> The IBA report also condemned attacks on media personnel by security forces as a way of restricting free speech.

J.S. Tissainayagam, who had been under detention since 7 March 2009, was convicted on all of his three charges under the *Prevention of Terrorism Act* (PTA) on 31 August 2009 by the High Court of Colombo and given the maximum sentence of 20 years rigorous incarceration.<sup>30</sup> This case represented the first instance of a journalist being tried and convicted under PTA for publishing articles that were critical of the government’s treatment of civilians during this period. The articles, written in 2006, accused the government of killing civilians, of refusing them food and medical supplies and advocated for the protection of Tamils in the Northeast. The ruling was condemned internationally. Tissainayagam was released on bail and pardoned on World Press Freedom Day 2010. He spent 21 months in detention.

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<sup>29</sup> Sri Lanka: State of Human Rights (SHR) 2002, 18

<sup>30</sup> Tissainayagam was charged with two charges under sub-section 2(1)(h) of the PTA related to statements published in the *Northeastern Monthly* intended to cause the commission of acts of violence and a third charge related to a general provision of the Emergency Regulations, specifically in this case referring to the receipt of funds used to publish information.

In addition to repressing the mainstream media, the government sought to attack social media claiming that “the final threat to Sri Lanka’s national security is the emergence of new technology-driven media, including social media sites such as Facebook, Twitter and other websites....<sup>31</sup> Civil Society organizations became the target of government repression in 2015. A letter was sent by the Ministry of Defence in July 2014 instructing all civil society organizations to refrain from holding press conferences, workshops and training for journalists and issuing press releases. Workshops organized by Transparency International Sri Lanka for investigative journalists were cancelled after being disrupted by organized mobs. Although this letter did not carry the weight of law, it was used to endorse such disruptions and intimidate civil society organizations.

## **6. Attacks on Minorities and Human Rights Defenders**

Caught between the two warring factions was another, largely forgotten, minority — the Muslim community who suffered at the hands of both parties. The year 2001<sup>32</sup> saw the escalation of communal riots between the Sinhalese and the Muslim minority with two Muslims being killed and a number of buildings and vehicles destroyed. Many residents of the Mawanella area where the riots took place complained to the Human Rights Commission that police inaction led to the riots there.

They were also hard hit by the tsunami. Their plight did not receive much attention although they predominantly inhabit the Eastern

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<sup>31</sup> Sri Lanka: State of Human Rights (SHR) 2015, 23

<sup>32</sup> Vijay Nagaraj and Farzana Haniffa, *Towards Recovering Histories of Anti-Muslim Violence in the Context of Sinhala–Muslim Tensions in Sri Lanka*, (Colombo: International Centre for Ethnic Studies, 2017).

Province. The plans drawn with regard to tsunami rehabilitation did not seek their views. Similarly, the ceasefire agreement between the government and the LTTE did not seek to address the grievances of the Muslim community. When the LTTE closed the Mavil Aru anicut in July 2006 causing much hardship to the farmers downstream, the security forces launched an operation to “liberate” the area, although the SLMM had already negotiated the re-opening of the gate. In the ensuing offensive many Muslims lost their lives. During the period up to 2009, many Muslims were denied their right to franchise, with voter lists rarely distributed and young voters having no way for registration.<sup>33</sup> In addition, there were several incidents of riots in which the Muslim community was the target.

In June 2007 around 3 am, Tamils residing in boarding lodges in many parts of Colombo were evicted by the police at short notice. They were given only about 30 minutes to pack their belongings and were forced onto buses. They were not informed of the destination. All those without a “valid” reason for residing in Colombo were sent back to their places of permanent residence and whether the reason was valid or not was determined by the police in an arbitrary manner. Due to an outcry by local and international human rights groups, as well as by foreign missions, the government transported these people back to Colombo. The Centre for Policy Alternatives filed a fundamental rights petition in the Supreme Court against these evictions. The Supreme Court called for an immediate end to the evictions. The Prime Minister

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<sup>33</sup> ‘PSM urges Polls Chief to ensure franchise of expelled Muslims’, Lankamuslim, 23 December 2009, <https://lankanet.wordpress.com/2009/12/23/psm-urges-polls-chief-to-ensure-franchise-of-expelled-muslims/>

made a public apology and the President ordered a probe into the incident. However, Chief Government Whip Jeyaraj Fernandopulle justified the evictions and saw no reason for the government apology. Investigations revealed that instructions to evict had been given by Gotabhaya Rajapaksa, the Defence Secretary.

Humanitarian workers and local human rights groups became the target of both parties to the conflict. In 2007 alone, 37 humanitarian workers were abducted, disappeared and killed. In June 2007 two volunteer Red Cross workers were abducted at the Fort Railway Station in Colombo. Their bodies with gunshot wounds were found the following day in a tea estate in Kiriella. The vehicle in which they were taken was later traced to the Karuna faction. The government, instead of investigating the killings, stated that they were an attempt to discredit the government. Lack of progress in the case of 17 aid workers of *Action Contra la Faim* was also criticized by rights groups. The International Commission of Jurists (ICJ) made a statement highlighting the flaws in the investigation and recommended the establishment of an independent investigation team.

## 7. Upcountry Tamils

Six months after Sri Lanka's Independence, the UNP government passed the *Citizenship Act No.18 of 1948*. This Act had the effect of disenfranchising millions of Plantation Tamils who were originally brought to Sri Lanka from India by the British to work on the tea plantations. Since this time the community has suffered consistent political, civil and socio-economic deprivation. Human rights issues in this community cannot be understood without reference to this Act which has had long lasting implications on plantation

livelihoods. Until 2003, some members of this community continued to suffer from disenfranchisement — the *Grant of Citizenship to Persons of Indian Origin Act* passed during this year granted citizenship to people of Indian origin who had either been a permanent resident of Sri Lanka since 1964 or who were descendants of such a resident. Though this formally ended the problem of citizenship, protection of the rights of this community has lagged behind. Plantation workers continue to contend with issues they were subjected to under conditions of statelessness. Under its international treaty obligations and under domestic legislation (specifically The Conditions of Employment of Plantation Workers Convention which was ratified in 1995), the state carries some responsibility for the economic, social and cultural rights of the plantation communities. Living conditions on plantations, however, remain well below those in the rest of the country. Previous SHR's have reported on the state of plantation livelihoods in recent years, suggesting that housing, access to clean water and adequate sanitation conditions remain unsatisfactory in many areas.<sup>34</sup> Attention to female workers in particular is lacking — trade unions have been criticised for lobbying for plantation rights without sensitivity to gender, meaning that at times provisions for female workers on estates — for example, basic washroom facilities — have been lacking. Protests for wage increases endure.

The Plantation communities have also suffered for some time at the level of local political representation. The *Pradeshiya Sabha Act* was introduced in 1987 to outline the provisions for local

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<sup>34</sup> Sri Lanka : State of Human Rights 2009, p. 342-345.

communities to gain access to essential public services through local government. Until 2017, though some Plantation Tamil's exercised their franchise rights during this period, the *Pradeshiya Sabhas* were not legally obligated to serve the community. The subsequent interpretation of this situation has been that estate management is responsible for the wellbeing and development of those that work on the plantations. Since the 1990s, when companies began to privatise, conditions on plantations have fallen. Still today plantations retain the power of certifying national identity card applications and electricity connections.<sup>35</sup> In 2017, an Amendment to the *Pradeshiya Sabhas Act* was passed by Parliament to amend terms that civil society groups had been arguing against for almost 30 years. Institutional and structural barriers continue to hinder plantations workers access and participation in local governance, but the amendment was an important first step towards a more active role for Plantation communities in their own local political representation.

## **8. Consensus Building**

In 2006 the Government established an All Party Representative Conference (APRC) charged with developing a southern consensus on a political devolution package that could be the basis for renewed talks with the LTTE. It had not reached a consensus at the end of 2007. Despite the name, it did not include all political parties. The LTTE proxy party, the TNA, was not invited. After several stalled attempts the APRC appointed a panel of experts consisting of 17 lawyers, public servants and scholars. The panel produced two reports in December 2006: the majority and minority reports.

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<sup>35</sup>LST Review May 2018.

The majority report recognized the need for power sharing in laying the framework for a solution but also providing space for negotiations. The proposals provided several safeguards including a constitutional court to settle disputes between the centre and the provinces and a comprehensive Bill of Rights. The proposals also sought to address some of the shortcomings of the 13<sup>th</sup> Amendment to the Constitution. The Minority report retained the province as the unit of devolution and reserved additional powers for the centre. It rejected devolution and recommended the de-merger of the Northeast Province. In mid-2007, the SLFP filed its own submission which reflected the government position. By the end of the year, final proposals of the APRC were yet to be submitted reflecting the absence of a political will to come up with a viable solution to the ethnic conflict.

In November 2006, a Commission of Inquiry to Investigate and Inquire into Alleged Serious Violation of Human Rights (COI) was established by Presidential decree to investigate 15 cases (later increased to 16) within the time period August 1<sup>st</sup> to October 16, 2006. An International Independent Group of Eminent Persons was invited by the President to observe the work of the COI. The Group voiced concern over several issues including lack of progress, conflict of interest by the AG's Department and the Presidential Secretariat, lack of witness protection programs and the limited mandate of the COI.

The government also took steps to implement the LLRC. However, the National Plan of Action to Implement the LLRC (NPA) seemed to omit a large number of the LLRC recommendations which were critiqued by the UN High

Commissioner for Human Rights in her report. While not acknowledging this critique, the government revised the NPA.

Elections to the Northern Provincial Council were held in September 2013 which were the first since 1990 when then President dissolved the amalgamated North-Eastern Provincial Council. Some claim that the elections were the result of international pressure. Despite 27 major incidents involving election violence observed by independent election monitors, the Tamil National Alliance (TNA) secured an overwhelming majority, winning 30 of the 38 seats. In the run up to the elections extrajudicial killings, disappearances and arbitrary arrests and detentions in the North and East decreased. The government continued to channel resources into infrastructure development in the North possibly hoping that people would value that over accountability to human rights. The government strategy to win elections by appeasing the international community, however, failed as nearly 80% of the votes went to the TNA.

In another departure from recent practice, Sri Lanka co-sponsored a resolution about itself at the UNHRC in 2015. It represented Sri Lanka's transitional justice agenda, in terms of establishing mechanisms on truth, justice, reparations and guarantees against non-recurrence. Cooperation with international actors and UN special procedures improved significantly. The Foreign Minister also issued a statement that it would ratify the International Convention for the Protection of All Persons from Enforced Disappearance, and did so in December 2015. The UN Working Group on Enforced Disappearances conducted a visit to Sri Lanka in November 2015 and despite criticisms, the Presidential Commission to Investigate into Complaints regarding Missing

Persons (Paranagama Commission) acknowledged the existence of over 21,000 complaints on missing persons.

As part of the government's good governance commitment, Sri Lanka co-sponsorship of Resolution 30/1 at the UNHRC represented a wide-ranging commitment by the government to transitional justice measures — measures that were unprecedented. The commitment represented a shift from the way in which Sri Lanka had engaged with the Human Rights Council in the past and contained specific commitments to establish a Commission for Truth, Justice, Reconciliation and Non-recurrence, an Office for Reparations, an Office on Missing Persons and a special council with judicial means to prosecute those who committed crimes during the war. In December 2015, invitations were issued to special procedure mandate holders (including the UN Special Rapporteur on Torture and UN Special Rapporteur on Freedom of Expression among others) and Sri Lanka's cooperation with external actors interested in facilitating the transitional justice process was perceived to be generally more amicable. A commitment to repeal the PTA was issued, with Sri Lanka's Foreign Minister at the time arguing it needed to be brought in line with 'contemporary international best practise'.

In January 2016, Prime Minister Wickremesinghe appointed an 11-member Consultation Task Force (CTF) drawn from civil society to gauge the public's perspective on the transitional justice mechanisms proposed under the UNHRC Resolution. Consultations were held between June and September 2016 and after thousands of submissions, a final report was handed down in

January 2017.<sup>36</sup> The establishment and success of the CTF was seen by observers as a positive step, with the UN Special Rapporteur during his visit in 2017 arguing that the CTF established its presence broadly and deeply in a relatively short period of time.<sup>37</sup> However, criticisms were levelled at the government for the report not being adequately received — its recommendations were seemingly dismissed, or at the very least have so far failed to influence on-going conversations about the transitional justice program.

As this government’s time in office draws out, its commitment to the transitional justice process has begun to be questioned and is now heavily criticised. Public officials continue to renege on their commitments and have failed on an overwhelming number of occasions to bring about significant change along the lines of their 2015 promises.<sup>38</sup> A very small number of cases have been brought through the courts successfully to bring justice to those who committed wartime crimes. At the 34th Session of the HRC in March 2017, UN High Commissioner for Human Rights issued a statement to suggest that ‘limited progress’ had been on the commitments made in Resolution 30/1. The HRC adopted

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<sup>36</sup> ‘Guide to the Recommendations from the Consultation Task Force (CTF) on Reconciliation Mechanisms,’ CPA, 2017 <https://www.cpalanka.org/wp-content/uploads/2017/06/Guide-to-CTF-Report-.pdf>

<sup>37</sup> ‘Sri Lanka continues to deprive itself of the benefits of Transitional Justice’, Colombo, 2017. <https://lk.one.un.org/news/full-statement-by-pablo-de-greiff-un-special-rapporteur-on-the-promotion-of-truth-justice-reparation-and-guarantees-of-non-recurrence-at-the-conclusion-of-his-official-visit/>

<sup>38</sup>For an analysis of Sri Lanka’s progress on commitments made in the 2015 Resolution, see: Sri Lanka Campaign for Peace & Justice. “Keep the Promise: Monitoring the Government of Sri Lanka’s Commitments for Achieving Justice & Reconciliation,” Verite Research, 2019. <https://www.srilankacampaign.org/take-action/keep-the-promise/>.

Resolution 34/1 at this time, which essentially rolled over the commitments made in the previous resolution and allowed Sri Lanka another 2 years to make progress on these same commitments.

Of the nine transitional justice commitments adopted by the government, only two commitments have been both completed and implemented. Those mechanisms that have been implemented still face criticism. For example, in May 2016 Sri Lanka signed the International Convention for the Protection of All Persons from Enforced Disappearance as part of its transitional commitment to families of the disappeared. An International Convention for the Protection of All Persons from Enforced Disappearance Bill was then passed through Parliament in 2018, representing the first time the concept of ‘enforced disappearance’ had been registered in domestic legislation. In late 2016, the Office on Missing Persons (OMP) was mandated, but commissioners were not appointed until early 2018. Criticisms have been levelled at both the legislation and the Office that is set up to fulfil the government’s commitment to it. The Office has been criticised for its poor attempts at public consultation — focus was placed on passing the legislation itself which has led to ongoing issues to do with implementation of its broad mandate, confidentiality and its linkages to other accountability mechanisms. On the whole, consultation and communication about the transitional justice process and its progress has generally been poor. No progress has been made on establishing a judicial mechanism to investigate violations of human rights during the war.

As part of its 2015 pledge, the government promised to repeal the *Prevention of Terrorism Act* (PTA). In its place would be a Counter

Terrorism Bill (CTA) to provide greater protections against torture and ill treatment. This reform was seen as a key step in keeping to Sri Lanka’s commitments under the UNHCR resolution, in part because of the PTA’s long and tragic history. But representatives of civil society are concerned that early drafts of this new CTA Bill are flawed, to the extent that some consider it worse than the PTA it is set to replace. Key concerns include the permitting arbitrary detention without charge for up to one year and ambiguous definitions with respect to what constitutes terrorism. Debate continues on whether the PTA should be repealed altogether and whether community consultation should take place before the country decides that it needs a specific Act to cover counter-terror issues not covered in criminal law or under emergency regulations. An Assistance to and Protection of Victims of Crime and Witnesses Bill was also passed during this period, enacted just before the united nations Human Rights Council session in March 2015. The Bill aims to protect victims and witnesses of crimes and provide mechanisms that assist in ensuring their protection. A fund was to be established in order to set up safe houses for witnesses giving evidence. It also sought to establish a National Authority for the protection of victims of crime and witnesses which would act as the body to execute these protections, but concerns emerged soon after the appointment of its members that the group may have strong conflicts of interest when witness came to give evidence implicating the state or members of the government in some way. It has also been criticised for its inaccessibility.

## **9. The Role of the Supreme Court**

The Supreme Court of Sri Lanka, the only judicial body entrusted with protecting fundamental rights of the people, has played an unpredictable role over the past 25 years. It would not be wrong to

say that its role has been a veritable roller coaster ride with many ups and downs. During the early years of the 1990s the Supreme Court played a very limited role in protecting rights of people, especially those who were illegally detained. This was in large part due to the legal profession not bringing these cases before the Supreme Court as many human rights lawyers were killed or threatened during the JVP uprising in the 1980s and its subsequent brutal suppression. From sending mixed signals — such as in the SLBC case where the Court held that although freedom of expression should not be narrowly interpreted, it does not guarantee the right to information, per se<sup>39</sup> — the Court went on to hand down the landmark decision in *Wimalenthiran* where the Court emphasised that emergency regulations could not be used to justify illegal activities. The Court also said that emergency regulations do not allow for the derogation of legal safeguards, even in a state of emergency, and that they cannot be used as grounds for an arresting officer to act on anything less than a reasonable suspicion.

In another important ruling, the Supreme Court directed the Department of Immigration and Emigration to amend the guidelines adopted by them with regard to the residence visas issued to foreign male spouses as they violated the equality clause under the Constitution.<sup>40</sup> Other landmark decisions include *Bulankulame and others v. Minister of Industrial Development and others* (the Eppawala Phosphate Mining Case — extensive discussion of international environmental law principles, soft law, public trust

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<sup>39</sup>Sri Lanka: State of Human Rights 1997, p 4.

<sup>40</sup>Feizal Samath, “Rights-Sri Lanka: Supreme Court Rights Gender Discriminatory Rule,” <http://www.ipsnews.net/1999/06/rights-sri-lanka-supreme-court-rights-gender-discriminatory-rule/>

doctrine and the principle of shared responsibility), *Sugathapala Mendis and Raja Melroy Senanayake v. Chandrika Bandaranaike Kumaratunge and Others* (extensive discussion of the public trust doctrine, executive powers, public purpose, environmental implications of the project and limits of the powers of the president) and *Vasudeva Nanayakkara v. K.N Choksy, former Minister of Finance and Others* (involving the *ultra vires* acts of a high ranking public officer). In the *Sugathapala Mendis* case, the Supreme Court reminded everyone that nobody, *not even the President*, is above the law.

In the landmark case of *Kanapathi Pillai Machchavallavan v. OIC, Army Camp, Plantation Point, Trincomalee and Others*, the Supreme Court implicitly recognised the right to life by affirming the right not to be disappeared. In this case, the Supreme Court held that the State is responsible for the disappearance of persons while detained at the Army Camp and later presumed to be dead. The Court held that if a person is arrested or held by the security forces, and subsequently disappears, then it will be assumed that the person was killed by the security forces. Because it was done without an order of a competent court, it violated Article 13(4) of the Constitution.

The dwindling number of fundamental rights cases brought before the Supreme Court in 2006 and thereafter seemed to suggest that the judiciary was also contributing to the worsening human rights situation in the country. Many petitions were dismissed at the leave to proceed stage barring advancement to the merits phase. According to the data from the Missing Persons Unit, only nine convictions had resulted as of 2003. Over 30,000 disappearances

were registered with the unit and 350 indictments were filed in the High Court.

At a time when the only body to uphold fundamental rights in the country was the Supreme Court, the appointment of Sarath N. Silva as the Chief Justice saw a general decline in the number of cases that were given leave to proceed, and were in fact awarded relief subsequently. The retirement or the demise of pioneer judges also contributed to this decline. However, the final nail in the Supreme Court coffin was surely made by its decision in the *Singarasa case*.

Singarasa was arrested by the Sri Lankan security forces in July 1993 while he was sleeping at home (along with 150 other Tamils who were “rounded up”). No reasons for arrest were given and the group was taken to an Army camp where they were accused of supporting the LTTE. During detention, Singarasa’s hands were tied together; he was kept hanging from a mango tree and was assaulted by the security forces. He was detained under the PTA without charges for 18 months. He was subjected to torture and ill-treatment and when he was finally brought before a High Court; his body had visible assault marks. The Judicial Medical Officer’s report indicated severe injuries. An alleged confession was deemed admissible and the JMO’s medical report was rejected without reason. He was convicted based solely on the alleged confession and sentenced to 50 years imprisonment. The Court of Appeal affirmed the conviction but reduced the sentence to 35 years while the Supreme Court refused special leave to appeal.

He then made a petition to the UN Human Rights Committee alleging violations of Article 14(1) of the ICCPR on the right to a

fair trial, Article 14(3)(c) due to delay of four years between his conviction and denial of leave to appeal, and Article 7. The Committee held that there were violations of Article 14 (1), (2), (3)(c) read together with Article 7(2) and (3) and, therefore, the state party must provide the author with an effective and appropriate remedy, including release or retrial and compensation.

When the author requested a revision/review of the decisions of the Supreme Court and other courts based on the decision of the Human Rights Committee, all hell broke loose. In a severe blow to international human rights law and oversight by the UN Human Rights Committee, the Supreme Court held that Sri Lanka's accession to the Optional Protocol to the ICCPR was unconstitutional. The Supreme Court appeared to be under the erroneous assumption that accession granted judicial power to the Committee. The Committee is not a judicial body and does not have any enforcement powers. The Supreme Court seems to have recovered somewhat from this awkward position but we may not see the golden era of the Supreme Court that we had in the late 1990s and early 2000s for quite some time.

## **10. Positive Steps**

In early 1994, the UNP government ratified the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. However, it fell to the new PA government to enact enabling legislation to give effect to the Convention within Sri Lanka. However, the legislation fell short of its international obligations and some important provisions were left out. Sri Lanka also ratified the Hague Convention relating to Inter-Country Adoption of Children in 1994.

The PA Government established a Parliamentary Select Committee on Constitutional Reform in 1994 and gave it time until July 1995 to recommend revisions to the Constitution. The promised reforms included strengthening the fundamental rights provisions, judicial review, reforming the executive presidency and the electoral system. The Ombudsman Act was amended to simplify the procedure for bringing complaints to the Ombudsman and provided for aggrieved persons to bring complaints directly.

The government ratified ILO Convention No 87 relating to Freedom of Association and Protection of the Right to Organize and acceded to the UN Convention on the Protection of Rights of All Migrant Workers and their Families in 1996. The Government also enacted the Protection of the Rights of Persons with Disabilities Act No 28 of 1996 and the Sri Lanka Human Rights Commission Act No 21 both of which were adopted in 1996. In 2000 Sri Lanka ratified several international conventions relating to international terrorism and hostage taking. It also ratified the Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflict.

The 17<sup>th</sup> Amendment to the Constitution was adopted in 2001 which established a Constitutional Council in an effort to free the Commissions created under that amendment from political interference. Thus, the Constitutional Council was charged with the task of recommending appointments to independent commissions such as the Public Service Commission, the Judicial Service Commission, the Election Commission, the Police Commission, the Bribery Commission and the Human Rights

Commission.<sup>41</sup> Despite these attempts, the appointments to these commissions did not proceed as expected. The President refused to appoint the person recommended by the Constitutional Council as chairman of the Elections Commission. Other appointments were delayed which resulted in some commissions being unable to function.

In 2008, the government established a steering group to draft a constitutional charter of rights. The group was supposed to have consultations countrywide in an effort to bring greater awareness on human rights issues as well as bringing people from different ethnic and social groups together to discuss and agree on the key components of the human rights charter. While the objective was laudable, no signs of implementing it were evident as the year drew to a close in 2009, highlighting, yet again, the lack of genuineness when it came to the government's commitment to human rights.

The 19<sup>th</sup> Amendment to the Constitution adopted in April 2015 introduced a new Article 33A which reads as follows:

33A. The President shall be responsible to Parliament for the due exercise, performance and discharge of his powers, duties and functions under the Constitution and any written law, including the law for the time being relating to public security.<sup>42</sup>

With the 19<sup>th</sup> Amendment, a right to information provision was included in the Constitution. In addition, the government adopted Right to Information Act in 2016 which refers to the fundamental right of people to access information which is in the possession,

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<sup>41</sup> Sri Lanka: State of Human Rights 2005, p 4

<sup>42</sup> Article 33A, 19<sup>th</sup> Amendment to the 1978 Constitution.

custody or control of a public authority, without having to provide a reason for requesting such information. Because this is included as a fundamental right, petitions can be referred to the Supreme Court with regard to infringements of the right by executive or administrative action. However, the constitutional right is somewhat narrower than the statutory right because the petitioner has to establish that such information is “required for the exercise or protection of a right.” This is a great victory for rights advocates as several previous attempts to enact a right to information law had failed, most notably, the version drafted under the leadership of Justice ARB Amerasinghe in 1996 and the version spearheaded by Milinda Moragoda in 2010. While some provisions in the law can certainly be improved to align with international standards, its adoption heralds a new watershed moment in relation to human rights protection in the country.

When Sri Lanka signed the Optional Protocol to the ICCPR, another avenue opened for Sri Lankans whose rights were violated to seek redress, provided they exhausted local remedies. After a slow start, several communications have been referred to the UN Human Rights Committee against Sri Lanka. In *Tony Michael Fernando v. Sri Lanka*, the Human Rights Committee found that the sentence passed by the Sri Lanka Supreme Court imposing a one year rigorous imprisonment term on the petitioner amounted to a violation of Article 9(1) of the ICCPR on arbitrary deprivation of liberty. The Committee found that the imposition of a draconian penalty without adequate explanation was a violation of Article 9(1).

In another communication, *Sarma v. the Government of Sri Lanka*, the Committee found that Sri Lanka had violated Articles 7 and 9 of

the ICCPR in relation to the applicant's son and Article 7 in relation to the applicant and his wife. The Committee directed the government to pay compensation and the Ministry of Foreign Affairs requested the Human Rights Commission of Sri Lanka (HRC) to compute the compensation. The HRC, while basing its reasoning on international standards, determined the amount based on economic realities in Sri Lanka. In another case, *Susila Malani Dahanayake and 41 Others* (represented by an NGO) that related to the Southern expressway, the Human Rights Committee was of the view that the authors were not "victims" within the meaning of Article 1 of the Optional Protocol as they had already received compensation for the violation of their rights under Article 12(1) of the Constitution from the Sri Lanka Supreme Court. Perhaps the most famous case was the *Singarasa case*, referred to above.

## 11. Overview of Events in 2017

Four chapters in this volume take stock of the human rights situation in the country in 2017 in relation to labour rights,<sup>43</sup> tax,<sup>44</sup> international monitoring of human rights,<sup>45</sup> and judicial interpretation of fundamental rights.<sup>46</sup> In addition, a separate

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<sup>43</sup> See Chapter on Old Wine in New Bottles: Returning of Old Authoritarianism in the Neo-Liberal Era and Human Rights by Vidura Munasinghe and Ishan Batawalage

<sup>44</sup> See Chapter Human Rights and Income Tax in Sri Lanka by Shivaji Felix

<sup>45</sup> See Chapter on International Monitoring of Human Rights in Sri Lanka in 2017 by Dinushika Dissanayake

<sup>46</sup> See Chapter 3 on Judicial Interpretation of Fundamental Rights by Dinesha Samararatne

chapter is devoted to the civil war, its aftermath and dilemmas of peace building from 1983-2017.<sup>47</sup>

The chapter on labour rights focuses mainly on three labour struggles that took place in 2017: (a) Telecom manpower strike; (b) manpower strike in the Ruhunu Magampura Port; and (c) the strike in the Associated Battery Manufacturers of Ratmalana. All three related to hiring manpower from manpower supplying agencies. The chapter points to how political authorities exploited the uncertain position of manpower workers to gain political mileage. It shows that in post-war Sri Lanka, economic development seems to have trumped over the realisation of human rights and that manpower agencies — which came into existence in early 1980s soon after the economy was liberalised — have complicated the employer-employee relationship that existed prior to that. With the liberalisation of the economy came “flexible” labour which posed a severe challenge to the rights of workers. The three struggles discussed in the chapter point to the erosion of not just labour rights but also economic and social rights of workers: “Thus, the worker not only loses the labor rights which were achieved through workers’ struggles in history, but also is exposed to a wide range of economic and social crises which are caused by loss of employment.”<sup>48</sup>

The chapter on income tax takes a look at the *Inland Revenue Act No 24 of 2017*, which became operational from 1 April 2018, through

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<sup>47</sup> See Chapter on Civil War, War Ending and Dilemmas of Peace Building in Sri Lanka by Jayadeva Uyangoda

<sup>48</sup> Chapter on Old Wine in New Bottles: Returning of Old Authoritarianism in the Neo-Liberal Era and Human Rights by Vidura Munasinghe and Ishan Chamara Batawalage

a human rights lens. The chapter argues that while the new Inland Revenue Act is likely to bring a considerable amount of revenue to the state coffers in the short term, it is unlikely to be sustainable in the long run.

The chapter on Monitoring Human Rights in Sri Lanka highlights that in 2017 alone, Sri Lanka ratified three international human rights treaties bringing the total of human rights treaties ratified to sixteen. The author however, notes that “For Sri Lanka, the evolution of its commitment to international human rights frameworks has been Janus-faced” — externally, Sri Lanka has ratified all the major human rights treaties. Internally, many discriminatory and contradictory domestic laws and policies continue to operate and many human rights abuses have gone uninvestigated and perpetrators unpunished. The author discusses Sri Lanka’s engagement with treaty bodies — especially, the Committee on Elimination of All forms of Discrimination Against Women, the Committee on Economic, Social and Cultural Rights, and Universal Periodic Review, all of which took place during 2017. The author concludes: “It is clear that despite the opportunities to deliver on promises on human rights and transitional justice, the government still failed to take critical steps in the right direction. The double-faced nature of international promises juxtaposed with domestic failures, continued to be the trend in Sri Lanka during 2017.”<sup>49</sup> This essentially captures the human rights situation in the country, which unfortunately, seems to continue to date.

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<sup>49</sup> Dinushika Dissanayake, Chapter on International Monitoring of Human Rights in Sri Lanka, 2017.

## 12. Conclusion

Looking back at the past 25 years, it was easy to see why this report was necessary. It has become an important evaluation of human rights violations in the country. No group had attempted to do this before. Foreign human rights groups as well as foreign government institutions, including the US State Department, consulted the report in preparing their own reports. Despite the many challenges it faced over the years, LST managed to produce the report culminating in this 25<sup>th</sup> anniversary edition. For this LST deserves our appreciation. Let us hope LST will continue to produce this report for many more years to come.

Undermining the democratic institutions that are established to protect rights of people and to uphold the rule of law is a sure way to erode democracy in any country. It takes years to repair the damage done by such actions. Thus, for example, during the Rajapaksa era, the Constitutional Council was not established due to disagreements relating to the appointment of the 10<sup>th</sup> member to the Council. This led to the appointment by the President of members of several independent commissions, including the Human Rights Commission, jeopardising its independent functioning.

Another area that needed reform relates to elections. Although a Parliamentary Select committee on Electoral Reform presented its report despite opposition by many political parties, no meaningful action has been taken. The report proposed a combination system with 140 members elected on the first past the post system, 70 on the district proportional representation system and 15 to be appointed from the National list.

The latest attempt at constitutional reform undertaken by the current government seems to be at a standstill. Several previous attempts had also failed. A Public Representations Committee on Constitutional Reform was established by a sub-committee of the Cabinet in December 2015. After island-wide consultations lasting a month, and after receiving around 3800 submissions, the Committee submitted a report to the Steering Committee on Constitutional Reform in May 2016. This process highlighted, yet again, the divided nature of Sri Lankan society and the mistrust among various ethnic groups. For example, Malay and Sufi groups did not want to be identified with Sri Lanka Muslims. Upcountry Tamils made representations for recognition as a special group while Burghers from the Eastern Province wanted to be recognised for their unique culture. Equal treatment was stressed by everybody and many groups, including women’s rights groups, requested the inclusion of socio-economic rights in the new constitution. This, however, gave rise to considerable debate as some groups felt that inclusion of socio-economic rights would obscure the real issues that needed to be tackled in the new constitution, namely, a political solution to the ethnic conflict. Similar to previous attempts at constitutional reform, the current attempt seems to have, yet again, fallen prey to political maneuvering and deal making.

Another point that needs highlighting is the fact that Sri Lanka has generally been good at ratifying international treaties. It is a party to all the major international human rights treaties. However, as this report has highlighted over the years, its track record of implementation, both in terms of adopting enabling legislation and implementing it on the ground, has been quite poor.

While the change in government and the demise of the Rajapaksa dynasty dawned a new era in Sri Lanka, recent incidents do not augur well for a government which came into power on a platform of good governance and transparency. Attacks against religious minorities have continued and ethnic tensions seem to be simmering on the surface. The slow pace of investigations of bringing perpetrators to justice, and the transitional justice process are also cause for concern. Many also complain about the high cost of living and the slow economic progress in the country. Civil society groups are voicing concern about the increased involvement of the Chinese government in major infrastructure projects such as the Port City Project that could have major environmental and social justice ramifications. Moreover, the recent local government elections at which the Sri Lanka Podujana Peramuna (SLPP)/Joint (JO), whose election campaign was led by President Mahinda Rajapaksa, won a majority of the local government bodies, which shows that our memories are indeed very short.



## II

### CIVIL WAR, WAR ENDING, AND DILEMMAS OF PEACE BUILDING IN SRI LANKA, 1983-2017

*Jayadeva Uyangoda\**

#### 1. Introduction

Sri Lanka's ethno-political civil war, which lasted for twenty-six years, encapsulated a persistent pattern of the country's post-independence political order: the inability of a democratic polity to create stable political structures for peaceful mediation of competing ethnic aspirations between majority and minority communities. After a protracted civil war and its particularly violent end, this now continues to persist in Sri Lanka as a feature

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embedded in Sri Lanka's ethnocratic state and its priorities. The stalling of recent efforts made to chart out a post-war path of peace building, political reforms and inter-ethnic understanding through reconciliation and political equality can be viewed as an expression of a new post-war conundrum: the mismatch between the present coalition government's promise to implement a reform programme and its continuing inability to deliver on the reform promise.

The central argument explored in this essay has two analytical components. First, peace building goals in Sri Lanka during and after the civil war initially entailed an agenda of political reforms for power-sharing to address ethnic minority demands for political equality and rights. Once the war became protracted, that agenda became complex with the need to address root causes of the conflict as well as the consequences of the war that included resolving human rights and humanitarian issues, rehabilitation and resettlement of the displaced and war affected communities, demilitarization at state and non-state levels, as well as inter-community reconciliation. After the war ended, this broad agenda of peace building became still more complex with the way in which the war ended with total military victory by the state and also massive humanitarian issues to be addressed in the post-war normalization process. The issues of state reform, political equality of the minority communities, addressing the human rights and war crimes issues through a process of transitional justice, and reconciliation between the state and the Tamil people, and among communities assumed new salience as well as urgency. The internationalization of the post-war peace building and the intense domestic resistance it fostered made the post-war peace building process entangled with the formation of a new phase of the

conflict. Thus, the continuous reproduction of the conflict during and after the war has placed Sri Lanka's peace building goals in a framework of intractability.

The second component of the argument is about the fusion of ethnocentric and national security dimensions of Sri Lanka's state after the war ended in May 2009. The new challenges to peace building are embedded in the ways in which Sri Lanka's state formation conflict between Sinhalese and Tamil ethno-nationalist projects advanced from an ethnocentric to a national security state. Its key feature during the war was the conflation of war and peace as mutually constitutive processes that not only sustained the war, but eventually created conditions for a military end to the war with a unilateral victory to the Sri Lanka state. Once the war ended, the Sri Lankan state began to express explicitly a qualitative transformation it has been acquiring during the war, that is, the fusion of its ethnocentric character of the state with a post-war national security agenda. An ethnocracy is one in which the state and the political order become the exclusive sites for the political dominance of one ethnic community over other, politically subordinate, ethnic communities (Yiftachel: 2000, Uyangoda: 2011, Weikala: 2015). The peculiarity of the Sri Lankan case is the emergence of a national security agenda of the state soon after the war ended as its dominant policy and ideological orientation, producing political outcomes that have led to a thin and minimalist version of peace building.

The narrative developed in this chapter is structured on the following themes: (a) political background to the civil war; (b) formation and escalation of the war process; (c) efforts at negotiated settlement to the war and conflict; (d) post-war politics

of peace building; and (e) the return to, and retreat from, the peace building project under Sri Lanka's present government.

## 2. Background

The backdrop of Sri Lanka's civil war comprises what the academic literature began to describe during the late 1970s and early 1980s, as the 'ethnic conflict'.<sup>1</sup> It revolved around the Tamil nationalist demand for regional autonomy for Sri Lanka's Tamil minority citizens living in the island's Northern and Eastern provinces. That demand was precipitated as a response by Tamil political elites to moves by the Sinhalese political elites to maintain an ethnic-majoritarian hold over the post-independent Sri Lankan state that was created by the departing British rulers as a unitarist entity. The federalist demand began to be articulated soon after political independence in 1948. This was also the time when political leaders of neighboring India were exploring the framework for restructuring the Indian state by means of a federal constitution. Sri Lanka's trajectory of post-colonial state formation did not go through such a reformist path. Its trajectory was one of consolidating the unitary state and simultaneously generating resistance and instability.<sup>2</sup>

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<sup>1</sup> The terms used in the academic as well as political discourses till the late 1970s to refer to were ethnic conflict 'race problem' or 'communal problem.' Roberts (1978) is one of the earliest to use the concept 'ethnic conflict' in the context of Sri Lanka. A few years later, the volume *Ethnicity and Social Change* published in 1984 indicated that it had gained currency among liberal as well as Left academics as well.

<sup>2</sup> Among the early works that deal with this early phase of Sri Lanka's ethnic politics are Howard Wriggins, *Ceylon: Dilemmas of a New Nation*, Princeton, (NJ): Princeton University Press, 1960), Robert Kearney, *Language and Communalism in the Politics of Ceylon*, (Durham: Duke University Press, 1967), and Michael Roberts, "Ethnic Conflict in Sri Lanka and Sinhalese Perspectives: Barriers to Accommodation," *Modern Asian Studies*, 12, 353-76, 1978.

### **3. Civil War –Formation and Escalation**

The origins of Sri Lanka's ethnic civil war goes back to the years 1978-82 when a low intensity conflict began to take shape between the Sri Lankan state and several Tamil militant groups in the Jaffna peninsula. There was a specific political context to the emergence of Tamil radical militancy during this particular phase of Sri Lanka's modern history. Its key features were (a) re-consolidation of the constitutional foundations of the unitary state amidst Tamil nationalist demand for regional autonomy, (b) transition of Tamil nationalist demand from regional autonomy to separate statehood, and (c) radicalization of Tamil nationalist politics with increasing polarization between the established political leadership and youth activists. The government's repressive law-and-order response to youth radicalization fuelled political unrest in the North, eventually creating conditions for the government to deploy the military to quell what Sinhala leaders and the public opinion understood at the time as an emerging terrorist threat to the state. The government's inability to politically respond to the Tamil nationalist mobilization, organized around the twin slogan of independence and separate statehood, and the radical Tamil nationalist argument that Tamil politics had reached a stage of seeking statehood through armed struggle, constituted the opposing perspectives that had been constructed by the two sides to the emerging civil war by the early 1980s.

The anti-Tamil riots of July 1983 and the manner in which the government handled the riots further escalated the tension that had already arisen over the course of decades of sporadic ethnic violence. The government took an unsympathetic stand towards the Tamils – victims of countrywide violence that saw hundreds

killed thousands of homes and businesses destroyed and tens of thousands made refugees<sup>3</sup> and appeared to justify violence purely on ethnic majoritarian grounds. Thus, the ethnic riots of July 1983 had a series of consequences that were to change the course of Sri Lanka's contemporary history. Firstly, riots marked the culmination of a long process of alienation between Tamil citizens and the Sri Lankan state, producing a point of no return in their relationship with the state. Secondly, the riots provided Tamil militant groups a forceful justification of their campaign for an armed struggle for secession. Thirdly, the riots opened up the space for India's intervention in Sri Lanka's ethnic conflict and its eventual internationalization. Against this backdrop, the government further hardened its approach to the ethnic conflict. Through the 6<sup>th</sup> Amendment to the Constitution,<sup>4</sup> even the advocacy of separation became an offence. The 6<sup>th</sup> Amendment forced the leadership of the Tamil United Liberation Front (TULF), the main Tamil parliamentary party, to flee to India and live in exile. That effectively cleared the way for the Sri Lankan state and the Tamil armed groups to escalate the war, leaving no political space for moderate political alternatives to the war.<sup>5</sup>

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<sup>3</sup> According to official Government statistics the number of those killed was 471 while the number injured was 3,769. The number of robberies was 3,835. However, unofficial reports say that the number killed was 2,000 and the number of Tamils displaced was around 150,000. Of the buildings destroyed were 8,000 houses and 5,000 commercial establishments. The value of property damaged or destroyed was estimated to be nearly 300 million U.S. dollars.

<http://www.lankaweb.com/news/items/2016/07/18/black-july-33-years-ago/>

<sup>4</sup> Sixth Amendment to the Constitution in 8 August 1983 imposed a prohibition on the violation of territorial integrity.

<sup>5</sup> See chapter 4 of Ketheshwaran Loganathan, *Sri Lanka, Lost Opportunities: Past Attempts at Resolving Ethnic Conflict*, (Colombo: University of Colombo, 1996) pp. 85-117.

#### 4. Efforts at Negotiated Settlement to War

One crucial part of the story of Sri Lanka's ethnic conflict and war has been the attempts made to bring parties to the war to the negotiation table and persuade them to sign an externally mediated peace treaty. The first such attempt was made by the Indian government in 1984, at a very early stage of the war. The Indian government seems to have been concerned by the escalation of Sri Lanka's internal war due to three reasons: (a) the problem of Tamil refugee inflow to South India; (b) political sympathy developed in India for the Sri Lankan Tamils as victims of the Sri Lankan government's aggressive ethnic majoritarian policies; and (c) the apprehension of unpredictable political consequences for India of Sri Lanka's separatist war.<sup>6</sup> India using its diplomatic and political resources brought the Sri Lankan government and Tamil parties to the negotiation table in August 1984. The talks were held in Thimpu, the capital of Bhutan. However, the talks ended in failure, because both sides came to the table seeking a unilateral political and propaganda advantage. Besides, the dynamics of the conflict at this early stage of the civil war were such that the Sri Lankan state and the Tamil militant groups were pursuing unilateral solutions by military means.<sup>7</sup>

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<sup>6</sup> S. D. Muni, *Pangs of Proximity: India and Sri Lanka's Ethnic Crisis*, (New Delhi: SAGE 1993), Krishna, Sankaran, *Postcolonial Insecurities: India, Sri Lanka and the Question of Nationhood*, (Minneapolis and London: University of Minnesota Press 1999) and Krishna Sankaran, *India's Role in Sri Lanka's Conflict*, Marga Monograph 3, (Colombo: Marga Institute 2001) and Partha Ghosh, *Ethnicity Versus Nationalism: Devolution Discourse in Sri Lanka*, (Colombo: Vijitha Yapa Publishers 2003) are good sources for different interpretations of India's involvement in Sri Lanka's conflict.

<sup>7</sup> Among the literature on peace efforts are Ketheshwaran Loganathan, *Sri Lanka, Lost Opportunities: Past Attempts at Resolving Ethnic Conflict*, (Colombo: University of Colombo 1996), K. M. De Silva, *Reaping the Whirlwind: Ethnic*

Despite the failure of the Thimpu talks, the Indian government continued to be engaged with parties to the Sri Lankan conflict in order to explore a framework for terminating the war and a possible political settlement to the conflict. Through persistent and difficult diplomatic efforts, by the middle of 1987, the Indian government of Rajiv Gandhi managed to achieve two outcomes; (a) to design a political framework of power-sharing in Sri Lanka as the basis of negotiations and a possible constitutional settlement, and (b) to persuade the Sri Lankan government as well as the Tamil rebel groups – whose exiled leaders were operating from South India at that time – to give up the military option and in turn to accept a political solution to the conflict. The Indian Prime Minister’s efforts bore fruit in July 1987 when he signed a peace accord with Sri Lanka’s President J. R. Jayewardene.

Known as the Indo-Lanka Accord, this bilateral inter-state agreement between Indian and Sri Lankan leaders envisaged: (a) termination of the war, with India as the guarantor for the demilitarization process; (b) surrender of weapons by the militant

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*Conflict and Ethnic Politics in Sri Lanka*, (New Delhi: Penguin Books 1998) and K. M. De Silva, Sri Lanka: *Ethnic Conflict Management and Resolution*, (Kandy: International Centre for Ethnic Studies 1999), Kumar Rupesinghe ed. *Negotiating Peace in Sri Lanka: Failures and Lessons*, Two Volumes, (Colombo: Foundation for Co-existence 2006), Partha Ghosh, *Ethnicity Versus Nationalism: Devolution Discourse in Sri Lanka*, (Colombo: Vijitha Yapa Publishers 2003), John Gooneratne, *Negotiating with Tigers (LTTE) 2002-2005: A View from the Second Row* (Pannipitiya: Stamford Lake 2007), Anton Balasingham, *War and Peace: Armed Struggle and Peace Efforts of Liberation Tigers* (Mitcham, England: Farimax Publishing Ltd. 2004), Ketheshwaran [Ketheshwaran Loganathan, *Sri Lanka, Lost Opportunities: Past Attempts at Resolving Ethnic Conflict* (Colombo: University of Colombo 1996)] was a participant in the Thimpu talks and Balasingham was LTTE’s chief negotiator in almost all peace talk events. Gooneratne, a Sri Lankan diplomat, as the title of his book suggests, has been closely watching the process as a government official.

groups and their entry to parliamentary politics; and (c) establishment of a system of provincial councils as the institutional structure for devolution, which was also to constitute the constitutional framework for the proposed political solution. With these three components at its core, the Indo-Lanka Accord marked a politically significant moment in Sri Lanka's post-colonial politics as well as in the conflict process. Except for the LTTE, all other direct parties<sup>8</sup> to the conflict and war accepted the political solution as conceived in the Accord. The Tamil rebel groups that accepted the Accord gave up arms and the path of armed struggle, accepted the system of devolution proposed in the Accord, and eventually joined the parliamentary process. Equally important was the fact that Sri Lanka's government leaders acknowledged the point that ethnic insurgency was not just a terrorist challenge to the state, but an expression of ethnic minority grievances warranting a non-military approach to its termination.<sup>9</sup> Linked to this point was the recognition by a leading faction of the Sinhalese political leadership that re-structuring of Sri Lanka's unitary state was necessary for a political solution acceptable to the Tamil minority. The proposed system of provincial councils indeed marked a major policy shift towards such state restructuring.<sup>10</sup>

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<sup>8</sup> Tamil militant groups such as the PLOTE, TELO, EPRLF, EROS and ENDLF were the other parties  
[https://www.researchgate.net/publication/310170139\\_Conflict\\_in\\_Sri\\_Lanka\\_A\\_Study\\_on\\_Peace\\_Negotiations\\_during\\_the\\_Civil\\_War\\_1984-2008](https://www.researchgate.net/publication/310170139_Conflict_in_Sri_Lanka_A_Study_on_Peace_Negotiations_during_the_Civil_War_1984-2008)

<sup>9</sup> Address by President Chandrika Bandaranaike Kumaratunga of the Democratic Socialist Republic of Sri Lanka at the High-level Plenary Meeting of the General Assembly of the United Nations New York 15 September 2005 <http://www.un.org/webcast/summit2005/statements15/sri05091515eng.pdf>

<sup>10</sup> The Thirteenth Amendment to the Constitution of 1978, enacted in 1987, provides the framework for the devolution of political power through a system of Provincial Councils (PC) in Sri Lanka.

At the same time, the Indo-Lanka Accord,<sup>11</sup> from the moment of its signing in Colombo, faced a number of unforeseen challenges, indicating the fragility of peace in Sri Lanka's civil war. Resistance to the Accord soon assumed the character of an armed rebellion in Sri Lanka's South. Sinhalese nationalist groups vehemently opposed the Accord on the argument that it violated Sri Lanka's sovereignty and independence. The ruling United National Party (UNP) faced an internal division and dissension within the second level of party leadership. Among the forces of opposition, the *Janatha Vimukthi Peramuna* (JVP), a radical Sinhalese underground movement, launched a revolt against the government and it soon spread across most of the country, enjoying some popular backing. Thus developed a second, parallel insurgency when attempts were being made to resolve the Tamil ethnic insurgency. However, despite resistance, violence, and unfolding political crisis, the government of President J. R. Jayewardene managed to get the parliamentary sanction for the constitutional amendment that established provincial councils. Amidst political uncertainty, the LTTE refused to surrender its weapons as envisaged by the Indo-Lanka accord. That compelled the Indian government, the guarantor of the peace Accord, to deploy its military forces for peace enforcement in Sri Lanka. That led to the collapse of the peace accord and the resumption of war, with the new dimension that the Indian government, the peacemaker, too became a direct party to Sri Lanka's ethnic conflict and war. The Indian peace

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<https://www.lawnet.gov.lk/1947/12/31/thirteenth-amendment-to-the-constitution-2>

<sup>11</sup> The Indo-Sri Lanka Peace Accord was signed in Colombo on 29 July 1987, between Indian Prime Minister Rajiv Gandhi and Sri Lankan President J. R. Jayewardene.

[https://peacemaker.un.org/sites/peacemaker.un.org/files/IN%20LK\\_870729\\_Indo-Lanka%20Accord.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/IN%20LK_870729_Indo-Lanka%20Accord.pdf)

Keeping Forces (IPKF) fought against the LTTE till early 1990 when they were forced to withdraw by Sri Lanka's new President, R. Premadasa.

President Premadasa made the third attempt towards a negotiated settlement with the LTTE. Peace talks began informally in February 1990 and ended in failure in early 1991. Premadasa-LTTE talks were not facilitated by an external actor. Both sides took up the stand that they could reach a peace deal without any third party involvement. However, these talks collapsed without producing any significant outcome when the LTTE unilaterally resumed hostilities in June 1990. Sri Lanka's relapse to war for the third time after aborted peace talks saw further escalation of violence. The assassination of President Premadasa on May 1, 1993, allegedly by the LTTE, was a major landmark in the post-peace talks re-intensification of war. President Premadasa's assassination had pushed the UNP government into a hardline position in its response to the LTTE. Re-escalation of war was the inevitable outcome of the breakdown of the engagement between the UNP government and the LTTE.

President Chandrika Kumaratunga, who became the new leader of the Sri Lanka Freedom Party, led a new coalition called People's Alliance (PA) and won the parliamentary and presidential elections held in August and November 1994 respectively. Her coalition government was a broad multiethnic alliance with direct and indirect participation of Tamil and Muslim parties. Left parties were also its coalition partners. The new coalition had pledged during the election that in power it would end the war through negotiated political settlement with the LTTE. The peace pledge had received popular support as well, enabling Kumaratunga to

win the Presidential election held in November 1994 with relative ease. Soon after forming the government, Kumaratunga initiated communication with the LTTE and invited its leaders to peace talks. By the end of 1994, the two sides had accomplished adequate preparatory work to launch a new phase of peace negotiations.

As a part of confidence building measures, the government and the LTTE signed a cessation of hostilities agreement on January 8, 1995. A series of letters was exchanged between President Kumaratunga and the LTTE leader, Velupillai Prabhakaran. Although the new peace initiative began with a sense of optimism, within four months, and after three rounds of direct meetings between delegation of the two sides, talks ended in April 1995, when the LTTE unilaterally returned to war. A key positive outcome of the peace process launched by the Kumaratunga government was the acceptance by the government that the existing framework of devolution, as formulated in the 13<sup>th</sup> Amendment, needed expansion. That realization was expressed in the devolution proposals made public by the Kumaratunga government in August 1995. Known as ‘August 1995 proposals,’<sup>12</sup> the new devolution offer envisaged a substantial re-working of the 13<sup>th</sup> Amendment to enhance powers of the provincial councils. This was the period in which the concept ‘13 plus’ also emerged to indicate the demands as well as the need for more regional autonomy beyond the framework of 13<sup>th</sup> Amendment.<sup>13</sup> Parallel

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<sup>12</sup>[http://old.satp.org/satporgtp/countries/shrilanka/document/papers/kumaratunga\\_devolution.htm](http://old.satp.org/satporgtp/countries/shrilanka/document/papers/kumaratunga_devolution.htm)

<sup>13</sup> V. Suryanarayan, *Sri Lanka and the 13th Amendment: Tamil Disenchantment*, (Institute of Peace and Conflict Studies, July 2013)  
<https://www.files.ethz.ch/isn/167641/SR143-Debate1307-IReS-SL-13Amendment.pdf>

with the failure of peace initiative with the LTTE, the constitutional initiative for enhanced devolution of the PA government failed.

The inability of the Kumaratunga government to take its devolution proposals forward in 1995 was due to a combination of several adverse factors. The intensification of the war with the LTTE wakened the government's argument for a negotiated political settlement with the LTTE. In that context, the government expected to advance its overall constitutional reform package so that the peace process could be revised once the legal framework of a political settlement was constitutionalized. However, the government had to negotiate the insurmountable constitutional obstacle of securing the necessary two-thirds majority in Parliament through the support of the UNP, the main opposition party in Parliament. The UNP, playing its usual role of an uncooperative opposition succeeded in undermining Kumaratunga's constitutional reform initiative, when a new constitutional draft<sup>14</sup> was presented to Parliament in 2001.

During the last stage of President Kumaratunga's administration, a new idea entered Sri Lanka's policy discourse on peace. That was about the possible role for a mediator outside the Asian region to facilitate the resumption of negotiations between the government and the LTTE. This was the beginning of Norway's involvement in Sri Lanka's peace attempts. Amidst intensified war, both the LTTE and the government indicated to the Norwegians their

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<sup>14</sup><http://www.ipsnews.net/2001/07/politics-sri-lanka-uncertainty-hurting-an-already-faltering-economy/>

willingness to return to talks under their auspices.<sup>15</sup> This shift of position by the warring parties occurred in 1998. However, a controversy soon erupted on the question of a ceasefire agreement as a prelude to talks. While the LTTE proposed a ceasefire as a confidence-building step towards normalization, the government objected to a ceasefire and suggested talks to resume without letting up the war. The government's stand rested on the assumption that the LTTE was proposing a ceasefire as a prelude to talks as ploy to re-group and re-arm its cadres and regain its military capabilities that had been weakened by the government's high intensity offensive. Besides, the Chandrika Kumaratunga government had taken up the position, after the negative experience of peace talks in 1995, that negotiations would be held only with a militarily weakened LTTE, and without a ceasefire in force.<sup>16</sup>

The anticipated Norwegian role as mediator/facilitator in Sri Lanka's peace efforts took a dramatically new turn in early 2002 soon after a new coalition government led by the UNP was formed in December 2001. Norwegians were invited to play that role by the LTTE as well as the new government headed by the new Prime Minister Ranil Wickremasinghe. Both sides also indicated an eagerness to sign a peace deal within a definite time frame. The

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<sup>15</sup> Alan Bullion, *Norway and the peace process in Sri Lanka*, Sept. 2001, [https://www.researchgate.net/scientific-contributions/2048269892\\_Alan\\_Bullion](https://www.researchgate.net/scientific-contributions/2048269892_Alan_Bullion)

<sup>16</sup>Jayadeva Uyangoda, "Government-LTTE Negotiation Attempt of 2000 through Norwegian Facilitation: Context, Complexities and Lessons," in Kumar Rupesinghe ed., *Negotiating Peace in Sri Lanka: Failures and Lessons*, Two Volumes (Colombo: Foundation for Co-existence 2006) pp.231-60 provides a detailed account of this controversy. Mark Salter, *To End a Civil War: Norway's Peace Engagement in Sri Lanka* (London: C. Hurst 2015) offers an account of the broad context in which the controversy arose.

ceasefire agreement facilitated by Norway was signed on February 22, 2002.<sup>17</sup> The working of the ceasefire was to be subjected to international monitoring.<sup>18</sup> There was also high-level participation by the Norwegian government in the facilitator's role with a government minister, Erik Solheim, personally giving it political leadership. The new peace process, initiated by the UNP government, enjoyed much public support as well. In fact, the UNP, in its parliamentary election campaign of December 2001, had pledged to resume peace negotiations with the LTTE and make a fresh attempt to bring about a political settlement to the ethnic conflict. The UNP's peace promise had elicited a supportive public response in Sinhalese, Tamil and Muslim communities as well, indicating that the cyclical condition of war weariness had set in again in Sri Lanka's public consciousness.

Four rounds of talks were held outside Sri Lanka. Initially there were signs that the two sides were actually moving in the direction of signing a peace agreement. The LTTE's chief negotiator, Anton Balasingham, even claimed that the LTTE was no longer working towards 'external self-determination', and, therefore, ready to explore a solution worked out on the principle of 'internal self-determination.' This marked an important shift in the LTTE's

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<sup>17</sup>[https://www.bbc.com/sinhala/highlights/story/2006/02/060222\\_anton\\_sp\\_ech.shtml](https://www.bbc.com/sinhala/highlights/story/2006/02/060222_anton_sp_ech.shtml)

<sup>18</sup> In order to institutionalize international involvement in the peace process the international community created forums. A key mechanism that was created was the Donor Co-Chairs bringing together some of the main actors involved in the peace process: US, EU, Norway and Japan.

<https://www.cpalanka.org/wp-content/uploads/2009/4/INTERNATIONALISATION%20OF%20THE%20SRI%20LANKAN%20PEACE%20PROCESS%20-%20Mirak%20Raheem%20and%20Kethesh%20Loganathan.pdf>

earlier position of hard bargaining at the negotiation table. At the very first round of 2002 peace talks held in Bangkok, the LTTE gave the impression that a negotiated political settlement was actually on its agenda, although the skeptics immediately expressed doubts about it. However, the peace process took an unexpected and sudden turn in April 2003 when the LTTE refused to take part in further talks,<sup>19</sup> making the allegation that the government was slow in implementing the promises made at the talks.<sup>20</sup> Responding to international pressure to return to the talks, the LTTE stated in May 2003 that it would re-consider the boycott only if the government was ready to discuss proposals for an interim solution in the form of an interim self-governing authority for the Northern and Eastern provinces.<sup>21</sup>

A new debate on an interim self-governing authority thus erupted while the ceasefire agreement was coming under severe stress. In May and June 2003, the UNP government submitted to the LTTE two proposals for an interim government in the North and East, but the LTTE rejected them as inadequate to form the basis for the resumption of negotiations. In October 2003, the LTTE presented to the government, through the Norwegian Ambassador in Colombo, its own proposals for an Interim Self-Governing Authority (ISGA). These proposals appeared to have been based on a new principle of extensive regional autonomy akin to confederalism.<sup>22</sup> It became clear that the government, which had a

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<sup>19</sup><http://www.peaceinsrilanka.lk/negotiations/ceasefire-agreement-20028>

<sup>20</sup><https://www.aftenposten.no/norge/i/395rA/2242003-Tigers-announce-they-are-suspending-peace-talks>

<sup>21</sup> Balasingham (2006) provides a comprehensive account, from the LTTE's point of view, of these developments.

<sup>22</sup>A union of states in which each member state retains some independent control over internal and external affairs. Thus, for international purposes,

few months earlier taken a ‘minimalist’ position on the extent of power of the interim government, could not offer a constructive political response to the LTTE’s ‘maximalist’ agenda. Prospects for the resumption of talks became diminished, as the gulf between the positions of the government and the LTTE on an interim solution progressively widened. The LTTE’s ISGA proposals also strengthened the Sinhala nationalist argument against any political understanding with the LTTE. Many saw the proposals confirming their belief that the LTTE, despite its occasional peace overtures, had in fact been working to achieve its ultimate objective of realizing a separate state through secession. For skeptics, the ISGA proposals were a mere pretext employed by the LTTE to bring the negotiations to a stage of terminal crisis and then justify a new military offensive.

The crisis of the Norwegian-led peace initiative had its political repercussions at the level of the government as well. Within days of the ISGA proposals being made public, President Chandrika Kumaratunga dismissed the UNP government’s defence, foreign, and media ministers and appointed members of her Sri Lanka Freedom Party (SLFP) as new ministers, justifying the move on the argument that national security and sovereignty were facing an imminent threat by the Wikremasinghe government’s inept handling of the new crisis. Within two months, the President took a more drastic step by dissolving Parliament thereby effectively sacking the UNP government. These actions by President Kumaratunga had a specific political context too. The fact that the President and the Prime Minister, representing Sri Lanka’s two

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there are separate states, not just one state. A federation, in contrast, is a union of states in which external affairs are controlled by a unified, central government.

main opposing political parties – the SLFP and the UNP respectively – could not work in a framework of accommodation, or cohabitation, had led to a phase of hostility and confrontation between the two centres of power. This crisis of cohabitation obviously provided the political context as well justification for the dismissal of the UNP government.<sup>23</sup>

At the parliamentary elections held in April 2004, a new coalition led by President Kumaratunga’s Sri Lanka Freedom Party emerged victorious. The core of the debate during the election campaign was about war and peace with the LTTE. The SLFP-led coalition’s campaign centered on an argument for a new hardline approach to the LTTE with the objective of restoring military balance in favour of the state so that the new government could re-launch the peace initiative without international participation and from a position of military strength. The SLFP-led coalition also conducted its election campaign in a manner that turned the parliamentary election into a ‘public referendum’ on the Norwegian facilitated peace initiative of the UNP government. The election outcome, which saw the UNP’s defeat, demonstrated that in Sri Lanka’s Sinhalese society, the idea of peace through negotiation and political accommodation with the LTTE had been discredited to a considerable degree. While the public confidence of the process had diminished considerably, the LTTE’s continuous violation of the ceasefire agreement and the recruitment of children to its fighting ranks had created a great deal of public skepticism about the LTTE’s *bona fides*. Among the Tamil citizens too, there was a

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<sup>23</sup> The account which Austin Fernando provides [Austin Fernando, *My Belly is White* (Colombo: Vijitha Yapa Books, 2008)] on the impact of the conflict between the President and the Prime Minister on the 2002-2004 peace process is full of insider’s insights. Fernando was the Secretary to the Ministry of Defence during this crucial period.

deep sense of disappointment caused by the government's reluctance to initiate a robust programme of normalization in the war-torn areas. Political inertia on the part of the government and the bureaucratic hindrances to taking bold initiatives for normalization particularly contributed to this growing sense disenchantment within the Tamil society. The crisis of the peace process had also revived, with public support and legitimacy, the argument for restoring the state's military strength vis-a-vis the LTTE and redesigning the peace initiative without international participation. In other words, the collapse of the peace process of 2002-2003 created conditions for greater acceptance of the military option by both the government and the LTTE.<sup>24</sup>

Thus, the aftermath of the collapse of the UNP government's peace initiative of 2002 marked the beginning of a new phase of Sri Lanka's civil war. The key feature of the new phase was the growing belief among powerful forces in the Sri Lankan state and the military, and the LTTE that a return to full-scale war would be the best way to achieve their individual strategic objectives. From the perspective of those forces within the government that pressed

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<sup>24</sup> One of the key topics of debate among policy makers in Sri Lanka during this period concerning political engagement for peace with the LTTE was about the approach to peace. This debate on approach centered on two perspectives. The first, advanced by the UNP, held the view that negotiations with the LTTE should be assisted and facilitated by the international community, with two parallel tracks of state reform for enhanced devolution and rapid economic development through the active participation of global capital. It viewed international participation as a 'safety net' for the government. It also promoted the LTTE's exposure to the international environment. The second approach, shared by the SLFP and its Sinhalese nationalist partners, wanted to de-internationalize the engagement with the LTTE as well as the peace process, negotiate with the LTTE from a position of military strength, do away with ceasefire as a precondition, and regain the military capacity of the government to define the terms of engagement as well as a possible settlement agreement.

for a military option, resuming the war was necessary to regain the state's military and political advantage over the LTTE. The new government's analysis of the Norway-facilitated peace process under the UNP government was that the ceasefire had damaged the existing military balance of power to the advantage of the LTTE. For the LTTE, returning to full-scale war was necessary to demonstrate its military invincibility and, in turn, strengthen its bargaining capacity with both the Sri Lankan government and the international actors. Thus, by the end of 2004, Sri Lanka appeared to be ready for another phase of war re-escalation. However, the Indian Ocean Tsunami of 26 December, 2004 tentatively prevented Sri Lanka's relapse to war.

The first steps towards a return to war began in late 2005 after the Presidential election was held on 17 November, 2005. Mahinda Rajapaksa, Prime Minister of Kumaratunga's United People's Freedom Alliance (UPFA) coalition government, won the election. He began his tenure as president by resuming the ceasefire and talks with the LTTE in early 2006. However, neither side appeared to be committed to any positive outcome from the talks. Amidst continuing ceasefire violations, failure of international actors to save the ceasefire, and increasing tension in government-LTTE relations, relapsing to total war seemed inevitable. Eventually, the three year period from 2006 to 2009 marked the final phase of Sri Lanka's civil war. The last phase of the war, spanning over a period about nine months, had been particularly intense, brutal and horrendously destructive. Both sides demonstrated their priority of military goals over the safety and security of the civilians trapped in the conflict. Although the government "won" the war, it was a pyrrhic victory in a humanitarian sense. The war ended in May 2009 with the outright military defeat of the LTTE. After twenty-

six years, the Sri Lankan state could re-establish its authority over the entire Northern and Eastern provinces, with no single Tamil rebel group challenging the writ of the state. Thus, after a series of failed attempts at a negotiated end to it by political means, Sri Lanka's civil war came to an end by military means.

Is war-ending an adequate condition to guarantee an end to the ethnic conflict as well and in turn for the establishment of lasting peace in Sri Lanka? A large share of Sri Lanka's politics since May 2009 has been revolving around this question. Before we turn to a discussion of this theme, let us focus our attention on identifying some key dynamics that emerged through the war process.

## **5. Politics of War and Peace during Civil War: Patterns and Trends**

In the evolution of politics Sri Lanka's ethnic war and peace, there have been several recurrent patterns. One is whenever a peace initiative faced a crisis, the argument for a military solution to the conflict re-emerged with renewed vigour. In such circumstances, the LTTE in the Tamil society and the hardline nationalist forces in the Sinhalese society have been pushing for a unilateral military solution as a more effective alternative to political engagement. At the same time, periodic resumption of talks had also kept the discourse of peace building alive, despite the frequent setbacks it suffered due to the regular pattern of relapsing to war.

In this trajectory of Sri Lanka's conflict in which persistent war and occasional peace had constituted its two complementary sides, there has also been a process of internationalization. External actors, both state and non-state, were involved in the supply of arms, provision of military training and intelligence as well as

humanitarian assistance<sup>25</sup>. Some attempted to broker a negotiated peace. Sri Lanka's conflict thus became enmeshed in global politics. In the early phase of the war, India was directly involved in both war and peace efforts in Sri Lanka. Indian political elites seem to have believed that it was India's exclusive prerogative to shape the political future of conflict-torn Sri Lanka. However, after the withdrawal of the IPKF in 1989 and the assassination of former Prime Minister Rajiv Gandhi by the LTTE in May 1991, India's role in Sri Lanka's conflict became discreet. That opened up the space for extra-regional actors, primarily the UN and the Western states, to experiment with their own peace agendas in Sri Lanka. Some Western countries -- the US, the UK and EU countries -- had provided the Sri Lankan government both military and humanitarian assistance, thereby becoming parties to both the conflict and war. It was against this backdrop that internationalization of efforts also took place. The Norwegian-led peace facilitation that began in 2002 marked the beginning of this new trend of linking Sri Lanka's conflict with the West-led global liberal peace project.<sup>26</sup>

The liberal peace programme, as conceptualized by the UN as well as the Western powers, linked peace with security and development. With regard to Sri Lanka, it had proposed a policy package that included: (a) internationally mediated negotiations and a peace agreement between the government and the LTTE,

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<sup>25</sup><https://journals.openedition.org/poldev/1629>

<sup>26</sup> For an elaboration of this argument, see Kristan Stokke and Jayadeva Uyangoda eds., *Liberal Peace in Question: Politics of State and Market Reform in Sri Lanka* (London: Anthem Press 2011) and Sunil Bastian, *Politics of Foreign Aid in Sri Lanka: Promoting Markets and Supporting Peace* (Colombo: International Centre for Ethnic Studies, 2007).

(b) international monitoring of negotiations, cease-fire and post-settlement process of implementation and peace building, (c) international political and diplomatic assistance to the government in the form of an international safety net, (d) rapid economic development facilitated by enhanced market liberalization and through the participation of private foreign capital to guarantee economic dividend of peace, and (e) democratization, including improvement of human rights and minority rights. Reconciliation and transitional justice were included in the agenda much later, after 2009.

State reform has been a major component of the peace project as defined by the Sri Lankan governments until 2005. Its recent origins go back to the establishment of devolution through the 13<sup>th</sup> Amendment to the Constitution in 1987. The Indo-Lanka Accord of 1987 had established the point in Sri Lanka's political discourse that a political response to the Tamil insurgency was necessary and possible, and that such a response should aim at offering a framework of regional autonomy to the Tamil minority. By the early 1990s, Sri Lanka's leading political elites had reached a cross-party consensus on this issue, with minor differences in the extent and unit of devolution. While the Tamil political leadership insisted on the permanent merger of the Northern and Eastern provinces and more devolution beyond the 13<sup>th</sup> Amendment, Sinhalese leaders expressed the willingness to negotiate these two demands. Muslim political leaders also joined the fray by demanding a separate Muslim unit of devolution in the Eastern province. This elite consensus broke down after the civil war ended.

## **6. The End of War and the Contentious Politics of Peace**

The end of the civil war in May 2009 saw the redirection of Sri Lanka's peace-building agenda along a path in which security and development were given primacy over human rights, ethnic reconciliation, and political reforms. The government of President Mahinda Rajapaksa appeared to have significantly deviated from the liberal peace-building project which defined the efforts of the previous UNP government. Soon after the war ended, the UN Secretary General visited Sri Lanka to revive the liberal peace-building agenda in Sri Lanka. President Rajapaksa initially indicated the willingness to follow the UN lead in post-war peace building. In a joint statement issued on May 2009, the President reiterated his government's "strongest commitment to the promotion and protection of human rights, in keeping with international human rights standards and Sri Lanka's international obligations" while the Secretary General "underlined the importance of an accountability process for addressing violations of international humanitarian and human rights law." President Rajapaksa agreed to take measures to address those grievances.<sup>27</sup> However, there appeared to be a fresh thinking within the government on the agenda as well as priorities of post-war peace building, leading to the articulation of a new approach which fundamentally differed from the UN agenda presented through the UN Human Rights Council. The core element of this new thinking was to design a 'home grown' peace building programme, so that the government's post-war strategy would be neither influenced by, nor accountable to, external actors, particularly the UN.

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<sup>27</sup> Joint Statement by United Nation's Secretary General, Government of Sri Lanka, May 26, 2009, <https://www.un.org/press/en/2009/sg2151.doc.htm>.

The main components of the government's 'home-grown' peace building agenda were as follows: (a) priority accorded to re-settlement of internally displaced people in the North and East, and rapid economic and infrastructure development in the region, (b) enhancement of security and military capacities of the state in order to flush out any remaining LTTE militants and prevent any future recurrence of the Tamil insurgency, (c) de-emphasis of the need for a political solution through enhanced devolution, and (d) postponement of addressing human rights issues arising from the war.

These components of President Rajapaksa's post-war agenda in a way reflected Sri Lanka's political realities altered by the ending of the war, the total military defeat of the LTTE, the absence of the Tamil secessionist insurgency, and even moderate resistance. It also reflected the new constellation of ideology and policy evolved during the last phase of the war under a new civil-military coalition that was set up to prosecute the war under President Mahinda Rajapaksa and his younger brother, Defence Secretary Gotabaya Rajapaksa. The new policy seems to have been built on an apparent analysis of the post-war political conditions in Sri Lanka, which gave rise to a set of assumptions including: (a) the military defeat of the LTTE and the absence of the Tamil insurgency radically altered the political balance of power in favour of the state and its armed forces; (b) ending the war made devolution and the argument for a political solution to the ethnic conflict redundant and irrelevant, because the policy option for devolution had emerged in the context of the LTTE's military pressure, which had ceased with their elimination; (c) post-war nation-building and national integration should be guided by the goal of economic integration of the war-torn areas with the rest of the country; (d)

the role for Western countries in Sri Lanka's post-war rebuilding should be minimized and confined to economic and humanitarian assistance without political conditions; and (e) post-war Sri Lanka needed a peace building agenda defined solely by the government and its defence establishment, not an externally imposed one.

This policy has its politics too. It reflected the ideology of hardline Sinhalese nationalism which the Rajapaksa administration had embraced during war against the LTTE. It also appealed to the majority of the Sinhalese electorate as became evident at the presidential election held on 26 January, 2010. President Rajapaksa sought re-election, shortening even the duration of his office, primarily on the record of the war victory claiming personal credit for it. He won majorities in all the Sinhala-majority electoral divisions. Equally significant was that Rajapaksa's opponent, former army commander General Sarath Fonseka, who had led the military campaign against the LTTE, won the majority of votes in all Tamil and Muslim majority electoral divisions in the Northern and Eastern provinces. The post-war policy as well as the electoral strategy of President Rajapaksa had also divided Sri Lankan voters clearly on ethnic lines. Still more significantly, the Rajapaksa administration lost the subsequent provincial council and local government elections in the North to the Tamil National Alliance, indicating that the Tamil citizens remained acutely skeptical about the government's policy of giving primacy to development over their political and human rights demands.

Why did the Rajapaksa administration opt for a post-war policy of reconstruction which emphasized economic and infrastructure development in the Northern and Eastern provinces at the expense of a political and humanitarian agenda? The answer to this

question is partly ideological and partly contextual. The regime's ideological position was that Sri Lankan Tamils never had genuine political grievances that warranted regional autonomy. The regime's ideology viewed the Tamil ethnic insurgency essentially as a 'terrorist problem' which required a military solution. However, as asserted in this ideological explanation, Tamils had legitimate economic grievances arising from two sources: (a) regional uneven development since independence, and (b) socio-economic consequences of war. The contextual explanation was linked to the way in which the war ended, with a unilateral military victory to the state. A victorious military and its defence establishment had thus emerged as the most powerful institution of Sri Lanka's post-war state. As it became evident soon after the ending of the war, the military approach to post-war peace building excluded political and humanitarian approaches. It also fostered majoritarian and hardline Sinhala nationalism which soon saw Muslims as the new threat to Sinhalese Buddhist interests. Among the political consequences of this approach to post-war reconstruction was the continuing alienation of the Tamil and Muslim minorities from the government.

This alienation of the minorities could have been minimized, if not prevented, if the Rajapaksa administration implemented the recommendations of the Lessons Learned and Reconciliation Commission (LLRC) which was appointed by President Mahinda Rajapaksa on 07 September, 2010, primarily to counteract growing international pressure to investigation alleged war crimes. Among the Commission's mandated tasks was the responsibility of finding out the reasons for the war and measures to be taken to prevent recurrence of war and violence as well as to "promote further

national unity and reconciliation among all communities.”<sup>28</sup> The Commission had public sittings for about a year, and listened to victims, survivors and witnesses in the war affected areas, and produced an interim report and later a final report.<sup>29</sup> The Commission’s analysis of Sri Lanka’s war, the human and humanitarian crises it had caused, and the recommendations were far reaching in terms of their potential in promoting sustainable peace in post-war Sri Lanka. This is despite the fact that the Report exonerated the armed forces from allegations of serious human rights violations during the last few months of the war.

The Commission’s recommendations aimed at inter-ethnic reconciliation exemplify the potential of the Report to be used as

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<sup>28</sup> President Rajapaksa’s official letter appointing the commission did not directly refer either to the ethnic conflict, the civil war, or violence. In a strange sort of formulation, the letter directed the commissioners to “inquire into and report on ... the facts and circumstances which led to the failure of the ceasefire agreement operationalized on 21<sup>st</sup> February 2002 and the sequence of events that followed thereafter up to the 19<sup>th</sup> of May 2009.” (LLRC Report, 2011: iii).

<sup>29</sup><http://slembassyusa.org/downloads/LLRC-REPORT.pdf>. The LLRC's eight members were: C. R. De Silva, PC (chair), Attorney General (2007–09), Solicitor General (1999–2007), Deputy Solicitor General (1992–97); Rohan Perera, PC, former legal advisor to the Ministry of Foreign Affairs and current member of the International Law Commission; Karunaratne Hangawatte, Professor of Criminal Justice at the Department of Criminal Justice, University of Nevada, Las Vegas and former consultant to the United Nations; Chandirapal Chanmugam, Secretary to the Treasury (1987–88); H. M. G. S. Palihakkara - former Secretary, Ministry of Foreign Affairs and former Permanent Representative to the United Nations; Manohari Ramanathan, former Deputy Legal Draftsman and former member of the Monetary Board of Sri Lanka; Maxwell Parakrama Paranagam, former High Court Judge; M. T. M. Bafiq, Senior Attorney at law and member of the Human Rights Commission of Sri Lanka

a powerful guide to policy for post-war peace building, accompanied by an equally strong moral and normative imagination as well.<sup>30</sup> The vision of reconciliation it advanced was a comprehensive one, encompassing rebuilding the relations between the Tamil community and the Sri Lankan state, addressing the problem of deep alienation between Tamil citizens and the state, and restoration of human rights in a comprehensive manner while addressing most of the concerns of the victims of war. Two of the noteworthy recommendations that illustrated this potential of the Report were:

- (a) Full acknowledgement of “the tragedy of the conflict and [undertaking a] collective act of contrition by the political leaders and civil society, of both Sinhala and Tamil communities.” Making this recommendation, the Commission also observed: “Seeds of reconciliation can take root. Leaders on all sides should reach out to each other in humility and make a joint declaration, extending an apology to innocent citizens who fell victims to this conflict, as a result of the collective failure of the political leadership on all sides to prevent such a conflict from emerging. Religious leaders and civil society should work towards it and emphasize the healing impact it would have on the entire process of reconciliation” (LLRC, 2011: 323).
- (b) Among the recommendations to deal with the allegations of serious human rights violations, the Commission proposed “a comprehensive approach to address the issue of missing persons ... as a matter of urgency” (p. 339). While making this recommendation, the Commission emphasized that “the

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<sup>30</sup><http://slembassyusa.org/downloads/LLRC-REPORT.pdf>.

relatives of missing persons shall have the right to know the whereabouts of their loved ones. They also have the right to know the truth about what happened to such persons, and to bring the matter to closure” (p. 339). Acknowledging “the complexity and magnitude of the problem” of disappearances, “and considering the number of persons alleged to have disappeared, and the time consuming nature of the investigations involved,” the Commission recommended the appointment of a Special Commissioner to investigate alleged disappearances and provide material to the Attorney General to initiate criminal proceedings as appropriate” (LLRC, 2011: 339).

However, the LLRC Report did not generate an enthusiastic response from the Rajapaksa administration. It ignored the Report and allowed it to be erased from the administration’s post-war policy agenda as well as from its political memory. Very clearly, the LLRC recommendations went against the grain of Rajapaksa administration’s triumphalist ethnic ideology as well as the ‘victor’s peace’ approach to post-war politics and policy. At the same time, however, the commission, and the government’s promises to implement its recommendations, provided a number of years of respite from international pressure at the UN Human Rights Council.

## **7. Return and Retreat of Liberal Peace Building: 2015 and After**

Meanwhile, an unexpected turn of events occurred in Sri Lanka’s post-war political trajectory in January 2015, bringing liberal peace building back to the political agenda. It was the replacement of the Mahinda Rajapaksa administration by a new coalition led by the United National Party that had remained out of power since 2004.

This was an unusual coalition between the UNP and a breakaway group of the SLFP led by Maithripala Sirisena, party Secretary at the time. Sirisena successfully contested the presidential election, held on 8 January 2015 as the common opposition candidate. The new coalition went on to secure a parliamentary majority at elections held on 17 August 2015. Wishing to repair its international reputation – particularly with Western governments and at the UN Human Rights Council – the leadership of the new government, immediately after coming into power, revived the UN-sponsored peace building programme which had earlier been kept in abeyance by President Rajapaksa and his government. The new government went to the extent of co-sponsoring along with the US, the UK, Japan and several other countries a new UNHRC resolution on Sri Lanka. It marked a bold commitment “to undertake a comprehensive approach to dealing with the past, incorporating the full range of judicial and non-judicial measures” aimed at delivering “truth, justice, reparation and guarantees of non-recurrence.”<sup>31</sup> Amnesty International described it a “historic commitment.”<sup>32</sup> The new peace plan included the following components: establishment of an Office of Reparations; establishment of a Commission for truth, justice, reconciliation, and non-recurrence; setting up offices of missing persons, and for reparations; and ensuring accountability by establishing a judicial mechanism to investigate violations and abuses of human rights and international humanitarian law.<sup>33</sup>

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<sup>31</sup> Promoting reconciliation, accountability and human rights in Sri Lanka, A/HRC/RES/30/1, 14 October 2015, paragraph 4.

<sup>32</sup><https://www.amnesty.org/download/Documents/ASA3734492016ENGLISH.pdf>.

<sup>33</sup>UNHRC Resolution 30/1, on Promoting Reconciliation, Accountability and Human Rights in Sri Lanka, October 14, 2015.

The new peace plan also reflected the general political trend that had marked the circumstances of regime change that occurred in January 2015. The new coalition had incorporated in its agenda a number of themes that had been key topics in the oppositional political campaign during the Rajapaksa administration. The range of oppositional topics included democracy, peace, human rights, inter-ethnic reconciliation, minority rights, corruption-free governance, democratic openness, and importantly, accountability for alleged war crimes and other serious rights violations during the war. These were also major elements of the political agenda of Tamil and Muslim parties. These minority parties and civil society groups that had been advocating for those themes were also components of the broad coalition which came to call itself a ‘coalition for good governance.’

The new government launched its reform agenda with a great sense of optimism. Although peace building was a tall agenda in the complex political context of Sri Lanka at the time, the government promised the world community and Sri Lankan citizens that achieving peace, democracy, and reconciliation were its top most policy priority. The government allowed the police to pursue inquiries into crimes and serious human rights violations during the previous regime that had not been properly investigated. It also set up a new institutional mechanism to investigate allegations of corruption and abuse of power during the previous regime. In order to restore the independence of the judiciary, the government forced the former Chief Justice to resign and appointed a successor based on seniority, insisting that it was committed to depoliticization and independence of the judiciary. In order to bring vigour and credibility to its reconciliation programme, a new Ministry for reconciliation was set up and the ministry of was

brought directly under President Sirisena. The government invited Chandrika Kumaratunga, the former president, to head the newly established Task Force – later made an Office – for National Unity and Reconciliation. To fulfill its promise of political reforms and political rights of the minorities, the government also initiated a programme of action for constitutional reform under the Prime Minister. It designed a novel process in which parliament could function as a constitutional assembly so that all parties in parliament would be participants and stakeholders in drafting and adopting a new constitution.

Despite its initial enthusiastic promises, the government seems to have found it difficult to implement them speedily. Foreign Minister Mangala Samaraweera’s statement to the UNHRC in Geneva made on 29 June 2016 indicated that the government had been slow and cautious in implementing key components of its reconciliation and transitional justice promises. Minister Samaraweera elaborated the government’s new approach of caution by quoting from President Sirisena’s Independence Day message to the nation on 4 February 2016. While reiterating his commitment “to fulfill the provisions of the resolution 30/1,<sup>34</sup> in working out the contours of a new Sri Lanka,” President Sirisena had also stated that government would implement the proposals with “patience, discipline, and restraint.” Suggesting possible sources of resistance to the government’s reconciliation and justice programme, President had qualified the nature of his government’s commitments with the following words: “Sri Lanka is committed to implement the Resolution to protect the dignity of our people,

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<sup>34</sup> UN Resolution on Promoting Reconciliation, Accountability and Human Rights in Sri Lanka <https://www.mfa.gov.lk/wp-content/uploads/2018/03/RES-30-1.pdf>

our state, and our security forces.”<sup>35</sup> Responding to concerns already been expressed in human rights and civil society circles of the delays in the justice front, Samaraweera had this to say: “Some have started raising alarm bells that sequencing of [transitional justice] mechanisms is a delay tactic or means to omit the component of justice. This is incorrect.”<sup>36</sup>

Sri Lanka Foreign Minister’s statement before the UNHRC made in 2017 gives more clues to the stalemate to which the entire peace building initiative had entered. The statement was like a report of minimum progress achieved with excuses for delays in, and the less-than satisfactory performance of, the peace-building programme.

The Minister’s report of progress of two years of peace-building activities is replete with preparatory work undertaken, indicating

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<sup>35</sup><http://www.president.gov.lk/speech-delivered-by-president-maithripala-sirisena-at-the-68th-independence-day-celebrations-on-february-4-2016/>

<sup>36</sup> All the quotations are from Foreign Minister Mangala Samaraweera’s statement available in <https://www.media.gov.lk/news-archives/575-statement-by-foreign-minister-mangala-samaraweera-to-the-32nd-session-of-the-un-human-rights-council>. Accessed on January 12, 2018. The following paragraph from Samaraweera’s statement, looking at it retrospectively, was probably prophetic too: “Reconciliation does not happen at once, overnight. It requires effort, hard work, commitment, and careful, continuous, concrete action. It is not an end that can be reached where no further work is required. It is not a box that can be ticked as achieved. It is a journey that requires constant striving. A commitment towards which our nation should be bound across generations, and a central tenet of governance, because the price to pay if we falter, is not one our nation can endure once again after over thirty years of bloodshed that has spared no one.” By the end of 2017 it appears that the government approach of caution has evolved into one of diminishing interest.

very clearly that the pace of implementation has been slow and the entire project had remained not only incomplete but also at a preliminary stage. Items listed in the Minister's progress report included the enactment of law for setting up the Office of the Missing Persons; approval by the Cabinet of Ministers of the National Policy on Durable Solutions for Conflict-affected Displacement; amendment of the *Registration of Deaths (Temporary Provisions) Act No 19 of 2010* was amended by Parliament, enabling the issuance of Certificates of Absence; cabinet approval granted to the National Human Rights Action Plan for the period 2017-2021; handing over of 11,253 houses to the internally displaced during 2016; drafting of legislation on the Truth-Seeking Commission; and the conclusion of public consultations carried out by the Consultation Task Force on Reconciliation Mechanisms. Placed against the huge expectations that the victims of Sri Lanka's war had placed on the government, and assessed in terms of the promises the government itself had made, this indeed is a rather poor progress report.

The Minister also admitted in his statement that "the journey" which the government had undertaken had been "challenging" and "strewn with both success as well as some setbacks" and "roadblocks and other obstacles in the day to day world of realpolitik" forcing the government to take "detours from time to time." However, Minister Samaraweera assured the world community that "the destination and [the government's] resolve to walk the distance will remain unchanged." He was particularly keen to assure the success of the transitional justice programme: "[The government's] resolve to see the transitional justice process through, has not diminished."

During the rest of the year 2017, the challenges, setbacks, roadblocks and obstacles in the world of realpolitik that Minister Samaraweera mentioned in his address to the UNHRC appeared to have led to the stalling of the peace building programme as a whole, sometimes with laws passed but not properly implemented, initiatives taken but the progress slowed down, and institutions and offices set up but with often overlapping mandates and without clearly designed work programmes. The transitional justice programme and the constitutional reform process illustrate how by the end of 2017 the government’s commitments had become uncertain and any further progress in peace building was unlikely to materialize.

### ***7.1 Transitional justice***

The transitional justice programme ran into crisis on two counts: the government wavered on the international participation in the proposed judicial mechanism and showed little commitment to ensure that investigations and court proceedings already being carried out reached conclusion. According to the UNHRC Resolution of 30/1 of 2015, the government had pledged to

“establish a judicial mechanism with a special counsel to investigate allegations of violations and abuses of human rights and violations of international humanitarian law, where applicable.” The government also affirmed through Resolution 30/1 “the importance of participation in a Sri Lankan judicial mechanism, including the special counsel’s office, of Commonwealth and other foreign judges, defence lawyers and authorized prosecutors and

investigators.”<sup>37</sup> But there was no progress at all on this commitment, and with the mounting criticism against the participation of ‘foreign judges’ in ‘hybrid courts,’ the government began to waver on the entire issue of transitional justice. The process of setting up the Office of the Missing Persons suffered similar setbacks. After much hesitation, the government passed the law in parliament, set up the office under the President, with limited mandate and resources. This situation even prompted the UN High Commissioner for Human Rights to urge the government that the Office should be “sufficiently resourced, promptly operationalized, and linked to other transitional justice mechanisms.”<sup>38</sup>

Indeed, the slow progress in the transitional justice front has not escaped the UNHRC’s critical scrutiny. The Human Rights Council in its Resolution 30/1 of 2015 had supported the commitment of the Government of Sri Lanka to implement a comprehensive transitional justice agenda that included the establishment of an accountability mechanism, truth-seeking, reparations programmes and institutional reforms. However, the UN High Commissioner for Human Rights in his report of 2017 observed that only “a limited progress [had been] made with regard

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<sup>37</sup> UNHRC Resolution 30/1, paragraph 6, p. 4, [http://www.mfa.gov.lk/images/stories/pdfs/docs/FINAL\\_published\\_-\\_thirty\\_slash\\_one.pdf](http://www.mfa.gov.lk/images/stories/pdfs/docs/FINAL_published_-_thirty_slash_one.pdf).

<sup>38</sup> Report of the Office of the UN High Commissioner for Human Rights, 34<sup>th</sup> Session of the UNHRC, 10<sup>th</sup> February 2017, paragraph 12, pp. 4-5. [https://reliefweb.int/sites/reliefweb.int/files/resources/A\\_HRC\\_34\\_20\\_E\\_N.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/A_HRC_34_20_E_N.pdf), pp. 4-5. Accessed on January 13, 2018. The President appointed commissioners for the OMP in February 2018, just one month before the UNHRC’s meeting in Geneva.

to transitional justice.”<sup>39</sup> The High Commissioner’s report is replete with observations that highlighted the gap between the government promises and their actual implementation. According to the High Commissioner, the government had

*“established several ad hoc bodies, including the Secretariat for Coordinating Reconciliation Mechanisms, and the Office for National Unity and Reconciliation, and several technical working groups tasked with drafting blueprints for the accountability and reconciliation mechanisms to be established. These bodies, however, are yet to present a sufficiently convincing or comprehensive transitional justice strategy to overcome the legacy of mistrust and scepticism left by a number of inconclusive and ad hoc commissions and procedures.”*<sup>40</sup>

The review of the Prevention of Terrorism Act too remains an incomplete, and now forgotten, commitment. Earlier reports indicated that the government was trying to introduce some marginal changes to the public security law and retain almost all of its draconian provisions. Government’s vacillation to honour another of its important human rights commitments seems to have coincided with the re-assertion of the national security considerations that had taken a back seat during the early months of the new administration. This needs to be placed in the larger context of the continuity of Sri Lanka’s national security state that emerged during the war, consolidated during the Rajapaksa

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<sup>39</sup><https://reliefweb.int/report/sri-lanka/report-office-united-nations-high-commissioner-human-rights-sri-lanka-ahrc3420>

<sup>40</sup>Report of the Office of the UN High Commissioner for Human Rights, 34<sup>th</sup> Session of the UNHRC, 10<sup>th</sup> February 2017, paragraph 12, pp. 4-5. [https://reliefweb.int/sites/reliefweb.int/files/resources/A\\_HRC\\_34\\_20\\_EN.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/A_HRC_34_20_EN.pdf), Accessed on January 13, 2018.

government of 2009-14, and suffered a brief and temporary retreat in January 2015.

## **7.2 Constitutional reform**

The Constitutional Reform process was another key component of the new government's peace building and democratization promise made to the country as well as the international community. The UNHRC Resolution 30/1 welcomed "the commitment of the Government of Sri Lanka to a political settlement by taking the necessary constitutional measures," and encouraged "the Government's efforts to fulfill its commitments on the devolution of political authority, which is integral to reconciliation and the full enjoyment of human rights by all members of its population"<sup>41</sup> (Paragraph 16). Constitutional reform was an essential component of peace building, because more devolution has been a key theme in Tamil political demands while abolition of the presidential system has been a demand in the broad democracy movement. The constitutional reform project appears to have fallen victim to the lack of political consensus within the government over the question whether the presidential system should be abolished altogether or not. When, in early 2015, the 19<sup>th</sup> Amendment to the Constitution, that eventually reduced powers of the president and enhanced the powers of parliament, was being drafted, there were disagreements between the government's two centres of power, one headed by the President and the other by the Prime Minister. While the Prime Minister and the UNP favoured a new constitution that would take Sri Lanka's

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<sup>41</sup> UNHCR Resolution 30/1 on Sri Lanka, adopted by the Human Rights Council on 1st October 2015 promoting resolution, accountability and human rights in Sri Lanka. <http://nirmin.gov.lk/web/images/pdf/unhrc-resolution-30.pdf>.

system of government back to the parliamentary model, President and the SLFP wanted to continue with the presidential system and effect reforms only to the electoral system. The total abolition of Sri Lanka's 'executive presidency' was indeed a major electoral promise made by both Sirisena and Wickremasinghe during the Presidential election campaign of November 2014 - January 2015.

It appears that the President and the Prime Minister have not reconciled their differences in approach to and the scope of constitutional reform. When the Sub-Committee of the Constitutional Assembly produced an Interim Report in September 2017, indicating different positions proposed by political parties in Parliament, a wave of opposition to the idea of a new constitution burst forth, led by leading Buddhist monks. The President and the Prime Minister failed to act together to defend the constitutional reform initiative against opposition indicating the working of the 'realpolitik' that Minister Samaraweera had flagged in his speech before the UNHRC as an obstacle to the progress of peace building. Eventually, Samaraweera found himself moved out of the Ministry of External Affairs with a record of excuses on behalf of the government for its mediocre progress in a vital component of its reform agenda.

## **8. Conclusion**

Thus, 2017 ended with continuing uncertainties about Sri Lanka's post-war peace building process. The key dimension of the uncertainty is the government's ambivalent and vacillating attitude to all components of the peace building programme, demonstrating the absence of a strong political will to abide by its own promises made to Sri Lankan citizens as well as the international community. This makes it difficult to fundamentally

distinguish between the previous administration and the current one in Sri Lanka on the question of post-war peace building. While there are differences, events during the past three years lend themselves increasingly to the observation that they are no more than marginal. The question that arises in this context is whether there is an undercurrent of continuity that is not transparently evident in the weak commitment of the present regime to peace building despite the regime change.

A much deeper issue seems to characterize the context that has blunted the Sirisena-Wickremasinghe administration's commitment to peace building. It is the continuity of what may be called 'the national security complex' that emerged during the war and finds its re-emergence in the current administration. It appears that the new government, when it co-sponsored the UNHRC resolution 30/1 in 2015, which contained a range of far reaching commitments on human rights, transitional justice and accountability, had not factored into its strategizing the ways in which the cooperation and participation of the military and defence establishment could be secured. The government also seems to have ignored the challenge arising from a victorious army, which was expected to be a partner in the government's accountability commitments that required internationally credible inquiries into allegations of possible war crimes. The government's retreat from the accountability commitments, as it became clear by the end of 2017, can be interpreted as a delayed realization of the complexity of balancing civil-military relations in a non-conflictual manner in a context of the re-assertion the ethnocratic and national-security orientation of the contemporary Sri Lankan state.

The discussion in this chapter suggests the conclusion that despite the periodic renewal of Sri Lanka's peace building agenda, the goal of peace has been entangled with the conflict and war. As we saw in the accounts of failed peace initiatives during the war, that failure was largely due to the subjection of peace to the imperatives of war. In instances where peace efforts were made during the war, they were incomplete projects that failed to address the core issues at stake as well as roots causes of the conflict and the consequences of war. These unaddressed issues continue to reproduce and sustain the conflict even after the hostilities ended. This discussion of the continued setbacks to peace building demonstrates the reproduction of the same pattern under conditions of no war, and in a context of the continuation of the national security complex. The post-Rajapaksa political order has not been effective in breaking up this vicious cycle. In fact, the regime change of 2015 has proved a necessary, but inadequate precondition to disentangle peace building from the imperatives of the national security complex as well as from the sharpening contradictions within the coalition regime. As a result, peace building has become secondary, and eventually insignificant, in importance for the government's overall agenda as well as its strategy for political survival. The issue returns to the government agenda annually, just before the UNHRC session, only to please the international sponsors of Sri Lanka's illusive peace.

# III

## JUDICIAL PROTECTION OF FUNDAMENTAL RIGHTS

*Dinesha Samararatne\**

### 1. Introduction

Relative to the immediately preceding years, the fundamental rights jurisprudence of the Supreme Court for the year 2017 indicates progress. A total of 62 judgments were issued in 2017. These judgments reflect a judicial mind that is responsive and receptive to the petitions alleging violations of fundamental rights. Judicial reasoning in these determinations has been more detailed than in the immediately preceding years. Furthermore, the amount of compensation ordered to be paid by the Court is notably higher than in the previous years. This qualitative improvement in the jurisprudence is complemented by the gradual progress that the Court has achieved over the years in its work in terms of the number of determinations and the amounts of compensation granted as well.

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The overall trend in terms of the types of fundamental rights that are challenged before the Court however continued in 2017 as well. Fifty-two of the 62 judgments were regarding allegations of the violation of the right to equality. Of these 52 judgments, 20 of the cases were with regard to recruitment, promotions and transfers in the public service while 10 cases were with regard to school admissions. Twelve cases were with regard to the right to be free from torture. These statistics suggest that the jurisdiction of the Court under Article 126 continues to be used primarily as a remedy for review of the administrative functions of the state in relation to the public service and school admissions. In keeping with the existing trend, it is only in a relatively smaller number of cases that the Court had the opportunity to determine guarantees of fundamental rights such as the right to be free from torture. The table below describes the overall patterns since 2010 with regard to the fundamental rights which have been invoked in the Court's judgments.

*Figure 1*

Year	Number of Judgments	In favour of Petitioner	Dismissed	Other	Awards of Compensation	Awards of Costs
2017	62	31	27	4	16	18
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

Figure 2

Year	Judgments	Art 12 <sup>1</sup>	Art 11 <sup>2</sup>	Art 13 <sup>3</sup>	Other
2017	62	52	12	13	10, 14A, (1)(g), (h)
2016	44	41 (93%)	06	13	14(1)(a), (c), (g)
2015	16	15 (93%)	01	06	12(2),14(1)(e),14(1)(g)
2014	19	13 (68%)	01	01	14(1) (a) (c)
2013	13	10 (76%)	02	02	15 <sup>4</sup>
2012	09	09(100%)	-	-	-
2011	09	07 (77%)	-	-	14(1)(g) <sup>5</sup>
2010	12	10	04	03	-

## 2. International Human Rights Law

By the end of 2017 Sri Lanka was a signatory to all the major human rights treaties and had accepted the individual petition mechanism under the International Covenant on Civil and Political Rights (ICCPR) as well as under the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW). In 2017, the reports on the missions of two Special Rapporteurs to Sri Lanka were tabled before the Human Rights

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<sup>1</sup> Art 12 guarantees the following – to all persons the right to equality before the law and the equal protection of the law to all persons (Art 12(1)), to citizens the guarantee of non-discrimination (Art 12 2), the guarantee of equal access to public places and places of public worship to all persons (Art 12(3)) and for ‘special provisions’ for ‘women, children disabled persons’ (Art 12(4)).

<sup>2</sup> Art 11 guarantees that no person shall be ‘subjected to torture or to cruel, inhuman or degrading treatment or punishment.

<sup>3</sup> Art 13 guarantees the right to freedom from arbitrary arrest, detention and punishment.

<sup>4</sup> Art 15 stipulates the grounds on which the exercise of fundamental rights can be restricted. These grounds include ‘interests of national security’ and ‘interests of racial and religious harmony’. It is noteworthy that the Constitution provides an absolute guarantee to the freedom of thought, conscience and religion and the freedom from torture.

<sup>5</sup> Art 14(1)(g) guarantees the individual or collective freedom to engage in a lawful occupation, profession, business etc.

Council and Concluding Observations were issued by the CEDAW Committee and the Committee on Economic, Social and Cultural Rights. Furthermore Sri Lanka completed its third cycle of Universal Periodic Review in 2017.

In his report, the Special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment observed the weaknesses in the fundamental rights petition mechanism in remedying the violation of the right to be free from torture. He further noted the significant backlog of cases before the Supreme Court.

*In practice, the only effective avenues for complaints are filing a “fundamental rights” case before the Supreme Court or submitting the case to the National Human Rights Commission. However, fundamental rights applications involve costly, complex litigation and are therefore not accessible to all victims. In addition, the application is not available to vacate a court order that has been based on a forced confession, as it does not lie against judicial decisions. Moreover, according to the Chief Justice, there is a worrying backlog of approximately 3,000 fundamental rights cases before the Supreme Court.’<sup>6</sup>*

In her report to the Human Rights Council, the Special Rapporteur on the Independence of the Judiciary observed that the ‘extreme form of legal dualism’ in Sri Lanka’s legal system is ‘not

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<sup>6</sup>Report of the Special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka (A/HRC/34/54/Add.2 22 December 2016) para 89.

sustainable.<sup>7</sup> She made specific observations regarding the inaccessibility of the remedy for violations of fundamental rights:

*The Supreme Court has the authority to receive applications from persons seeking remedy for the infringement by executive or administrative action of any of the fundamental rights enshrined in the Constitution. If it finds that a violation has occurred, the Court can order compensation and make recommendations, but its decisions cannot be appealed. While this is an important avenue for lodging complaints for violations of fundamental rights, it fails to reach the most vulnerable. Indeed, many victims cannot afford to travel to Colombo and hire a local lawyer to file the application, while some others fear reprisals if they were to do so. There are also language barriers and a time limit of one month, which can prove insurmountable. Some police officers have allegedly offered money to victims or their families agreeing not to file a complaint. Moreover, according to the Chief Justice, there is a backlog of approximately 3,000 applications.<sup>8</sup>*

The report of the Special Rapporteur on minority issues on her visit to Sri Lanka did not specifically focus on the remedy for fundamental rights violations. However, the report highlighted the weaknesses in minority rights protection in Sri Lanka including observations regarding the problems with certain provisions of the Constitution. Article 16 of the Constitution declares that all existing written and unwritten laws remain valid notwithstanding their inconsistency with the fundamental rights chapter. The

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<sup>7</sup>Report of the Special Rapporteur on the independence of judges and lawyers on her mission to Sri Lanka (A/HRC/35/31/Add.1 23 March 2017) para 29.

<sup>8</sup> Report of the Special Rapporteur on the independence of judges and lawyers on her mission to Sri Lanka (A/HRC/35/31/Add.1 23 March 2017) Para 82.

Special Rapporteur pointed out that this Article protects laws that are discriminatory of women in minority groups – namely Muslim women and women governed under *Tesawalamai* law.<sup>9</sup> Similar observations were made regarding the weaknesses in the protection afforded to human rights by the CEDAW Committee and the CESCR. For instance the CESCR notes that while the Supreme Court has relied on the Directive Principles of State Policy in interpreting the right to equality that the jurisprudence falls short of a ‘comprehensive catalogue of judicially enforceable economic, social and cultural rights.’<sup>10</sup> The CEDAW Committee recommended the introduction of judicial review of legislation to reform laws that discriminate against women.<sup>11</sup>

As evident from the overall patterns discussed in the introduction, the judicial interpretation of fundamental rights in 2017 is commendable, relative to the jurisprudence in the immediately preceding years. The observations made by the international monitoring mechanism of the judicial protections offered for fundamental rights in Sri Lanka points to areas that require further improvement, including laws delays, availability of legal aid, accessibility of the remedy and the constitutional protection afforded to pre-existing laws that are inconsistent with fundamental rights.

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<sup>9</sup>Report of the Special Rapporteur on minority issues on her mission to Sri Lanka (A/HRC/34/53/Add.3 31 January 2017) para 13.

<sup>10</sup> Concluding observations on the fifth periodic report of Sri Lanka (E/C.12/LKA/CO/5 4 August 2017) para 7.

<sup>11</sup> Concluding observations on the eighth periodic report of Sri Lanka (CEDAW/C/LKA/CO/8 3 March 2017) para 11.

### **3. Right to Equality**

The right to equality continues to be interpreted primarily as a right that protects persons from arbitrary use of public power within the notion of formal equality. In Sri Lanka, the right to equality jurisprudence has not been fleshed out in relation to the right to be free from discrimination even though discrimination on the basis of ethnicity, religion and sex has been consistently documented.<sup>12</sup> Substantive equality is yet to be read into the right to equality in the fundamental rights jurisprudence of Sri Lanka. This trend continued in 2017.

#### ***3.1. Review of administrative action***

Judgments that reviewed administrative actions on the basis that they violated the right to equality interpreted the right as including a prohibition on decisions that are arbitrary, unreasonable and illegal.<sup>13</sup> For instance, in the case of *Mendis v. Director General, Rubber Department, Premadasa*<sup>14</sup> extensive reference was made to the Indian case of *Royappa v. the State of Tamil Nadu*<sup>15</sup> in holding that arbitrary and unfair actions of administrators comes within the purview of the right to equality in Sri Lanka. Other types of complaints that came before the Court as violations of the right to equality included challenges to disciplinary inquiries. For instance, in the case of *Nandasiri v. Assistant Superintendent, Police Headquarters, Jayasinghe*<sup>16</sup>

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<sup>12</sup> See for instance, Gehan Gunatilleke, *The Chronic and the Entrenched: Ethno-religious Violence in Sri Lanka* (International Centre for Ethnic Studies / Equitas 2018); *Sexual Harassment on Public Buses and Trains* (UNFPA 23 February 2017).

<sup>13</sup> *Wijesekara v Principal, Maliyadeva Balika Vidyalaya, Kurunegala* SC (FR) 05/2017, Supreme Court Minutes 31 October 2017.

<sup>14</sup> SC (FR) 32/14, Supreme Court Minutes 16 June 2017.

<sup>15</sup> *EP Royappa v State of Tamil Nadu and Another* [1974] AIR 555, 1974 SCR (2) 348

<sup>16</sup> SC (FR) 12/2012, Supreme Court Minutes 4 August 2017, 8.

the court ‘quashed’ a disciplinary order and ordered the Inspector General of Police to ‘impose a punishment that is commensurate with the disciplinary breaches’. The case of *Ekanayake v IGP, Balasooriya*<sup>17</sup> was similar. The petitioner was a Reserve Police Constable who challenged his suspension from service.

### **3.2. School admissions**

The Court’s time is taken up with petitions that allege a violation of the right to equality due to non-compliance with due process in determining admissions to schools. In Sri Lanka, education is provided by the state, free of charge, from primary school upwards. Admission to state schools is regulated by the state through a marking scheme. A marking scheme determines the points that each applicant can be allocated and a cut off mark is determined based on the number of positions that are available in a given school. As evident in the case of *Saman v Principal, Dharmashoka Vidyalaya Ambalangoda, Wetthimuni*,<sup>18</sup> these petitions require the Court to review the application of the marking scheme for school admissions, the validity of factual claims that are made with regard to the residence of applicants etc. The number of fundamental rights judgments that are issued on this aspect indicates the challenges parents face in ensuring admission of children to school. For instance, the case of *Madhurangana v AG*<sup>19</sup> involved 88 petitioners from one school who challenged the non-admission to particular schools for their secondary education. Students in state primary schools can seek admission to other secondary schools based on their performance at a standardized test (the ‘Scholarship Exam’). The petitioners, from primary schools, relied on a directive

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<sup>17</sup> SC (FR), 556/2010, Supreme Court Minutes 6 October 2017.

<sup>18</sup> SC (FR) 43/2017, Supreme Court Minutes 05 December 2017.

<sup>19</sup> SC (FR) 57/2012, Supreme Court Minutes 5 July 2017.

issued by the Provincial Education Director of the Western Province to the Zonal Director of Education in Colombo. In this letter the Provincial Director had directed the Zonal Director to compulsorily admit the petitioners to certain schools in the Colombo Zone. The Court dismissed the petitions on the basis that none of the petitioners had scored the marks required for admission to these schools.

In the past, in determining petitions that challenge non admission to schools, the Supreme Court has served as a review mechanism and has primarily concerned itself with the relevant facts. The case of *De Silva v. Principal and Chairman Interview Board, Dharmashoka Vidyalaya Ambalangoda, Parakramawansa*<sup>20</sup> is refreshing in that it offers a much needed interpretation of the right to access education in Sri Lanka as an aspect of the right to equality. The Court noted the history of free education in Sri Lanka. Although the Constitution does not recognize a fundamental right to education, ‘the complete eradication of illiteracy and the assurance to all persons of the right to universal and equal access to education’ is a directive principle.<sup>21</sup> The Court relied on *Seneviratne UGC*<sup>22</sup> and the more recent case of *Watte Gedera Wijebanda v. Conservator General of Forests*<sup>23</sup> in holding that ‘although the Constitution states that Directive Principles do not impose legal rights or obligations and they are not justiciable, our courts have given effect to Directive Principles as long as they do not conflict with other Articles of the Constitution.’<sup>24</sup> Accordingly Court

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<sup>20</sup> SC (FR) 50/2015, Supreme Court Minutes 2 August 2017.

<sup>21</sup> SC (FR) 50/2015, Supreme Court Minutes 2 August 2017, 8.

<sup>22</sup>[1978-79-80] 1 Sri LR 182.

<sup>23</sup>[2009] 1 Sri LR 337.

<sup>24</sup> SC (FR) 50/2015, Supreme Court Minutes 2 August 2017, 9.

declared that the right to equality should be interpreted to include the right of equal access to education. It is regrettable that the Court made no reference to the provisions of the ICESCR or to the General Comment on the Right to Education in its interpretation which elaborates on the meaning of access to education.<sup>25</sup>

### **3.3 Forfeiture of property rights**

In the case of *Sivarajah v. OIC, TID*<sup>26</sup> the Court held with the petitioner who alleged that his property was forfeited under the Emergency Regulations at the time.<sup>27</sup> Court determined that the discretion vested with the Minister under these regulations is not unfettered and can only be exercised on the basis of relevant facts. Court found that rules of natural justice had not been complied with and that there was no evidence to support the claim that the property was being used by the petitioner for criminal activities which would justify forfeiture under the Emergency Regulations.

### **3.4 Laws delays**

For the first time, delay in criminal prosecution was included as a violation of the right to equality. In the case of *Perera v. IGP Ilangakoon*<sup>28</sup> the family members of a murder victim alleged that the delay of 5 years in receiving the Attorney-General's advice in the criminal proceedings amounted to a violation of their right to equality. The petitioners claimed that the delay in investigations and prosecution had resulted in a violation of their right to be free

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<sup>25</sup> General Comment 13 of the CESCR (1999).

<sup>26</sup> SC (FR) 15/2010, Supreme Court Minutes 27 July 2017.

<sup>27</sup> Emergency Regulations as declared by Gazette extraordinary 1583/12 of 7 January 2009.

<sup>28</sup> SC (FR) 372/2015, Supreme Court Minutes 17 November 2017.

from torture. Although the Court held that the petitioners had failed to establish that the delay in criminal proceedings have caused ‘suffering and trauma’ to the victim, it held that the delay had violated the right to equality of the petitioners and each petitioner was awarded Rs 50,000 as compensation payable by the state.

### **3.5 Local authority elections**

In the case of *Muhammed v Election Commission of Sri Lanka*<sup>29</sup> the Court had to determine whether the failure to conduct the elections to Local Authorities amounted to a violation of the right to equality of the petitioner. Although this petition had implications for public interest, the petitioner filed it only in terms of an alleged violation of his right to equality. The Court noted that the Minister of Local Government and Provincial Councils had not made representations to Court and that it would ‘take it for granted that the Minister has no excuse or justification to offer to explain the delay.’<sup>30</sup> Having noted that the delay in the delimitations process has not been explained or defended by the Minister concerned, the Court held with the petitioner and directed the respondents to conduct the elections to the Local Authorities without ‘further delay’.

This judgment was given by the Court in December 2017. However an amendment to the *Local Authorities Elections Act* was adopted on the 31<sup>st</sup> of August that year which introduced a quota of 25% seats for women in all local authorities.<sup>31</sup> Moreover, the electoral system was changed from proportional representation to

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<sup>29</sup> SC (FR) 35/2016, Supreme Court Minutes 15 December 2017.

<sup>30</sup> SC (FR) 35/2016, Supreme Court Minutes 15 December 2017, 13.

<sup>31</sup>*Local Authorities Elections (Amendment) Act No 16 of 2017.*

a mixed-member proportional representation system. The judgment, however, made no reference to this Amendment and considered the law as it stood prior to it. Since the petition was filed in 2016 which was prior to this Amendment, the Court seems to confine itself to a determination of the conduct of the responded in relation to the law as it stood then. The introduction of a quota system in 2017 arguably was not directly relevant to the delay in the delimitation process. Nevertheless, for the purpose of clarity, it would have been desirable for the Court to note that at the time of issuing judgment, the law relating to elections to Local Authorities stood further amended and included a quota for women.

#### **4. Right to be Free from Torture**

The Supreme Court continued to receive petitions that alleged gruesome forms of cruel, inhuman or degrading treatment by the police. In spite of the efforts by civil society to address this unacceptable and unconstitutional practice, torture continues. In the 12 judgments that the Court issued in 2017, the Court demonstrated receptivity and empathy to victims of torture. However, the Court continued to apply the requirement of medical evidence to establish torture. The standard of proof remains a ‘balance of probability’. The alleged violations of the right to be free from torture revealed the limitations of the remedy under Art 126. Petitioners who have suffered one of the worst forms of violations of their fundamental rights guarantees are required to establish within a month, corroborated medical evidence through a lawyer, in Colombo, in order to succeed. In spite of the receptivity of the Court to these petitions in 2017 it is noteworthy that the Court did not draw upon Sri Lanka’s obligations under international law including its obligations under the Convention

against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in its judicial reasoning.<sup>32</sup>

Of the cases alleging torture that were decided in 2017, the case of *Gunasekara v. Sub Inspector Athukorala, Meetiyagoda Police Station*<sup>33</sup> is unusual in that a petitioner who alleged that he was ‘subjected to torture and to cruel, inhuman and degrading treatments [sic]’ files a fundamental rights petition alleging a violation of the right to equality.<sup>34</sup> There is no clarity on why the petitioner chose to claim only a violation of the right to equality. Three respondents were not represented in this case. The Court agreed with the petitioner and granted compensation as well as costs. However, the Court did not make any observations as to the applicability of Art 11 to this petition.

In the case of *Rajinikanth v. OIC Bulathsinhala Police Station*<sup>35</sup> the petitioner alleged that the police subjected him to gruesome forms of cruel, inhuman and degrading treatment amounting to torture. However, the Court found that the evidence placed before the Court did not meet the standard of proof that the petitioner must satisfy. The Court followed the cases of *Vivienne Gunewardena v Perera*<sup>36</sup> and *Channa Peiris v Attorney General*<sup>37</sup> in determining the standard of proof:

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<sup>32</sup> Sri Lanka ratified this treaty in 1994 and its Optional Protocol in 2017.

<sup>33</sup> SC (FR) 126/2008, Supreme Court Minutes 11 July 2017.

<sup>34</sup> SC (FR) 126/2008, Supreme Court Minutes 11 July 2017, 4.

<sup>35</sup> SC (FR) 194/2012, Supreme Court Minutes 29 September 2016.

<sup>36</sup>[1983] 1 Sri LR 305.

<sup>37</sup>[1994] 1 Sri LR 1.

*‘...it is clear that though alleged infringement of fundamental rights have to be proved on a balance of probability or on a preponderance of evidence as in a civil case, the Court requires a high degree of proof within that standard, typical with the nature of the allegations made, while at the same time ensuring that no undue burden is placed upon a petitioner.’<sup>38</sup>*

A similar approach was adopted in the case of *Aberathna v Chief Inspector Dharmaratne*<sup>39</sup> decided the same year.

The case of *Wickremapathirana v. Sub Inspector Salvatura*<sup>40</sup> is noteworthy in terms of the sensitivity demonstrated by the Court towards the plight of a victim of torture. The petitioner had been subjected to torture for seven days. The respondents claimed that the petitioner had not complained of torture when he was produced before a Magistrate. The Court responded to this claim by noting that ‘Nobody who was tortured at a police station would ever be not scared to complain to the judge at such a time when he was at the mercy of the judge and the police to get bail.’<sup>41</sup> The respondents had submitted affidavits from other suspects who were in police custody at the time to support the respondent’s claim that the petitioner had not been held in detention for the said period. Court rejected these affidavits and noted:

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<sup>38</sup>*Rajinikanth v OIC Bulathsinhala Police Station* SC (FR) 194/2012, SCM 29 September 2016, 9.

<sup>39</sup> SC (FR) 222/2014, Supreme Court Minutes 31 August 2017.

<sup>40</sup> SC (FR) 244/2010, Supreme Court Minutes 30 May 2017.

<sup>41</sup> SC (FR) 244/2010, Supreme Court Minutes 30 May 2017, 6.

<sup>42</sup> SC (FR) 244/2010, Supreme Court Minutes 30 May 2017. 8.

*'To place this kind of very low standards of proof of absence of the Petitioner [from the police station], during that period, inside the Police Station, is incredible. I view this kind of action as despicable and absurd. No court would ever be willing to rely on affidavits by suspects and detainees in the custody of the police, to safeguard the police officers under whom the said suspects and detainees were living their lives inside the cell of the police station, during that period.'*<sup>42</sup>

In this case, the Court noted that the methods of torture that have been employed left minimal scars on the petitioner and noted that the Court should recognize such forms of torture even in the absence of medical evidence.<sup>43</sup> This observation is a welcome change in the general attitude of the Court which is to insist on medical evidence of torture or of cruel, inhuman or degrading treatment or punishment.

The case of *Naidos v. Inspector Damith, Moratuwa*<sup>44</sup> involved facts that showed how abuse of power by the police leads to extreme forms of violations of fundamental rights including the violation of the right to be free from torture. The petitioner was arrested purportedly on suspicion of committing theft. He was informed of this on or about the third day of his detention. However, the law requires that suspects be produced before a Magistrate within 24 hours of arrest and detention for some offences<sup>45</sup> and within 48 hours in relation to other offences.<sup>45</sup> The petitioner was subjected to severe forms of torture by the police. The petitioner was produced before a Magistrate only about seven days after arrest by which time the police had framed the petitioner for two offences related to the possession of narcotics. The Magistrate found that the petitioner was falsely implicated in both cases and that the petitioner had been 'assaulted and treated inhumanely.' However

there is no evidence to suggest that the Magistrate recommended prosecution of the police officers or even disciplinary action. The Supreme Court declared that the petitioner’s right to be free from torture and the right to be free from arbitrary arrest had been violated. A sum of Rs 300 000 was awarded as compensation. However, the Court made no direction to the Attorney-General for investigation and prosecution of the respondents under the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act*.<sup>46</sup>

detention was paraded in public as the ‘grease yaka’ – the nickname popularly attributed at that time to men who were subjecting women to sexual harassment.<sup>48</sup> where Court recognized the psychological aspects of the right to be free from torture. The petitioner was subjected to arbitrary arrest and during his Due to the horrific experience of torture he endured, the petitioner eventually dropped out of his vocational training programme. He continued to experience stigma due to the public shaming that he was subjected to by the police and had been receiving treatment at a psychiatry clinic. In addition to the compensation award of Rs 300,000 the Court directed the Attorney-General to take necessary action against the respondents.

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<sup>43</sup> SC (FR) 244/2010, Supreme Court Minutes 30 May 2017, 11-12.

<sup>44</sup> SC (FR) 608/2008, Supreme Court Minutes CM 19 January 2017.

<sup>45</sup> ...Note that persons arrested under the Prevention of Terrorism....

<sup>46</sup> No 22 of 1994

<sup>47</sup> SC (FR) 527/2011, Supreme Court Minutes 22 July 2016.

<sup>48</sup> Grease yakas were reported during these times as watching women undress through bedroom windows etc.

## **5. Right to be Free from Arbitrary Arrests**

Of the cases that alleged a violation of the right to liberty under Article 13, the incidents leading up to the case of *Cokeman v. Attorney General*<sup>49</sup> received significant publicity in 2017. A British woman visiting Sri Lanka was subjected to arbitrary arrest, detention and deportation because of a tattoo of the Buddha on her arm. The tourist was accosted by a taxi driver and taken to a police station. Thereafter, in complete disregard of the law, she was subjected to detention and an order for deportation was issued. She was not given an opportunity to contact the British High Commission. Moreover,

She was subjected to inhuman treatment including sexual harassment and being solicited for bribes. After a detailed description of the relevant facts Court observed that ‘there was no legal basis or a right to arrest the Petitioner at all.’ Accordingly, the Court held that her right to equality, right to be free from torture and the right to be free from arbitrary arrest, detention and punishment had been violated. The state was ordered to pay Rs 500,000 as compensation and Rs 200,000 as costs to the petitioner.

In the case of *Priyawansa v. Ministry of Defence, Gotabhaya Rajapakse*<sup>50</sup> the Court had to determine whether the arrest and detention of the petitioner under a detention order was a violation of the right to equality and the right to be free from torture. The petitioner filed the petition as a remandee. Having considered the relevant facts, which related to the investigations into the murder of the journalist

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<sup>49</sup> SC (FR) 136/2014, Supreme Court Minutes 15 July 2017.

<sup>50</sup> SC (FR) 458/2010, Supreme Court Minutes 15 February 2017.

Lasantha Wickramatunga, Court noted that there was no basis for the arrest of the petitioner. The Court reasoned that if there was no basis for the arrest then the detention that followed too was arbitrary. Court held that of the six respondents that were cited in the petition, that the Inspector of Police was responsible for violating the petitioner’s right to equality and the right to be free from

arbitrary arrest and detention. However, the Court only made an order for compensation. The Court did not declare that the detention order was a violation of the fundamental rights guarantee. Nor did it order that the remandee be released.

## 6. Environmental Justice

Two petitions that concerned environmental justice were determined by the Court in 2017. One of them is discussed under the ‘Time Bar’ as the petition was declared to be out of time. The Court granted leave to proceed in the case of *Dharmasuriya v. Mahaweli Authority of Sri Lanka*<sup>51</sup> where the petitioner filed a petition in the public interest challenging the decision of the Mahaweli Authority to issue permits to the respondents for construction on Victoria Reservoir reservation lands. The respondents claimed that the petitioner was out of time. Court rejected this claim stating that the fundamental rights must be interpreted in light of the Directive Principles of State Policy. These Principles, according to Court, ‘define the constitutional goals’ and ‘set forth the standards or norms of reasonableness which must guide and animate government action.’<sup>52</sup>

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<sup>51</sup> SC (FR) 330/2015, Supreme Court Minutes 9 February 2017.

<sup>52</sup> SC (FR) 330/2015, Supreme Court Minutes 9 February 2017, 5.

The Court recognised that ‘there is a constitutional imperative on the State and its agencies not only to ensure and safeguard proper environment [sic]but also an imperative duty to take adequate measures to promote, protect and improve the natural environment.’<sup>53</sup> This determination, though commendable, could have been strengthened if it drew upon Sri Lankan jurisprudence on environmental justice and applicable international law.<sup>54</sup>

## 7. Right to Information

The case of *De Silva v. Prime Minister, Ranil Wickremasinghe*<sup>55</sup> is the first judgment to be issued in relation to the right to information that was included, among other provisions, in the Constitution by the 19<sup>th</sup> Amendment in 2015.<sup>56</sup> The petitioner alleged that the refusal to release the interim report of the Parliamentary Committee on Public Enterprises (COPE) amounted to a violation of his right to information. The petitioner sought access to the report in order to know the findings of the Committee on the allegations of corruption with regard to the issuance of bonds by the Central Bank in 2015. The Court, however, upheld the preliminary objections of the respondents and dismissed the petition stating that until the Interim Report had been tabled in Parliament the *Parliament (Powers and Privileges) Act* prohibits its

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<sup>53</sup> SC (FR) 330/2015, Supreme Court Minutes 9 February 2017, 4.

<sup>54</sup> Example for Sri Lankan jurisprudence on environmental justice include *Bulankulama v. Secy min of Industrial Development* [2000] 3 Sri LR 243 and *Watte Gedara Wijebanda v. Conservator General of Forest* [2009] 1 Sri LR 337. Examples of applicable international standards include the Sustainable Development Goals (Resolution 70/1 of the United Nation General Assembly: "Transforming our World: the 2030 Agenda for Sustainable Development.")

<sup>55</sup> SC (FR) 308/2015, Supreme Court Minutes 22 February 2017.

<sup>56</sup> Art 14 (A) of the Constitution.

release. Court further recognized that the fundamental rights remedy is available only against executive or administrative action and not with regard to the actions of the legislature.

## 8. Public Functions Test

In the case of *Captain Abeygunewardena v. Sri Lanka Ports Authority*<sup>57</sup> the Court had to determine whether an incorporated company could be subjected to the fundamental rights jurisdiction of the Supreme Court. The petitioner argued that the company was essentially controlled by the state and was owned by the state. The respondents' claim relied primarily on the absence of a statutory basis in arguing that the company was not an agency of the state. The Court engaged in a detailed analysis of the development of what it identified as the 'functional test' or the 'Governmental control test' in Sri Lanka and adopted the test of 'the real relationship which exists between the State and a corporate body.'<sup>58</sup> Accordingly, Court noted:

*'Though these corporate bodies are legal persons in their own right and their legal identity is distinct from the State, they often operate in terms of State policy or are closely associated with the State or perform functions on behalf of the State or are largely controlled by the State or are financed by the State...Frequently, the power and authority of the State lies behind these corporate bodies when they deal with the people. They are, in truth and fact, agencies or instrumentalities of the State which, therefore must be held to be bound by Article 4(d) (...).'*<sup>59</sup>

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<sup>57</sup> SC (FR) 57/2016, Supreme Court Minutes 20 January 2017.

<sup>58</sup> *Captain Abeygunewardena v Sri Lankan Ports Authority*, SC (FR) 57/2016, Supreme Court Minutes 20 January 2017, 7.

<sup>59</sup> *Captain Abeygunewardena v Sri Lankan Ports Authority*, SC (FR) 57/2016, Supreme Court Minutes 20 January 2017, 7.

The reasoning of the Court in this case is commendable, particularly at a time when Public-Private partnerships are increasing and the state is establishing new institutions and projects. The rapidly evolving nature of the state requires a revision of the traditional criteria for the application of public law. This case clearly lays down the test that could be applied in such contexts.

### **9. Epistolary Jurisdiction**

For the first time since the recognition of the epistolary jurisdiction in the mid-1990s, the Supreme Court had the opportunity to exercise it in 2017.<sup>60</sup> This is a provision for complaining of violations of fundamental rights by way of a letter addressed to the Supreme Court. The Court noted in the case of *Thavarajanie v. Acting Principal College of Nursing Ampara, Kanaganayagam*<sup>61</sup> that the petitioner invoked its epistolary jurisdiction. The Court, however, did not reveal the nature or other specific details of the complaint made by the petitioner. From the time the matter was taken up by the Court, proceedings reveal that the petitioner had failed to comply with applicable Supreme Court rules in converting her letter to a petition. The Attorney-General took the position that the petitioner had failed to specify the fundamental right that had been allegedly violated by the respondents.

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<sup>60</sup> In 1994 persons who had been arbitrarily and indefinitely detained following the second youth insurrection in Sri Lanka (approximately 1989-1990) complained in writing to the Supreme Court. The Court then converted the letters to petitions and proceeded to make determinations regarding the constitutionality of those arrests and detentions. Soon thereafter the Supreme Court amended its rules to recognise an epistolary jurisdiction.

<sup>61</sup> SC (FR) 04/2014, Supreme Court Minutes 4 August 2017.

Court took the view that having subsequently availed herself of legal representation the petitioner was expected to comply with these rules. Accordingly, the petition was dismissed.

## 10. Standing

A liberal approach to standing was affirmed by the Court in the case of *Dharmasuriya v. Mahaveli Authority of Sri Lanka*<sup>62</sup> discussed above. Court made the following observation in that regard:

*If no one can maintain an action for redress of a public wrong or public injury, it would be disastrous to the rule of law 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. The strict rule of standing ... is relaxed and a broad rule evolved which gives standing to any member of the public who is not a mere busy body or a meddling interloper but who has sufficient interest in the proceeding. There can be no doubt that the risk of legal action against the State or its agencies by any citizen will induce the State or its agencies to act with greater responsibility and care thereby improving the administration of justice.*<sup>63</sup>

Through these observations the Court affirmed the established judicial trend of the Sri Lankan Supreme Court of recognizing petitions made in the public interest even though the text of Article 126 recognises standing only for the victim or the attorney-at-law to file fundamental rights petitions.

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<sup>62</sup> SC (FR) 330/2015, Supreme Court Minutes 9 January 2017.

<sup>63</sup> SC (FR) 330/2015, Supreme Court Minutes 9 January 2017, 5.

## **11. Time-bar**

Article 126 of the Constitution stipulates that petitions that allege an infringement or imminent infringement of fundamental rights should be filed within one month. The Sri Lankan Supreme Court has had a contrasting approach to the interpretation of this requirement. In 2017, in two cases that alleged serious violations of fundamental rights, the Court chose to adopt the more restrictive or literal approach in its interpretation of the one month rule.

In the case of *Environmental Foundation (Guarantee) Limited v. Conservator General of Forests, Sathurusinghe* <sup>64</sup> the Court upheld a strict interpretation of the one month rule. Environmental Foundation Ltd., an organization established to carry out work in relation to environmental justice, filed this fundamental rights petition challenging the issuance of a permit for land use, an environmental license and other documents related to a mini-hydro power project in the ‘border line’ of the Sinharaja forest. The Court upheld the objection by the respondents and dismissed the petition on the basis that it was out of time. The documents that were challenged had been issued approximately 6 years prior to the petition. In dismissing the petition the Court observed that ‘Petitioners being involved in environmental issues has to be vigilant as it is the primary concern of the Petitioners’.<sup>65</sup>

Even though the alleged harm to the petitioners continued the Court enforced a strict interpretation of the one month rule. By contrast, the Court observed that Article 126 must be given a

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<sup>64</sup> S.C (FR) 04/2016, Supreme Court Minutes 29 May 2017.

<sup>65</sup>S.C (FR) 04/2016, Supreme Court Minutes 29 May 2017, 7.

‘generous and purposive construction’ in the case of *Central Engineering Consultancy Bureau Engineers’ Association v. Central Engineering Consultancy Bureau*.<sup>66</sup> in which the Engineer’s Association of the Central Engineering Consultancy Bureau challenged a decision regarding the allocation of an official residence. In this case the Court held that the petitioners had filed the petition within a month of the alleged violation but nevertheless affirmed that the one month rule must be interpreted in a generous manner.

The petition challenging the banning of the niqab<sup>67</sup> at the Moratuwa University was declared to be out of time in the case of *Sabar v. University of Moratuwa*.<sup>68</sup> The petition was filed 4 ½ months after she was refused entry to the University with the It could have been argued on behalf of the petitioner that the banning of the niqab was a continuing violation. However, neither the Court nor the lawyers acting on behalf of the petitioner seemed to have considered this aspect of the alleged violation of fundamental rights. Consequently, the petition was dismissed.

The substantive violations of fundamental rights that were alleged to be violated in these petitions ought to have attracted the attention of the Court. In both instances, the violations that were complained of were of a continuing nature. The issuance of permits in the former case had resulted in construction activities

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<sup>66</sup> SC (FR) 45/2016, Supreme Court Minutes 1 February 2017.

<sup>67</sup> The term ‘niqab’ is used to describe a face veil that is worn by Muslim women. In some cases the niqab does not cover the eyes while in some other cases the eyes are covered by some form of netting.

<sup>68</sup> SC (FR) 424/2013, 427/2013, Supreme Court Minutes 2 February 2017.

that were continuing. The undergraduate had been forced to stop wearing the niqab in continuing her university education. Taking these factual realities into account, the Court could have overlooked the delay on the part of the petitioner in coming to Court. If the Court had chosen to adopt a purposive interpretation of the one month rule, the Court would have had the opportunity to make a substantive contribution to the development of the jurisprudence on environmental justice, religious freedom, and women's rights.

## **12. Reliance on International Human Rights Law, Foreign Judgments**

In some of the cases determined in 2017, the Supreme Court relied to some extent on foreign judgments but no reliance was placed on international human rights law except in one case where the UDHR was referred to. Case law from the United Kingdom, United States of America and from India were referred to in a few cases by the Court in explaining its interpretation of the fundamental right concerned. These cases are briefly discussed below. Foreign judgments only carry a persuasive value. However, reference to such judgments allows the Court to draw from and be inspired by judicial reasoning in other jurisdictions.

In the case of *Mendis v. Director General, Rubber Department, Premadasa*<sup>69</sup> extensive reference was made to the Indian case of *Royappa* in holding that arbitrary and unfair actions of administrators comes within the purview of the right to equality

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<sup>69</sup> SC (FR) 32/14, Supreme Court Minutes 16 June 2017.

<sup>70</sup> *EP Royappa v. State of Tamil Nadu and Another* [1974] AIR 555, 1974 SCR (2) 348

in Sri Lanka.<sup>70</sup> It is noteworthy that the Court made no effort to relate the *Royappa* case to the constitutional jurisprudence in Sri Lanka. The reference was direct. The leading case of *Padfield v. Ministry of Agriculture*<sup>71</sup> from the United Kingdom was cited in the case of *Sivarajah v. OIC, TID*<sup>72</sup> in holding that discretion vested by statute is not absolute and can only be exercised for the purpose for which such discretion has been vested in a public authority.<sup>73</sup> The Court relied extensively on several judgments of the Indian Supreme Court in affirming that incorporated companies that are effectively owned and controlled by the state would be subject to the fundamental rights jurisdiction of the Court.<sup>74</sup>

In the case of *Bandara v. National Gem and Jewellery Authority*<sup>75</sup> the Court referred to the Universal Declaration of Human Rights. The petition alleged a violation of the right to engage in a lawful employment under Art 14(1)(g) of the Constitution. The Court seems to cite the UDHR to affirm that the right to work for a living 'is the very essence of personal freedom.'<sup>76</sup> The Court made no further reference to the UDHR in this case.

The case of *De Silva v. Principal and Chairman Interview Board, Dharmashoka Vidyalaya Ambalangoda, Parakramawansa*<sup>77</sup>

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<sup>71</sup>1968 (AC) 997.

<sup>72</sup> SC (FR) 15/2010, Supreme Court Minutes 27 July 2017.

<sup>73</sup>*Sivarajah v OIC, TID* SC (FR) 15/2010, Supreme Court Minutes 27 July 2017, S 11.

<sup>74</sup>*Captain Abeygunewardena v Sri Lanka Ports Authority*, SC (FR) 57/2016, Supreme Court Minutes 20 January 2017.

<sup>75</sup> SC (FR) 118/2013, Supreme Court Minutes 13 December 2017.

<sup>76</sup> SC (FR) 118/2013, Supreme Court Minutes 13 December 2017, 5.

<sup>77</sup> SC (FR) 50/2015, Supreme Court Minutes 2 August 2017.

for drawing inspiration from the Fourteenth Amendment to the US Constitution in the interpretation of the scope of the right to equality in Sri Lanka. The Court quoted from the case of *Brown v. Board of Education Topeka* in observing the significance of the ensuring equal access to education.<sup>78</sup>

The Court recognized the right to reasons for decisions by public authorities in the case of *Jayaweera v. Fernando*.<sup>79</sup> In affirming this principle the Court relied on the Indian case of *SN Mukherjee v. Union of India* rather than on the established Sri Lankan jurisprudence on the right to reasons.<sup>80</sup> The reason for relying on Indian jurisprudence in this instance is not clear.

**13. Compensation**

In comparison to the awards of compensation and costs in the previous years, the awards made by the Supreme Court in 2017 are significantly higher. As evident from the table below in all cases except one the amounts awarded was over Rs 100,000.

*Figure 3*

Range	No of Cases
Less than 100, 000	1
100, 000- 200, 000	4
200, 000- 300, 000	-
300, 000- 400, 000	4
400, 000- 500, 000	-
500, 000- 600, 000	3
600, 000- 700, 000	-
700, 000- 800, 000	-
800, 000- 900, 000	1
900, 000- 1 000, 000	-
1 000, 000 or greater	3

<sup>78</sup> 347 US 483 (1954).

<sup>79</sup> SC (FR) 484/2011, Supreme Court Minutes 16 January 2017.

<sup>80</sup> (1990) 4 SCC 594, AIR 1990 SC 1984.

In keeping with past practice, in most cases the Court ordered the respondents to pay part of the compensation personally. As pointed out in previous issues of the *State of Human Rights* reports, a more detailed study of the compensation awards has to be undertaken to understand its usefulness as a remedy for violations of fundamental rights.

**14. The Duration of Proceedings**

According to Article 126(5) of the Constitution, the Supreme Court is required to ‘hear and finally dispose of’ fundamental rights petitions within two months. However, as evident from the table below, most cases seem to take at least two years while 21 cases have taken at least 7 years to be concluded. Further research has to be undertaken to identify the reasons for this delay as the Court does not refer to the delay or offer an explanation for it. It could be argued that the delay in the determination of fundamental rights petitions in and of itself could amount to a violation of the right to equality.

*Figure 4*

	No of years since filing of petition	No of Petitions	Approximate % from the total no of judgments
1	0-1	5	12
2	1-2	11	26
3	2-3	0	0
4	3-4	2	5
5	4-5	7	15
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

Moreover, as reported by the Special Rapporteur on the Independence of the Judiciary, as the Chief Justice himself had observed, about 3, 000 fundamental rights petitions are currently

pending before the Court.<sup>81</sup> By vesting the exclusive jurisdiction with regard to Fundamental Rights to the Supreme Court the legal system affords the highest possible degree of recognition in the administration of justice. However, the time lag between the filing of a petition and the conclusion of proceedings suggests that the effectiveness of the remedy is being diluted by laws delays. Further research should be carried out to identify the factors that contribute to the delay.

### **15. Conclusion**

The jurisprudence of the Court during 2017 on fundamental rights can be described as being relatively progressive. The restoration of the independence of the judiciary by the 19<sup>th</sup> Amendment to the Constitution in 2015 seems to be having a positive impact on the Court. Despite this, the foregoing analysis points to a few gaps that still persist. One is the method of judicial reasoning. The judgments continue to reveal a pre-occupation with the determination of facts whereas the Court should be primarily developing the interpretation of the fundamental right concerned. Related to this is the concern regarding the sparse reference to judicial precedent and to Sri Lanka's international obligations under human rights treaties.

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<sup>81</sup> Report of the Special Rapporteur on the independence of judges and lawyers on her mission to Sri Lanka (A/HRC/35/31/Add.1 23 March 2017) Para 82.



# IV

## INTERNATIONAL MONITORING OF HUMAN RIGHTS IN SRI LANKA 2017

*Dinushika Dissanayake\**

### **1. Introduction**

The year 2018 marks 70 years since the international community agreed to a set of core principles that were to guide the evolution of human rights- the Universal Declaration of Human Rights (UDHR). The UDHR was adopted by the United Nations General Assembly on 10 December 1948, when Sri Lanka as a sovereign nation was less than one year old, having achieved independence from the British on 4 February 1948. Sri Lanka would eventually incorporate only a few of the core rights in the UDHR into the first fundamental rights chapter of the Republican Constitution in 1972. Other rights, especially key economic and social rights,

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continued to be relegated to directive principles of state policy and remained non-justiciable.

The milestone 70<sup>th</sup> anniversary of the UDHR provides a useful lens with which to approach the international monitoring of the human rights state in Sri Lanka for the year past. The UDHR did not bifurcate human rights along civil and political rights, and economic, social and cultural rights demarcation. In a sense, the approach of the UDHR was to recognize the intersectionality and interdependence of human rights. The second and third iterations of international human rights law encapsulated in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) eventually overtook the interdependency principles that the UDHR recognized, and resulted in an emphasis on guarantee of civil and political rights as a precursor for the guarantee of other rights.<sup>1</sup> The guarantee of civil and political rights further fit well into the governing economic ideology of the times, and the tensions caused by the cold war between the major political powerhouses of the time.

For Sri Lanka, the evolution of its commitment to international human rights frameworks has been a janus-faced. Externally, Sri Lanka has ratified as many as 16 major human rights treaties and covenants. Internally, however, multiple discriminatory laws and policies continue to govern the legal framework, and human rights

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<sup>1</sup> For example the 1978 Constitution and the 1972 Constitution of Sri Lanka do not include several key economic, social and cultural rights as justiciable rights.

abuses have gone unpunished and un-adjudicated,<sup>2</sup> and resultant actions and inactions by the state. Some of these laws predate the UDHR and are a part of our colonial heritage, such as archaic provisions in the *Penal Code*, which criminalize, for example, same sex relations and sex work and still retain the death penalty for a variety of offenses. Others were very much an organic product of Sri Lanka's political gambles and were enacted shortly after independence such as the *Citizenship Act No. 18 of 1948* which disenfranchised thousands of Tamils of Indian origin. Sri Lanka also does not provide for a set of justiciable rights vis-à-vis key economic, social and cultural rights guarantees, although Supreme Court decisions have interpreted some rights such as the right to education as rights that are recognised in the bill of rights although there are no express provisions to give effect to the same.<sup>3</sup>

In this chapter, the international monitoring of human rights in Sri Lanka is addressed by assessing the various engagements Sri Lanka had over 2017 with international bodies and agencies. The chapter begins with a short analysis of the international human rights obligations Sri Lanka has taken upon itself since independence, which obligations along with customary international law form the benchmark for assessing international human rights law. Thereafter the treaty body engagements through the year are discussed, with Committee on Elimination of All forms of Discrimination against Women, Committee on Economic, Social

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<sup>2</sup> Discriminatory laws have included archaic provisions in the *Penal Code*, personal laws, and stand-alone laws like the *Vagrants Ordinance No. 4 of 1841* which discriminate against women, religious and ethnic minorities and LGBT people.

<sup>3</sup> *Haputhantrige & Others v. Secretary, Ministry of Education & Others* (2007 FR) 10-13/2007 (Grade One Admission case) (2007) 1 Sri LR 101.

and Cultural Rights, and Universal Periodic Review all taking place through the year. In each of these, the meeting of international human rights obligations vis-à-vis previous review cycles was reviewed by the committees, civil society and national Human Rights Commission views were considered along with state party reports, and recommendations were made for Sri Lanka for the next reporting cycle. The chapter follows a thematic analysis which looks at the treaty body review and recommendations on each of the major human rights themes of economic, social, cultural, civil and political rights.

### **International Treaty Body System**

The international treaty body system monitors the implementation of international human rights obligations by state parties. Each of the major human rights treaties, such as the International Covenant on Economic, Social and Cultural Rights<sup>4</sup> (monitored by the Committee on Economic, Social and Cultural Rights), the International Covenant on Civil and Political Rights<sup>5</sup> (monitored by the Human Rights Committee), the Convention on Elimination of All Forms of Discrimination Against Women<sup>6</sup> (monitored by the Committee on Elimination of All Forms of Discrimination Against Women), are good examples.

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<sup>4</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR- adoption 1966, entry into force 1976)

<sup>5</sup> The International Covenant on Civil and Political Rights (ICCPR- adopted 1966; entry into force 1976)

<sup>6</sup> The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW – adoption in 1979; entry into force in 1981);

The other core international human rights treaties are:

- the International Covenant on the Elimination of All Forms of Racial Discrimination (CERD – adoption in 1965; entry into force in 1969);
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT – adoption in 1984; entry into force in 1987);
- the Convention on the Rights of the Child (CRC – adoption in 1989; entry into force in 1990);
- the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW – adoption in 1990; entry into force in 2003);
- International Convention on the Rights of Persons with Disabilities (CRPD- adoption 2006; entry into force 2008) and
- the International Convention for the Protection of All Persons from Enforced Disappearance (ICPED -adoption 2006, entry into force 2010)

The Treaty body committees that monitor implementation of these treaties are as follows:

- The Human Rights Committee (HRCttee);
- The Committee on the Elimination of Racial Discrimination (CERD);
- The Committee on the Elimination of Discrimination Against Women (CEDAW);

- The Committee on Economic, Social and Cultural Rights (CESCR);
- The Committee Against Torture, and its Subcommittee on Prevention (CAT);
- The Subcommittee on Prevention of Torture (SPT)
- The Committee on the Rights of the Child (CRC);
- The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW);
- The Committee on the Rights of Persons with Disabilities (CRPD);
- The Committee on Enforced Disappearances (CED);

The monitoring obligation of these treaties is multiple. According to the OHCHR (Office of the High Commissioner for Human Rights), “These include consideration of State parties' periodic reports, consideration of individual complaints, conduct country inquiries and they also adopt general comments interpreting treaty provisions and organize thematic discussions related to the treaties.”<sup>7</sup>

In addition to monitoring implementation of treaties, treaty bodies also formulate ‘General Comments’ which interpret the meaning and scope of specific articles of the relevant treaty. These General Comments are useful to assess whether specific action or inaction

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<sup>7</sup> OHCHR, <https://www.ohchr.org/EN/HRBodies/Pages/WhatTBDo.aspx>

by the state is in violation of treaty body interpretations of the scope of the right.

Each treaty body has a reporting cycle for state parties. The Human Rights Committee, for example has a reporting cycle of four years. For the Committee on Economic, Social and Cultural Rights, the first report must be submitted within two years of acceding to the treaty, and thereafter every five years. State parties are obliged to submit their reports on time. In the event there is a significant delay, some treaty bodies like the Human Rights Committee can conduct the review even without the state party report. In such instances the concluding observations are shared with the state party privately- and may be made public later.

Each of the treaty bodies provides concluding observations at the end of each review. These concluding observations are positive recommendations to the state to improve its implementation of treaty based human rights obligations. Concluding observations also acknowledge progress already made by the state party in implementing rights. In its deliberations the committee takes into account the reports submitted not only by the state party, but also by civil society and independent human rights bodies like the national Human Rights Commission.

One notable point was that Sri Lanka's engagements were largely positive in 2017, although accepting recommendations from these treaty body reviews were often mixed with refusal to engage on some core human rights issues such as abolition of the death penalty. On the other hand, significant promises were made such as to repeal the Prevention of Terrorism Act. The chapter concludes with an overview of what these promises mean, the

importance of monitoring the implementation of these obligations over the next reporting cycles, and the role of civil society and independent bodies to hold government to the promises they have made internationally.

### **International charter-based bodies**

The mandate of charter-based bodies arises from the UN Charter and not from specific treaties. The Human Rights Council is a charter-based body just as its predecessor the United Nations Commission on Human Rights was also a charter-based body. The subsidiary bodies under the Human Rights Council include the Universal Periodic Review Working Group which was established under a General assembly resolution in 2006, and the Human Rights Council Advisory Committee established in 2007 by a Human Rights Council resolution.<sup>8</sup>

Special procedures also fall within the responsibility of the Human Rights Council. Special Procedures include Special Rapporteurs, Working Groups and Independent Experts. These special procedures play a key role in investigating, monitoring and reporting on specific human rights issues which could be based on either a country mandate or a thematic mandate.<sup>9</sup>

## **2. Sri Lanka’s History of Commitments to International Human Rights Frameworks in Recent Years**

As noted, Sri Lanka has ratified 16 major human rights conventions. On 14 November 2017 the cabinet approved Sri Lanka’s accession to the Optional Protocol to the Convention

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<sup>8</sup> UN Documentation, <https://research.un.org/en/docs/humanrights/charter>

<sup>9</sup> UN Documentation, <https://research.un.org/en/docs/humanrights/charter>

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against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, that recognized the competence of the Committee against Torture (CAT) to receive individual communications.

In the last three years alone, Sri Lanka signed the Convention on the Rights of Persons with Disabilities and the Optional Protocol thereto, the International Convention for the Protection of All Persons from Enforced Disappearance, and the International Labour Organization Employment Policy Convention, 1964 (No. 122), all in 2016; and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children in 2015.

However, Sri Lanka is not a signatory to the Second Optional Protocol to the ICESCR. The Second Optional Protocol permits individual communications to the treaty body directly; therefore, this option is still not available for people who have exhausted domestic remedies in Sri Lanka and have still not been guaranteed a given right under the international covenant. The Committee on Economic, Social and Cultural Rights (hereinafter CESCR) recommended in 2017 that Sri Lanka ratify the Second Optional Protocol, and this was accepted by Sri Lanka at the Universal Periodic Review later in 2017, when Sri Lanka supported the recommendation by Uruguay to ratify the same.<sup>10</sup>

Sri Lanka also accepted recommendations from the Committee (CESCR) to ratify the Optional Protocol to the Convention against

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<sup>10</sup> UPR, p. 10, para 116.1

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and to implement the same upon ratification.<sup>11</sup>

Therefore accepting international human rights obligations has been part of Sri Lanka's strategy in terms of external relations; the challenge has been to guarantee these human rights obligations domestically. For example, although Sri Lanka accepted recommendations from several state parties including Poland, Uruguay, Senegal, New Zealand and Denmark at the UPR, to ratify the optional protocol to CAT, the routine use of torture in custody in Sri Lanka has also been highlighted in international treaty body reviews in 2016 (Committee against Torture) supported by submissions by the Human Rights Commission of Sri Lanka.

**a. Domestic legislative developments**

Subsequent to the decision in *Singarasa v. AG*,<sup>12</sup> the dualist nature of Sri Lanka's legal system requires that all international obligations be enacted via local legislation in order for the law to be implemented domestically. In that case, a man who had been convicted based on a forced confession, complained to the Human Rights Committee. This was after the Supreme Court dismissed his application for special leave to appeal against the conviction.<sup>13</sup> The Human Rights Committee recommended that the decision be reviewed. When the petitioner then appealed to the Supreme

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<sup>11</sup> CESCR, Concluding observations, para 73, E/C.12/LKA/CO/5, Committee on Economic, Social and Cultural Rights, Concluding observations on the fifth periodic report of Sri Lanka, 4 August 2017. These recommendations were repeated at the UPR, pg.10 at para 116.2-116.8

<sup>12</sup> [2013] 1 Sri L.R.245

<sup>13</sup> *Nallaratham Singarasa v. Sri Lanka*, Communication No. 1033/2001, U.N. Doc. CCPR/C/81/D/1033/2001 (2004), <http://hrlibrary.umn.edu/undocs/html/1033-2001.html>

Court, the five-judge bench led by Chief Justice Sarath N. Silva, determined that the Human Rights Committee had no jurisdiction, and that all international obligations committed to internationally by Sri Lanka, had to be passed by the legislature as domestic law in order to be applicable domestically.<sup>14</sup> The appeal was dismissed.

In her 2017 report on the independence of the judiciary in Sri Lanka, the UN Special Rapporteur on Independence of Judges and Lawyers Monica Pinto commented as follows:-

*“This extreme form of legal dualism is not sustainable, as it is well accepted in international law that a State party to a treaty may not invoke provisions of its domestic legislation as a justification for its failure to meet its treaty obligations.”<sup>15</sup>*

The interpretation by the Supreme Court of the dualist nature of Sri Lanka’s legal system in *Singarasa* has been the subject of critique,<sup>16</sup> the impact of that decision has been that all international human rights (and other) treaty obligations of Sri Lanka would need to be passed via domestic legislation in order to be deemed justiciable rights. In this context, several key laws were passed during the year, and a good example is the Right to Information Act, which became operative on 3 February 2017. This was a hard-

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<sup>14</sup>*Singarasa v. the Attorney General*, (2013) 1 Sri L.R. 245

<sup>15</sup> Report of the Special Rapporteur on the independence of judges and lawyers on her mission to Sri Lanka, Human Rights Council, 6-23 June 2017, A/HRC/35/31/Add.1 at para 29.

<sup>16</sup> See for example the excellent analysis of the judgment by R.K.W. Goonesekere, a counsel in the case, published in the *The Island*, 2006, [http://www.island.lk/index.php?page\\_cat=article-details&page=article-details&code\\_title=149136](http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=149136).

won gain that has resulted in greater accountability and transparency in government.

On the other hand, Sri Lanka's Constitution still fails to recognize economic, social and cultural rights as justiciable rights. While other countries have had similar challenges, judicial interpretation or Constitutional reform have incorporated economic, social and cultural rights into the bill of rights for example in India (judicial interpretation) or in Nepal (new Constitution). The directive principles of state policy in the 1978 Constitution of Sri Lanka does refer to these rights, but it is only through judicial interpretation that these rights have become justiciable. Although Sri Lanka began a Constitutional reform process in 2016, with island-wide consultations, the process ground to a halt in the last quarter of 2017. The recommendations that emanated from the country-wide public consultations in 2016 included clear recommendations to include economic, social and cultural rights in the Constitution. The government reported to the Universal Periodic Review in November 2017 that consultations on Constitutional reform were on-going;<sup>17</sup> however, genuine political will to amend key sections of the Constitution was ambiguous despite early gains with the passing of the 19<sup>th</sup> Amendment to the Constitution in 2015.

Sri Lanka also reported to the UPR that the Office of Missing Persons would become operational in September 2017; but the Office would eventually only become operational in 2018. This was significantly the first of the transitional justice mechanisms that would be set up by the government post UN Resolution 30/1.<sup>18</sup>

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<sup>17</sup> UPR, p.4 at para 16

<sup>18</sup> Human Rights Council, 'Promoting reconciliation, accountability and human rights in Sri Lanka', A/HRC/RES/30/1, available at

The *Office of Missing Persons Act No. 14 of 2016* was passed in 2016, and the only development in the year 2017 was the making of budget allocations for the operationalizing of the office, and the calling for nominations to fill the positions of Commissioners.

At the UPR in November 2017, Sri Lanka accepted recommendations by state parties including Montenegro, Nepal, Namibia and Netherlands, to continue the Constitutional reform process including recommendations to re-formulate the bill of rights.<sup>19</sup> The CEDAW review earlier in the year however raised concerns on the extent of women's participation in the reform process.<sup>20</sup> The OHCHR also commended the Constitutional reform process at the Human Rights Council sessions in February 2017.<sup>21</sup> Since then, the progress has halted and the possibility of Constitutional reform appears distant at the time of writing in 2018. The cause appears to be a combination of issues from lack of political will, instability of the coalition government, and disagreement on critical reform agendas such as the nature of the state (federal or unitary, for example).

The Constitutional reform process was progressing slowly in the year 2017. The interim report of the Steering Committee on Constitutional Reform (appointed by the Constitutional Assembly

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<https://undocs.org/EN/A/HRC/RES/30/1>. This is a key resolution before the Human Rights Council, co-sponsored by Sri Lanka, where the government of Sri Lanka agreed to undertake key steps to guarantee transitional justice and accountability. These included addressing needs of accountability, truth, justice and reparations and specific legislative measures like repealing the draconian Prevention of Terrorism Act.

<sup>19</sup> UPR, p. 11 at para 116.13

<sup>20</sup> CEDAW, p. 3 at para 10 and 11(a)

<sup>21</sup> OHCHR, p. 14 at para 59

in April 2016),<sup>22</sup> was published on 21 September 2017.<sup>23</sup> The steering committee report was scheduled to have been issued in January of the same year, but was delayed by over nine months. The interim report was debated by the Constitutional Assembly in October and November 2017, in hearings that were broadcast via loudspeakers outside of Parliament, and on national television; but thereafter, there has been no public information on further progress on constitutional reform.

**b. Treaty body scrutiny of Sri Lanka’s human rights record**

Three major treaty bodies reviewed Sri Lanka in 2017, vis-à-vis its responsibility to respect, protect and fulfil its international human rights obligations made recommendations that have a general application. One of these important steps is in relation to action to be taken to further empower the Human Rights Commission of Sri Lanka (HRCSL). The UN Committee on Economic, Social and Cultural Rights, for example, strongly urged the government of Sri Lanka to amend the Constitution to make the Human Rights Commission an independent body established under the Constitution, with a wider mandate that includes economic, social and cultural rights.<sup>24</sup> It also urged the government to allocate sufficient resources to the Commission. In the Universal Periodic Review in November 2017, Sri Lanka accepted a recommendation by the Philippines to ensure adequate funding and human resources for the Human Rights Commission of Sri Lanka

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<sup>22</sup> <https://english.constitutionalassembly.lk/steering-committee>

<sup>23</sup> <https://english.constitutionalassembly.lk/images/pdf/interim-report/ReportE%20CRR.pdf>

<sup>24</sup> Concluding Observations on the fifth periodic report of Sri Lanka, 4<sup>th</sup> August 2017, Committee on Economic, Social and Cultural Rights, available at [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/LKA/CO/5&Lang=En](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/LKA/CO/5&Lang=En) at p.2, para 10

(HRCSL).<sup>25</sup> In May 2018, the HRCSL was re-accredited by the Subcommittee on Accreditation of the Global Alliance of National Human Rights Institutions as an ‘A’ grade institution, a clear indication of its revival as an independent and credible human rights institution in Sri Lanka. The Subcommittee is established under the International Coordinating Committee for National Human Rights Institutions which was established in 1993. It is an association of national human rights institutions (NHRIs) from around the world, is incorporated in Switzerland. It promotes NHRIs to be in accordance with the Paris Principles, and promotes protection of human rights.<sup>26</sup>

During the year, the HRCSL was one of the few institutions that maintained their early promise of independence and commitment to human rights. Although the Annual Report of the HRCSL has not been available for perusal at the time of writing in October 2018, the elevation of the HRCSL to an ‘A’ grade institution is evidence of its improved functioning as an independent human rights oversight body.

The CESCR also urged the government to ensure the independence of the judiciary, in line with the recommendations of the UN Special Rapporteur on the Independence of Judges and Lawyers.<sup>27</sup> The independence of the judiciary has been one of the thorniest issues for Sri Lanka to tackle, despite a judicial system that dates back to over a century. In 2017, the Special Rapporteur

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<sup>25</sup> Report of the Working Group on the Universal Periodic Review, Human Rights Council, 37<sup>th</sup> Session, 29 December 2017, p. 11 at para 116.16

<sup>26</sup> “A brief history of GANHRI,”

<https://nhri.ohchr.org/EN/AboutUs/Pages/History.aspx>

<sup>27</sup> A/HRC/35/31/Add.1

Monica Pinto issued her report after visiting Sri Lanka in 2016. The report pointed to several flaws in the guarantee of justice in the country. Among the several conclusions of the Rapporteur is the endemic nature of resistance to human rights within the judicial sector: “A significant change in the attitude and sensitivity of many members of the legal professions, in particular the judiciary, towards reforms and human rights will be necessary.”<sup>28</sup>

The Special Rapporteur noted that “Many credible concerns relating to the independence, impartiality and competence of the judiciary” were reported to her during her visit.<sup>29</sup> Despite improvements in the independence of some judges after 2015, the Rapporteur comments on the structural issues that contribute to interference in the judiciary, making special mention of the offer of government positions and diplomatic postings to judges after retirement, which can lead to conflicts of interest. She concluded that judicial independence seems to have eroded over the decades, leading one to conclude that the issues are a system-wide malaise rather than specific issues related to specific members of the judiciary. She raises concerns on appointments, promotions, transfers and selection of judges, and the way in which independence of the judges may be compromised at each of these stages.

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<sup>28</sup>Report of the Special Rapporteur on the Independence of Judges and Lawyers on her mission to Sri Lanka, Human Rights Council, 6-23 June 2017, A/HRC/35/31/Add.1.

<sup>29</sup>Report of the Special Rapporteur on the Independence of Judges and lawyers on her mission to Sri Lanka, *id.at* para 30.

### **3. Responding to International Treaty Bodies in 2017**

In the context of Sri Lanka's struggle to weave human rights values into its laws and policies, there were three major human rights treaty body reviews that Sri Lanka was subjected to in 2017. In addition to this, Sri Lanka was also considered at the Human Rights Council sessions in 2017 and was given more time to complete its obligations to guarantee transitional justice under Resolution 30/1 that it committed to in 2015.

The three international human rights bodies were the Committee on Elimination of All forms of Discrimination Against Women (CEDAW) on 6 March 2017, the Committee on Economic, Social and Cultural Rights (CESCR) in June 2017 and by the Universal Periodic Review Working Group (UPR) in November 2017. This chapter will traverse the recommendations of the treaty bodies and will attempt to draw connections between the failures and successes of the State in guaranteeing the full gamut of rights to its people; rights which are intersectional and interdependent. Notably, the Committee on the Elimination of Discrimination against Women (CEDAW) in its review of Sri Lanka noted that the domestic laws (and policies) of Sri Lanka do not 'address intersectional discrimination.'<sup>30</sup>

#### ***3.1 Economic rights***

The connection between economic rights and the guarantee of civil and political rights is illustrated in many human rights violations around the world. Those who are economically marginalised are more vulnerable to all manner of human rights abuses and

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<sup>30</sup> Committee on Elimination of All forms of Discrimination Against Women, CEDAW/C/LKA/8, 3 March 2017, p. 3 at para 10(c).

discrimination. This is clear in the propensity of economically marginalised persons to be tortured, for example.<sup>31</sup>

In this context, both the CEDAW review and the CESCR review of Sri Lanka raise significant concerns vis-à-vis Sri Lanka’s guarantee of economic rights to its people.

An important recommendation by the CESCR was on the fiscal revenue of the State and its obligation to demonstrate justifications for cuts in spending on health and education. Sri Lanka reduced spending on both of these important areas of public services in 2017. The Committee pointed out that Sri Lanka must demonstrate that any cuts due to *exceptional circumstances of economic hardship* are temporary, non-discriminatory, proportional and do not affect disadvantaged and marginalized persons and groups.<sup>32</sup>

Sri Lanka began to reduce the total number of *Samurdhi* social security allowance recipients by 10% annually from 2017.<sup>33</sup> For a country which already has low social security availability, and an already flawed structure in the *Samurdhi*, this is a doubly problematic policy decision. The CESCR, for example, noted that a large proportion of the population lives on less than US\$1.50 per day.<sup>34</sup> According to the joint civil society report submitted to the CESCR review of 2017, “About 40 percent of the population lives

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<sup>31</sup> The Critical Criminology Companion, ed. Thalia Anthony, Chris Cunneen, (Hawkins Press 2008, New South Wales, Australia) at p. 163.

<sup>32</sup> Committee on Elimination of All forms of Discrimination Against Women, CEDAW/C/LKA/8, 3 March 2017, p. 4, para 22

<sup>33</sup> Committee on Elimination of All forms of Discrimination Against Women, CEDAW/C/LKA/8, 3 March 2017, p. 5, para 35

<sup>34</sup> Committee on Elimination of All forms of Discrimination Against Women, CEDAW/C/LKA/8, 3 March 2017, p. 7, para 45

on less than 225 rupees per person per day, 3 multidimensional poverty measures classify an additional 1.9 million people as poor”.<sup>35</sup> These pockets of poverty of course contribute to rising inequality and violation of other human rights. According to the Central Bank of Sri Lanka, poverty headcount index as a percentage for Sri Lanka in 2016 was 4.1%, compared to 6.7% in 2012/13.<sup>36</sup> However, the overall figures hide district level inequalities, with the Eastern Province having a poverty headcount index as high as 7.3% and the Northern Province as high as 7.7% for the year 2016.

In addition, the right to housing has also been compromised with regard to urban populations in Sri Lanka. Since 2010, as many as 5,500 families have been evicted by the Urban Regeneration Program of the Urban Development Authority of Sri Lanka which the CESCR noted was without due process, compensation and involving the military.<sup>37</sup> The CESCR recommended that a legislative process be put in place, and that compensation, legal protection and redress be guaranteed.<sup>38</sup>

The CEDAW review also revealed the specific issues faced by female headed households ranging from debt dependency

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<sup>35</sup> “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, p. 5, para 9, [https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/LKA/INT\\_CESCR\\_CSS\\_LKA\\_27228\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/LKA/INT_CESCR_CSS_LKA_27228_E.pdf)

<sup>36</sup>Central Bank of Sri Lanka, [https://www.cbsl.gov.lk/sites/default/files/cbslweb\\_documents/statistics/ot\\_herpub/economic\\_and\\_social\\_statistics\\_of\\_SL\\_2018\\_e\\_0.pdf](https://www.cbsl.gov.lk/sites/default/files/cbslweb_documents/statistics/ot_herpub/economic_and_social_statistics_of_SL_2018_e_0.pdf), pg. 134.

<sup>37</sup> Committee on Elimination of All forms of Discrimination Against Women, CEDAW/C/LKA/8, 3 March 2017, p. 7, at para 47

<sup>38</sup> CESCR, p.7, para 48

exacerbated by finance companies that have flooded fragile economies in the North and East, to the demand of sexual bribery for grant of welfare services and benefits.<sup>39</sup> It is clear from the recommendations of both these treaty bodies that Sri Lanka must urgently take measures to address welfare and social security benefits, particularly those of marginalized groups like female headed households.

Before the UPR in November 2017, Sri Lanka unveiled plans to tackle poverty.<sup>40</sup> The year 2017 was declared the year of alleviating poverty. Actions outlined by the government included a poverty alleviation program called *Gramashakthi* and the drafting of a National Sustainable Development Vision 2030. Despite these assurances, public spending on essential economic and social rights like health and education were regressive in 2017, with the CESCR asking the government of Sri Lanka to increase spending on public provisioning for these sectors.<sup>41</sup> The policies of government, therefore, appear at odds; 2017 had been declared a year in which alleviating poverty is the goal, but other policy level decisions contributed to increasing debt dependency of the poorest populations and increasing the cost of living for the general population through austerity measures which target the poor indiscriminately.

The militarization of commercial and civilian activities in Sri Lanka is yet to end although the armed conflict came to a brutal end in May 2009. The military occupation of private and public land in

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<sup>39</sup> CEDAW, p. 12 at para 36

<sup>40</sup> UPR, p. 8, para 84.

<sup>41</sup> Committee on Elimination of All forms of Discrimination Against Women, CEDAW/C/LKA/8, 3 March 2017, p. 8, para 58

the North and East and its consequences on livelihood as well as use of fresh water wells in private lands under the control of the military and its consequences on water security for the people in that area are both noted by the CESCR. The military also controls fishing activities in parts of the country which impacts the livelihood of the fisheries sector. Key recommendations of the CESCR with regard to militarization were that (a) military involvement in commercial and civilian activities be ended, (b) the lands held by the military be mapped, (c) an independent national land commission be established, (d) a national land policy be developed, and (e) private and public lands that are being held by the military be released.<sup>42</sup>

The CESCR noted that 42,000 Internally Displaced Persons (IDPs) are yet to be resettled for various reasons including the fact that the military are occupying private land.<sup>43</sup> Thirty two camps for internally displaced persons existed at the time of the CEDAW review in February 2017.<sup>44</sup> They languished in IDP Camps, and their return remains an urgent issue to be addressed by the government so many years after the end of the armed conflict.<sup>45</sup>

Sri Lanka submitted before the Universal Periodic Review in November 2017 that the Cabinet of Ministers had approved a National Policy on Durable Solutions for Conflict-Affected

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<sup>42</sup> CESCR, p.7, para 49-50

<sup>43</sup> CESCR, p.7, para 51-52

<sup>44</sup> CEDAW, p. 13 at paras 42-43

<sup>45</sup> As of 31 December 2017, there were still 42,000 IDPs due to the conflict, and a further 135,000 displaced during the year due to disasters. Internal Displacement Monitoring Centre, available at <http://www.internal-displacement.org/countries/sri-lanka>

Displacement in 2016.<sup>46</sup> The fact that such a large number of people remained in IDP camps indicates the inefficiency or non-implementation of the said National Policy.

Despite Sri Lanka's high social indicators, it has one of the world's highest wasting prevalence, ranking 128 out of 130 countries.<sup>47</sup> Climate unpreparedness is also evident with droughts in 2016 and early 2017 and floods later on in the year both affecting food security in Sri Lanka. The impact of these factors makes the situation of marginalized and vulnerable groups doubly precarious in accessing food, water, sanitation, housing and other services such as healthcare and education. They are, therefore, at a greater risk of human rights violations.

### **3.2 *Right to health***

The reducing expenditure on health services by Sri Lanka was also noted by the CESCR. The regional disparities in access to health services and the affordability of public health care including hidden costs that are borne by the patient were concerns noted by the CESCR. Despite the acute need for mental health provisions, the CESCR concluded that such services are "inadequate and insufficiently available and accessible."<sup>48</sup> The high use of agrochemicals in Sri Lanka is also a grave cause for concern. The CESCR recommended that Sri Lanka take steps to address these concerns and ensure it is progressively realizing the rights it has agreed to fulfil under the ICESCR.<sup>49</sup>

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<sup>46</sup> UPR, p. 3 at para 13

<sup>47</sup> CESCR, p.8, para 55-56

<sup>48</sup> CESCR, p.8, para 57-60

<sup>49</sup> CESCR, p. 9, para 62

As noted, the right to health is not recognised as a fundamental right in Sri Lanka. However, creative judicial interpretation has led to the recognition of the right to health in the context of the right to be free from torture, in *Sanjeema, Attorney-at-Law (on behalf of Gerald Mervin Perera) v. Suraweera, Officer - in - charge, Police Station, Wattala and others*.<sup>50</sup> Despite such recognition, the state has yet to take positive steps to include the right to health as a fundamental right in the Constitution; it remains to be seen whether the draft constitution would include the express right to health as a justiciable right.

### **3.3 Prevention of Terrorism Act**

The *Prevention of Terrorism Act* (PTA) in Sri Lanka is a notorious piece of legislation that has been used since its promulgation to repress people. At the UPR review, Sri Lanka pledged voluntarily to review and repeal the law, and while it ominously mentioned replacing it with a new counter terrorism law, it did pledge that such law will be compliant with international human rights law.<sup>51</sup>

One of the recommendations of the Consultative Task Force on Reconciliation (CTF) was that the PTA be repealed and those held in terms of that Act be released. This was also reported by the OHCHR in its report at the February 2017 sessions of the Human Rights Council.<sup>52</sup> What is most troubling is that arrests under this flawed law continued in 2016; and structural issues such as the places in which the special High Courts set up to try cases under this law are predominantly Sinhala-speaking, which sets up

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<sup>50</sup> (2003) 1 Sri L.R. 317

<sup>51</sup> UPR, p. 24, para 122 (Voluntary pledges and commitments)

<sup>52</sup> OHCHR, p. 5 at para 14

language barriers to Tamil lawyers wishing to defend clients many of whom are of Tamil origin.<sup>53</sup>

### **3.4 Right to education**

Sri Lanka boasts near universal enrolment of children in primary education and the age of compulsory education has increased from 14 to 16.<sup>54</sup> However, intersectional discrimination affects children’s access to education in Sri Lanka. For example, the CEDAW notes the low levels of school enrolment for specific marginalised groups such as low-income groups, children of migrant workers, in areas where schools are located close to fisheries and plantations and in the North and East of the country.<sup>55</sup> According to the joint civil society report to the CESCR in April 2017, reasons include inequalities in school infrastructure in rural areas, lack of trained teachers, lack of transport to schools/difficulties in reaching schools, choice of subjects, hidden costs of education among other issues, all contribute to higher dropout rates from schools despite free education in Sri Lanka for all including the tertiary level.<sup>56</sup>

Similar to health, government reduced spending on public education in 2017 which is revealed in regional disparities on access to education and hidden costs like donations for admissions to schools. These additional costs mean that access to quality education remained a challenge. Children with disabilities face

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<sup>53</sup> OHCHR, p. 11 at para 42

<sup>54</sup> CEDAW, p. 9 at para 30

<sup>55</sup> CEDAW, p. 9-10, at paras 30-31

<sup>56</sup> “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, pp. 49-50, [https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/LKA/INT\\_CESCR\\_CSS\\_LKA\\_27228\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/LKA/INT_CESCR_CSS_LKA_27228_E.pdf)

greater challenges in accessing even primary education with just 34.6% enrolled in primary education.

The right to education, like many other economic and social rights are not justiciable in Sri Lanka as explained previously. Although a number of fundamental rights petitions are filed annually in the Supreme Court on admission of children to government schools, these petitions usually base their claims on right to equality and/or non-discrimination. Thus, in the absence of express protection of these rights, the possibility of further erosions of the right to education is a cause for concern.

### ***3.5 Non-discrimination***

Sri Lanka's failure to amend its bill of rights continued to hold back its obligation to guarantee non-discrimination to groups of marginalised people. Although the Constitution guarantees the right to equality, it does not extend to people with disabilities, and on grounds of sexual orientation or gender identity. This means that although Sri Lanka signed the Convention on the Rights of Persons with Disabilities and the Optional Protocol in 2016, its bill of rights is yet to expressly guarantee the rights therein.

The Sri Lankan government noted before the UPR in November 2017 that it had prepared draft legislation to give effect to the Convention on the Rights of Persons with Disabilities.<sup>57</sup> It also made a voluntary commitment to incorporate the provisions of the Covenant into domestic law. However, the law is yet to be passed at the time of writing. On the other hand, the government did pledge before the UPR that several other steps such as drafting a

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<sup>57</sup>UPR, p. 8 at para 83.

bill on sign language, sensitizing public officers, giving effect to the 3% employment quota for persons with disabilities in the public sector were under way. Sri Lanka had also allocated funds to build houses for women with disabilities in the North and East.

One of Sri Lanka’s obligations under Article 2 of the ICESCR is to take “all appropriate means, including particularly the adoption of legislative measures” towards the full realization of the rights they have committed to.<sup>58</sup> The failure to undertake legislative amendments is a clear violation of the commitment to demonstrate that the measures taken are appropriate to respect, protect and fulfil these rights. The Committee’s recommendations extended to including colour, national and ethnic origin, disability, sexual orientation and gender identity as grounds of non-discrimination in Article 11 of the Constitution.

The intersectionality of discrimination was also evident in the observations of the CESCR, in relation to “Upcountry community” or *malaiyaba makkal*, who are historically denied access to dignified working conditions, access to adequate water, housing, nutrition and quality health care.<sup>59</sup> The *malaiyaba makkal* are some of the most marginalised people in Sri Lanka; affected by the *Citizenship Act No.18 of 1948*, the citizenship question of the *malaiyaba makkal* were being resolved as recently as 2003.<sup>60</sup> According to the Joint Civil Society Shadow report submitted to the CESCR, only 2.2% of this community have passed the General

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<sup>58</sup> CESCR General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant), December 1990, available at <http://www.refworld.org/pdfid/4538838e10.pdf>, at paras 3 and 4.

<sup>59</sup> CESCR, p.3 at para 16

<sup>60</sup> *Citizenship (Amendment) Act No. 16 of 2003*

Certificate Examination (advanced level), and the estate sector has a national poverty headcount of 11 percent<sup>61</sup> As many as 60% of the community live in line rooms, which are small, vulnerable to threat of fire or natural disasters, owned by the estate and not by the household, and are cramped and unsanitary. The state of their lives illustrate a denial of their rights to housing, to water, sanitation, and ultimately, dignity. The Committee urged the government to guarantee these rights to the *malaiyaba makkal* with specific mention of the above economic rights.

The discrimination based on sexual orientation and gender identity was also highlighted by the CESCR.<sup>62</sup> Ranging from the discriminatory laws such as sections 365 of the *Penal Code*,<sup>63</sup> to violations of access to healthcare, housing, work and education, the government of Sri Lanka has failed to guarantee non-discrimination to LGBTI people. However, Sri Lanka made a startling argument before the UPR in November 2017 that Article 12 of the Constitution which guarantees the right to equality and non-discrimination “implicitly included non-discrimination on the grounds of sexual orientation.”<sup>64</sup> This is despite the fact that same-sex relations are criminalized in terms of the Penal Code.

The right to work for women and persons with disabilities was also an area of concern for the CESCR. It pointed out that, for

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<sup>61</sup> 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, pp. 11-12, [https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/LKA/INT\\_CESCR\\_CSS\\_LKA\\_27228\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/LKA/INT_CESCR_CSS_LKA_27228_E.pdf)

<sup>62</sup> CESCR, p.3 at para 18

<sup>63</sup> With a side note “Unnatural Offenses”, section 365 criminalizes same sex relations.

<sup>64</sup> UPR, p. 8 at para 82

example, the 3% quota for persons with disabilities was not implemented adequately.<sup>65</sup>

In Sri Lanka, women’s participation in the formal labour market remains low, and many are clustered in low-income jobs such as the garment sector or in the tea plantations in the hill country. On the other hand, Sri Lanka does not estimate or value the work by women in the informal economy both as full time or part time care givers and in informal work such as domestic workers, cleaners, cooks, and other occupations.<sup>66</sup>

The informalization of work<sup>67</sup> is another grave area of concern that the Committee commented on, and the resulting precariousness of working conditions. CEDAW also highlighted the concentration of women in the informal sector and the intersectional discrimination for groups such as former combatants and domestic workers which affect their right to work.<sup>68</sup>

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<sup>65</sup> CESCR, p.4 at para 28

<sup>66</sup> Ground Views, “Unpaid Care Work: The Overlooked Barrier in Women’s Economic Empowerment”, Anarkalee Perera, 15 September 2017, <http://groundviews.org/2017/09/15/unpaid-care-work-the-overlooked-barrier-in-womens-economic-empowerment/>

<sup>67</sup> “Informalization of work” is a phenomena where increasingly employers are turning to informal arrangements for work instead of hiring employees on fixed term or permanent contracts which attract social security benefits and other employee rights. Due to unequal bargaining power of employees, this results in vulnerable workers, who may be hired or fired at whim, who have no fixed place of employment and who will have no claims to pension, to social security benefits attached to permanent employment, or even leave/holidays. In most cases this results in “self-employment” where the employee takes all risks of finding work, for example, domestic workers, agricultural workers, and increasingly even some roles that were permanent employment contracts in the past.

<sup>68</sup> CEDAW, p.

Specific recommendations to the government included protecting the economic and social rights of workers in the informal economy, the right to form and join trade unions, and providing adequate wages, minimum wages and social security<sup>69</sup>. The right to work is also constrained by the restrictive application of trade union rights in the Constitution to citizens of Sri Lanka, which excludes non-citizens who nevertheless are permitted to work in the country.

In terms of the right to work, women are specifically targeted in discriminatory regulations which prevent women who have children below the age of five years from migrating for work without a 'family background report' from the *Grama Niladhari* or Development Officers of the Ministry of Foreign Employment.<sup>70</sup> A 2013 challenge to this circular was rejected by the Supreme Court of Sri Lanka.<sup>71</sup> A further circular was issued in June 2015, which came into effect from August 2015. Provision 10 of the circular says that mothers of children with a disability should not be recommended for foreign employment. Disability is not defined in the circular. The circular also introduced an age limit for migrant work for different countries.<sup>72</sup>

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<sup>69</sup> CESCR, p.5 at para 30

<sup>70</sup> Ministry of Foreign Employment, Ministerial Circular 2015/1, MFE/RAD/10/13, available at <http://mfe.gov.lk/downloads/Circulars/English.pdf>

<sup>71</sup> 'Migrant worker challenges Govt. over restrictive rule', *Sunday Times FT*, 01.09.2013, available at <http://www.sundaytimes.lk/130901/business-times/migrant-worker-challenges-govt-over-restrictive-rule-59771.html>

<sup>72</sup> Ministry of Foreign Employment, Ministerial Circular 2015/1, MFE/RAD/10/13, available at <http://mfe.gov.lk/downloads/Circulars/English.pdf>

The objective of the circular is ‘preventing various difficulties and social problems resulting from the migration of women for employment’; the result is a discriminatory set of restrictions on women’s rights to work. The circular was challenged before the Supreme Court in December 2015 by an activist invoking public interest litigation.<sup>73</sup> It appears that the government had thereafter issued a further circular on 16 June 2016.<sup>74</sup>

A civil society shadow report<sup>75</sup> to the UN Committee on the Protection of the Rights of All Migrant Workers

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<sup>73</sup> ‘Family Background Report violates migrant women workers’ rights’, *Daily News*, 03 December 2015, available at <http://www.dailynews.lk/2015/12/03/local/family-background-report-violates-migrant-women-workers-rights>.

<sup>74</sup> Civil Society Shadow Report to the UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, August 2016, available at [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&ved=0ahUKEwj13P7xh6HcAhUZT30KHcceCv0QFghnMAc&url=https%3A%2F%2Ftbinternet.ohchr.org%2FTreaties%2FCMW%2FShared%2520Documents%2FLKA%2FINT\\_CMW\\_NGO\\_LKA\\_24817\\_E.docx&usg=AOvVaw3HGhHQ\\_AJotCEWRq3RUmvn](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&ved=0ahUKEwj13P7xh6HcAhUZT30KHcceCv0QFghnMAc&url=https%3A%2F%2Ftbinternet.ohchr.org%2FTreaties%2FCMW%2FShared%2520Documents%2FLKA%2FINT_CMW_NGO_LKA_24817_E.docx&usg=AOvVaw3HGhHQ_AJotCEWRq3RUmvn)

<sup>75</sup> The shadow report is by 20 civil society organizations; Caritas SEDEC, Colombo, Sri Lanka; Caritas Seth Sarana, Colombo, Sri Lanka; Centre for Human Rights and Community Development (CHRC), Kurunegala, Sri Lanka; Centre for Poverty Analysis (CEPA), Colombo, Sri Lanka; Community Development Services (CDS), Colombo, Sri Lanka; Eastern Self-Reliant Community Awakening Organisation (ESCO), Batticaloa, Sri Lanka; Good Shepherd Sisters, Nayakakanda, Wattala, Sri Lanka; Helvetas Swiss Intercooperation, Colombo, Sri Lanka; Institute of Social Development (ISD), Kandy, Sri Lanka; Lanka Jathika Estate Workers Union (LJEWU), Welikada, Rajagiriya, Sri Lanka; Lawyers Beyond Borders - Sri Lanka Chapter, Colombo, Sri Lanka; National Trade Union Federation (NTUF), Rajagiriya, Sri Lanka; Plantation Rural Education Development Organization (PREDO), Kandy, Sri Lanka; Sarvodaya Women's Movement, Colombo, Sri Lanka; Saviya Development Foundation, Galle, Sri Lanka; Social Organizations Networking for Development (SOND), Jaffna, Sri Lanka; Social Welfare Organization

and Members of their Families, states that “a committee has been formed comprising of the additional secretary of MFE,<sup>76</sup> DOs<sup>77</sup> of the respective divisions, 4 SLBFE<sup>78</sup> officers, to consider the appeals of the female migrants who have been denied of FBR.”<sup>79</sup> However, the report also raises concerns that the primary care giver role assigned to women who wish to consider migrant work, and the restrictions on her mobility persisted even at that date. Unfortunately, the CEDAW review does not go into the details of this particularly discriminatory practice which singles out women and imposes severe restrictions on the freedom of movement and the right to work. It did, however, recommend that Sri Lanka abolish the Family Background Report and sex specific restrictions on migrating for work.<sup>80</sup>

### ***3.6 Language rights and cultural rights***

The CESCR also noted the lack of implementation of the Official Languages Law and the National Trilingual Policy. An alarming statistic quoted by the CESCR is that only 1% of schools offer teaching in all three languages in Sri Lanka. Although Sri Lanka finally permitted the singing of the National Anthem in both Sinhala and Tamil on 4<sup>th</sup> February 2016, the country’s genuine

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Ampara District (SWOAD), Akkaraipattu, Sri Lanka; Solidarity Centre, Colombo, Sri Lanka; Stand Up Movement Lanka, Negombo, Sri Lanka; Working Women's Front (WWF), Kandy, Sri Lanka.

<sup>76</sup> Ministry of Foreign Employment

<sup>77</sup> Development Officers for Foreign Employment

<sup>78</sup> Sri Lanka Bureau of Foreign Employment

<sup>79</sup> “Shadow report - Sri Lanka To the UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) For consideration during the 25th Session (29th August, 2016 – 07th September, 2016)”, at p. 15,

[https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCMW%2fNGO%2fLKA%2f24817&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCMW%2fNGO%2fLKA%2f24817&Lang=en)

<sup>80</sup> CEDAW, p. 12 at para 38-39

commitment to non-discrimination on the basis of language remains moot.

The fate of indigenous people in Sri Lanka is also dire. Only 20% of the *veddab* children attend school and have been historically marginalized, losing access to traditional occupations and lands due to multiple reasons.<sup>81</sup> Sri Lanka has also not ratified the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), and the CESCR has recommended ratification as a step towards effective realization of the cultural rights of this group of people. Sri Lanka voted in favour of the UN Declaration on the Rights of Indigenous People, in September 2007.<sup>82</sup>

### **3.7 Freedom of religion**

Sri Lanka emphasized before the Universal Periodic Review that it maintained zero tolerance for hate speech and that the police were duly authorized to take action whenever such instances were reported.<sup>83</sup> However, individuals who were involved in hate speech and incitement to violence like Galagodatte Gnanasara, who

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<sup>81</sup> The *Veddab* community has lost land due to designation of traditional lands as national parks or forest land. They have also been repeatedly displaced due to this, and many have assimilated with local villages, losing traditional livelihood and culture. They have lost more land after the war, according to civil society groups, and traditional hunting land, *cbena* (slash and burn) cultivation lands have been seized and declared as forest lands. “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, p. 7, [https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/LKA/INT\\_CESCR\\_CSS\\_LKA\\_27228\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/LKA/INT_CESCR_CSS_LKA_27228_E.pdf)

<sup>82</sup> United Nations Bibliographic Information System, <http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=.VM&term=ares61295>

<sup>83</sup> UPR, p. 5 at para 39

instigated violence in Aluthgama in 2014 and then again in Digana (Kandy) in February 2018, continued to roam free, without charges being pressed against him for the human rights violations committed in 2014 and several other instances of hate speech. The only case that continued against him was the contempt of court charges when he threatened Sandya Eknaligoda outside the Homagama Magistrate's Courts when she was attending hearings into the enforced disappearance of her husband Prageeth Eknaligoda.

### **3.8 Women's rights**

Perhaps the root of discrimination against women in Sri Lanka is the dearth of female representation in political office at all levels of elected government. At the national level, only 5% of elected members in Parliament were women for the last 17 years at the time of writing.<sup>84</sup> Although Sri Lanka introduced a quota of 25% for women in local government in 2016, promises to enact similar quotas at provincial level were yet to be realized in 2017. Thanks to the quota, representation at local level went up from 2% in the last 15 years to 25% after the February 10, 2018 local government elections.<sup>85</sup> This is an increase from 82 women across the island elected to local government in 2011 to 2000 women elected in 2018.<sup>86</sup> Challenges remain, however, in increasing women's representation at national and provincial level, which is crucial if

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<sup>84</sup> CEDAW, p. 9 at para 28

<sup>85</sup> Chulani Kodikara and Kumudini Samuel, "The Significance of the 25% Quota for Women in Local Government", *Groundviews*, <https://groundviews.org/2018/02/07/the-significance-of-the-25-quota-for-women-in-local-government/>

<sup>86</sup> The Bergen Project, 'Female Political Representation in Sri Lanka increase', 1 March 2018, available at <https://borgenproject.org/female-political-representation-in-sri-lanka/>

meaningful engagement on structural discrimination against women in law, policy and executive action are to be addressed. The CEDAW recommendations traversed all of these issues by stating that Sri Lanka must improve the representation of women in politics by the government of Sri Lanka and detailed specific steps to do so.<sup>87</sup>

The CESCR noted the structural issues which impact women's rights in Sri Lanka. This includes the lack of Tamil language capability in police stations in parts of the country which leads to barriers in access to justice for women. In the CEDAW review in early 2017, the same concerns were raised and the Committee recommended that language barriers which prevent access to justice for women be addressed through specific measures such as increasing the number of Tamil speaking judicial enforcement officers, guaranteeing the independence and impartiality of the judiciary, increasing gender sensitivity of the judiciary, and capacity building across a range of law enforcement officers.<sup>88</sup>

Marital rape and gender-based violence were themes that were noted by both the CEDAW<sup>89</sup> and by the CESCR. Despite the national plan of action to address sexual and gender-based violence 2016-2020, the country was yet to implement actions recommended therein to address the structural issues which lead to the high levels of gender-based violence in the country.<sup>90</sup> One of the key recommendations of the CESCR was to implement the

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<sup>87</sup> CEDAW, p. 9 at para 28-29

<sup>88</sup> CEDAW, p. 4 at para 14

<sup>89</sup> CEDAW, pp.6-7 at paras 22-23

<sup>90</sup> CESCR, p. 6, para 39-40

National Plan of Action.<sup>91</sup> Before the CEDAW review the government of Sri Lanka said that the cabinet approved the establishment of an Independent National Commission on Women in 2017. However, at the time of writing the Commission has not been set up. It is interesting to also recall that as far back as 2011, similar commitments were made to set up a national commission on women, which was never fulfilled.<sup>92</sup>

Discriminatory laws which are contrary to the right to equality enshrined in Article 12 of the Constitution, still continue to be applied and cannot be challenged due to the operation of Article 16(1).<sup>93</sup> The juxtaposition of these two contrary positions means that laws that perpetuate discrimination continue to apply. One of the key recommendations of CEDAW to the government in 2017, was to repeal Article 16(1) of the Constitution.<sup>94</sup> The Committee also recommended enacting laws to address intersectional discrimination, including caste-based discrimination. The discriminatory laws that affect women range from personal laws such as the *Muslim Marriage and Divorce Act*, to the *Land Development Ordinance* which discriminates against men and women vis-à-vis

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<sup>91</sup> CESCR, p.6, para 40

<sup>92</sup> 'Bill to establish National Women's Commission Soon', *Daily Mirror*, 06.12.2011, available at <http://www.dailymirror.lk/15285/tech>

<sup>93</sup> In terms of Article 16(1) of the Constitution of Sri Lanka, legislation that is incompatible with the fundamental rights chapter, will continue to operate irrespective of such inconsistency. Therefore for example, sections of the Land Development Ordinance which discriminate against women and therefore violate Article 12, continue to be legal despite this inconsistency. "All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter." Article 16(1), 1978 Constitution.

<sup>94</sup> CEDAW, p. 3 at para 11(d)

joint ownership, inheritance and succession.<sup>95</sup> The government reported to the CEDAW Committee that a draft amendment to the *Land Development Ordinance* was under review by the Legal Draftsman, but at the time of writing more than a year after the CEDAW review, no further update on such an amendment has been forthcoming.

The government also mentioned before the CEDAW Committee in early 2017 that a Cabinet Sub-Committee was reviewing the *Muslim Marriage and Divorce Act*. The said sub-committee (MMDA Sub-Committee) was first set up in 2009, deliberated for 9 years, and the report was only issued in January 2018. The report was also received with severe criticism and there were allegations that the report was not valid.<sup>96</sup> The MMDA Sub-Committee itself has disputed its validity, with claims that the final report did not carry recommendations by 9 other members of the Committee in the main section of the report, and that members who did not attend the committee had also signed off on the report. Civil society also criticised the report, with protests outside the Ministry of Justice at the time the report was handed over to the Ministry. There has been no mention of amending the other personal laws, namely the Kandyan Law and Thesawalamai Law, although the CEDAW recommended amendments to all of these laws to bring them in line with international human rights law.

The CEDAW review also highlighted the regressive manner in which Sri Lanka polices sex work. The trafficking of women is yet

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<sup>95</sup> CEDAW, p.4 at para 13(b)

<sup>96</sup> 'Long Awaited MMDA report a Façade', *The Daily FT*, 30.01.2018, available at <http://www.ft.lk/columns/The-long-awaited-MMDA-report--a-façade-/4-648362>

to be effectively addressed, and CEDAW commented on the low number of prosecutions, investigations and convictions of traffickers themselves. On the other hand, the police arrests women engaged in prostitution, often evidenced by the fact that they are in possession of condoms. They are subject to harassment, sexual bribery and extortion, on the basis of a British era law, the *Vagrants Ordinance*. One of the recommendations by the CEDAW Committee to the government of Sri Lanka was to repeal the *Vagrants Ordinance* and redress trafficking by taking specific measures and actions towards this end.<sup>97</sup>

### **3.9 Children's rights**

Sri Lanka is yet to ban child marriage in the country, which is still permitted under the *Muslim Marriage and Divorce Act*.<sup>98</sup> The protection of children remained a major concern with child labour, insufficient protection of children from child abuse, neglect and inability to law enforcement to respond appropriately to these violations.<sup>99</sup>

### **3.10 Freedom from torture and extra judicial executions**

The review of Sri Lanka by the Committee against Torture in terms of the International Covenant, took place in 2016. The OHCHR Report noted in its February 2017 report on Sri Lanka that investigations and prosecutions for the 2012 Welikada Prison massacre was still not forthcoming.<sup>100</sup> The deaths caused by the

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<sup>97</sup> CEDAW, p. 8 at paras 26-27

<sup>98</sup> The CESCR recommended the amending of both *the Muslim Marriage and Divorce Act and Marriage Registration Ordinance*, CESCR, p.6, para 42

<sup>99</sup> CESCR, p.6, para 44

<sup>100</sup> High Commissioner on Human Rights, "Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka,"

A/HRC/34/20,

unleashing of violence against protestors in Weliveriya for the right to clean water that resulted in three deaths, was only met with compensation ordered by the President in August 2016, and investigations and prosecutions for injuries of 33 persons that were allegedly caused by the armed forces, was still at a stand-still.<sup>101</sup> In 2014, the Brigadier who was in charge of the contingent that fired at protestors, was given a diplomatic posting.

While court proceedings have been ongoing since 2013 in relation to the deaths of five youth in Trincomalee, there has been no decision or new information that is available in the public sphere on this case and on the case of the murder of 17 aid workers of *Action Contra Lá Fémme*, in the year under review, “other than attempts to overcome difficulties encountered in summoning or interviewing potential witnesses now living abroad”.<sup>102</sup>

In 2016, accused military intelligence officers in the Prageeth Eknaligoda disappearance case were released on bail. These are a few of the emblematic cases that were commented on during the February 2017 sessions of the Human Rights Council; in most of the cases thus highlighted, hardly any progress had been made.

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[https://www.ohchr.org/en/hrbodies/hrc/regularsessions/.../a\\_hrc\\_34\\_20\\_e\\_n.docx](https://www.ohchr.org/en/hrbodies/hrc/regularsessions/.../a_hrc_34_20_e_n.docx), p. 9, para 32.

<sup>101</sup> High Commissioner on Human Rights, “Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka,”

A/HRC/34/20,

[https://www.ohchr.org/en/hrbodies/hrc/regularsessions/.../a\\_hrc\\_34\\_20\\_e\\_n.docx](https://www.ohchr.org/en/hrbodies/hrc/regularsessions/.../a_hrc_34_20_e_n.docx), p. 9, para 33.

<sup>102</sup> High Commissioner on Human Rights, “Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka,”

A/HRC/34/20,

[https://www.ohchr.org/en/hrbodies/hrc/regularsessions/.../a\\_hrc\\_34\\_20\\_e\\_n.docx](https://www.ohchr.org/en/hrbodies/hrc/regularsessions/.../a_hrc_34_20_e_n.docx), page 9, para 34.

The use of torture in Sri Lanka was described by Ben Emmerson, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, as some of the worst he has seen, in his message at the conclusion of his official visit in July 2017.<sup>103</sup> Referring to the use of torture against those arrested under terrorism charges, he noted the disproportionate use of torture against Tamils in Sri Lanka: “Since the authorities use this legislation [PTA] disproportionately against members of the Tamil community, it is this community that has borne the brunt of the State’s well-oiled torture apparatus.”<sup>104</sup>

### ***3.11 Transitional justice***

Perhaps the most compelling indictment on the slow pace of progress in Sri Lanka on the transitional justice front was by the Office of the High Commissioner for Human Rights (OHCHR), when the High Commissioner presented his report on 10 February 2017.<sup>105</sup> The OHCHR stated that in reference to the Office of National Unity and Reconciliation (ONUR), the various technical groups and the Secretariat for Coordinating Reconciliation Mechanisms, that ‘are yet to present a sufficiently convincing or comprehensive transitional justice strategy to overcome the legacy of mistrust and scepticism left by a number of inconclusive ad hoc

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<sup>103</sup> <https://lk.one.un.org/news/full-statement-by-ben-emmerson-un-special-rapporteur-on-human-rights-and-counter-terrorism-at-the-conclusion-of-his-official-visit/>

<sup>104</sup> Full Statement by Ben Emmerson, UN Special Rapporteur on human rights and counter-terrorism, at the conclusion of his official visit, 14 July 2017, <http://lk.one.un.org/news/full-statement-by-ben-emmerson-un-special-rapporteur-on-human-rights-and-counter-terrorism-at-the-conclusion-of-his-official-visit/>

<sup>105</sup> Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka, Office of the High Commissioner for Human Rights (OHCHR), A/HRC/3420

commissions and procedures'.<sup>106</sup> While appreciating the consultative process that the Consultative Task Force (CTF) undertook and noting that its report was handed over to government in January 2017, the OHCHR was clearly sceptical of the pace at which reforms were progressing. On the other hand, the CTF process was appreciated by the OHCHR, calling it 'broad, independent and inclusive'.<sup>107</sup> One of the many recommendations of CTF was the setting up of a hybrid court, with a majority of national judges and at least one international judge.

Despite the slow progress on a number of counts, Sri Lanka had moved forward in legislative guarantees on criminalizing enforced disappearances with the ratification of the International Convention for the Protection of All Persons from Enforced Disappearance, and the passing of the *Registration of Deaths (Temporary Provisions) (Amendment) Act, No. 16 of 2016* (enabling the issuance of certificates of absence to families of the disappeared), as well as the adoption of legislation to establish the Office of Missing Persons. The legislation on the Office of Missing Persons was gazetted in September 2017.<sup>108</sup> These steps are symbolically important to guarantee justice for the disappeared, but in the face of years of apathy and failure to guarantee justice to the disappeared these legislative measures mean little to the victims and their families until prosecutions take place, and the right to remedy is guaranteed.

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<sup>106</sup> OHCHR, p. 5 at para 12

<sup>107</sup> OHCHR, p. 5 at para 14

<sup>108</sup> 'President signs gazette to operationalize Office on Missing Persons', *Daily FT*, 13 September 2017, available at <http://www.ft.lk/news/President-signs-gazette-to-operationalise-Office-on-Missing-Persons/56-639514>

CEDAW made strong recommendations to the government of Sri Lanka on guaranteeing women's participating in all transitional justice mechanisms. This included a specific recommendation to ensure that at least 50% of the representation in such institutions comprise women, and to ensure international participation in such mechanisms.<sup>109</sup>

Conflict related sexual violence is a cause for grave concern that continued to manifest itself even eight years after the end of the armed conflict. In the CEDAW review, the Committee was explicit that the government of Sri Lanka had failed to provide sufficient data on sexual violence committed by the armed forces and police, and the steps taken by the State to investigate, prosecute, convict and impose sentences for such crimes.<sup>110</sup>

#### **4. Conclusion**

It is clear that despite the opportunities to deliver on promises on human rights and transitional justice, the government still failed to take critical steps in the right direction. The double-faced nature of international promises juxtaposed with domestic failures, continued to be the trend in Sri Lanka during 2017. On key matters such as repealing the Prevention of Terrorism Act, the authorities still failed to take positive steps. The international monitoring of human rights during the year highlighted these failures despite further promises by the government to guarantee all human rights within the country. It is clear though that two years after the UNHRC Resolution, time is running out for the government to deliver on its obligation to guarantee transitional justice. On the

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<sup>109</sup> CEDAW, p. 5 at para 17(a)

<sup>110</sup> CEDAW, p. 7 at para 26 & 27.

domestic front, economic policies further eroded economic and social rights, as illustrated by budget cuts on essential services.

It is clear, therefore, that if genuine political will to guarantee human rights is to be demonstrated, then specific and clear, concerted efforts need to be taken to tighten the regulatory framework, ensure independence of the judiciary, guarantee all human rights as justiciable and overhaul attitude to human rights among law enforcement and military personnel, are among the myriad steps that Sri Lanka has accepted in multiple treaty body reviews in 2017.

# V

## OLD WINE IN NEW BOTTLES: RETURNING OF OLD AUTHORITARIANISM IN THE NEO - LIBERAL ERA

*Vidura Prabath Munsinghe\**

*Ishan Chamara Batawalage\**

### 1. Introduction

At the dawn of 2017, delivering a lecture titled 'Populist Challenge to Human Rights' at the London School of Economics, UN Special Rapporteur on Extreme Poverty and Human Rights Philip Alston made the following remark:

*“...the challenges the human rights movement now faces are fundamentally different from much of what has gone before. This does not mean, as scholars have told us, that these are ‘the end times of human rights’, that human rights are so compromised by their liberal elite association that they are of little use in the fight against populism, or that we have entered ‘the post-human rights era’. Nor does it mean that we should all despair and move on, or that there is a ‘desperate need’ to find tools other than human rights with which to*

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*combat the many challenges brought by the new populism combined with an old authoritarianism with which we are all too familiar.”<sup>1</sup>*

According to Alston the new populist challenge is based on the old authoritarian argument of national security, sovereignty and economic nationalism.<sup>2</sup> These arguments are being propagated by present day populist world leaders such as President Donald Trump of the United States, Prime Minister Narendra Modi of India, President Duterte of the Philippines, President Jair Messias Bolsonaro of Brazil, President Andrzej Duda of Poland and President Janos Ader of Hungary. The same argument was used in the pro-Brexit debates.<sup>3</sup> According to Alston an increasingly diverse array of governments expressing the desire to push back against key pillars of the international human rights regime is emerging as a powerful and energetic ‘coalition of the willing.’<sup>4</sup> Throughout history there have been coalitions that challenged human rights, but in the past the United States and other leading Western and Latin American governments have held steadfast against such sentiments (we are all aware that they were not apolitical acts which were carried out with the sole objective of promoting human rights). On the contrary, the challenge this time is emanating mainly from the camp which earlier portrayed themselves as human rights protectors.

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<sup>1</sup>Phillip Alston. “The Populist Challenge to Human Rights.” in *Journal of Human Rights Practice*, Volume 9, Issue 1, (2017): 1–15.

<sup>2</sup>Ibid.

<sup>3</sup> Timothy B. Lee. “Brexit: the 7 most important arguments for Britain to leave the EU,” [www.vox.com](http://www.vox.com), accessed November 15, 2018,

<https://www.vox.com/2016/6/22/11992106/brexit-arguments>.

<sup>4</sup>Ibid.

In Sri Lanka too, there is a conception in public as well as in private sector that human rights is an inconvenience that interferes with ‘development.’<sup>5</sup> This paper analyzes three labour struggles that took place in Sri Lanka during 2017 (the Telecom manpower strike, Manpower strike in the Ruhunu Magampura Port and the strike in the Associated Battery Manufactures of Ratmalana)<sup>6</sup> with the objective of identifying the economic phenomena that gave rise to these rights issues and to explore the relationship between these phenomena and the anti-human rights discourse.

We can clearly identify a common thread that binds aforementioned three labour struggles together, i.e. the practice of hiring ‘manpower’ from the manpower supplying agencies. Therefore, it is important to analyzing the historical evolution of the practice of hiring manpower through third party man power supplying agencies before exploring the each labour struggle further.

## 2. Paradigm Shift in Labour?

The first manpower supplying agencies in Sri Lanka came into existence in early 1980s right after the open economy was introduced to the country.<sup>7</sup> Nowadays most of the private sector institutions as well as many public sector institutions have turned to manpower supplying agencies to get their manpower

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<sup>5</sup> Radhika Coomaraswamy. “International Human Rights: Dispelling the Myths,” <https://groundviews.org>, accessed November 15, 2018. <https://groundviews.org/2014/08/28/international-human-rights-dispelling-the-myths-by-radhika-coomaraswamy/>

<sup>6</sup> Although their initiation may have occurred prior to 2017, they continued through most part of the year 2017 becoming major topics among the worker’s rights movement.

<sup>7</sup> Vidura Munasinghe, *Reimagining ‘The Worker’ and Resistance in the Neo-Liberal Era* (Colombo: Law & Society Trust, 2018), 13.

requirements fulfilled. The clearly identifiable formal employer-employee relationship model that existed in the classical modern factories emerged in industrial capitalist societies,<sup>8</sup> was made complicated with the introduction of the third party- the manpower supply agency- creating new complexities in labour relations.<sup>9</sup>

It was the challenges faced by the Keynesian economic model in the 1960s that gave rise to this new employer-employee relationship model.<sup>10</sup> Rigidity in employer-employee relations; social protection responsibility assigned to the state; and organized trade union action by the labour force were identified as barriers. Accordingly, the idea that government interventions in the market should be minimized was formulated on the premise that the government is not in a position to receive sufficient information that would enable it to infer market signals (prices). Hence, labour processes, labour markets, goods and consumption patterns were changed dramatically in order to make them more flexible<sup>11</sup> and thereby making them more favorable to the employer and less favorable to the employee. These changes which were based on the belief that the interests of mankind can be furthered by liberalizing individual entrepreneurial rights under an institutional framework

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<sup>8</sup> In the early industrial capitalist societies where the modern factories were first emerged the form of employment available was regular, fulltime, wage employment with strict hierarchical control of the factory management. Edgell, Stephen. *Sociology of Work: Continuity and Change in Paid and Unpaid Work* (London: Sage Publications, 2006), 1-27.

<sup>9</sup>Ibid.

<sup>10</sup> David Harvey. *Spaces of Neo-Liberalism: Towards a Theory of Uneven Geographical Development*. Hettner Lecture 2004, Franz Steiner Verlag, 2005. <https://d-nb.info/974905585/04>

<sup>11</sup> David Harvey, *A Brief History of Neo-Liberalism*, (Oxford: Oxford University Press, 2006), 76.

shaped by stronger private land rights, open markets and free trade constituted a form of market fundamentalism. Today this politico-economic ideology is known as neoliberalism. Deregulation of the labour market is an essential aspect of market fundamentalism based on flexible accumulation<sup>12</sup>. This process of deregulation commenced in Sri Lanka with the introduction of the open economy in 1977. During the past four decades, deregulation has been implemented via three main approaches in Sri Lanka:

1. Introducing anti-labour, pro-capitalist legislative and policy interventions,
2. Introducing new diverse forms of working arrangements, which make worker identity complicated and exclude them from the fixed-term labour force (thereby getting rid of employer responsibility),
3. Disempowering the trade union movement.<sup>13</sup>

Now we can examine the aforementioned three labour struggles (which had resulted due to the practice of hiring manpower through third party manpower supplying agencies) in the light of deregulation of labour markets under neo-liberalism.

### **3. Three Labour Struggles**

Sri Lanka Telecom (SLT) started using outsourced manpower as far back as 1988.<sup>14</sup> During the early stages, Sri Lanka Telecom

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<sup>12</sup> Ibid.

<sup>13</sup> Vidura Munasinghe, *Reimagining 'The Worker' and Resistance in the Neo-Liberal Era* (Colombo: Law & Society Trust, 2018), 12.

<sup>14</sup> 100% of the work at SLT was not outsourced. Only part of the workforce was hired through outside manpower supplying private companies. This created two

hired workers from private manpower supplying agencies. But in 2008 a subsidiary company to SLT by the name of Sri Lanka Telecom Manpower Solutions was formed exclusively for the purpose of procuring manpower required for SLT.<sup>15</sup> Later on Sri Lanka Telecom Manpower Solutions was renamed as SLT Human Capital Solutions, but the 100% ownership of the company remained with SLT.<sup>16</sup> Accordingly there were two types of workers within SLT, i.e. permanent SLT workers (workers directly recruited to SLT) and workers hired through SLT Human Capital Solutions. Both types of workers carried out the same duties.<sup>17</sup> Permanent employees of SLT enjoyed higher pay, better bonuses, job security and all the other perks attributed to the semi-government workers while manpower workers (workers from SLT Human Capital Solutions) who performed the same duties did not receive any of these additional perks and received only 1/3 of the monthly salary earned by SLT permanent workers.<sup>18</sup>

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types of workers within SLT (SLT workers and manpower workers). Most of the times these workers carried out the same duties at SLT although they were hired by different employers.

<sup>15</sup> Gurusinge, Interview, August 15, 2018.

<sup>16</sup> Sri Lanka Telecom, <http://slt.lk>, accessed November 11, 2018, <http://www.slt.lk/en/about-us/profile/subsidiaries>.

<sup>17</sup> Permanent workers and workers hired through a manpower supplying agency employed by SLT work in the same work places under the same supervisors. They receive the same training. They use the same fingerprint scanners to clock in and out of work. The only difference is that one group enjoys lesser rights than the other.

<sup>18</sup> An SLT worker is entitled to an annual bonus of Rs. 180,000 while they are paid Rs. 320 per hour for over-time work. Comparatively a manpower worker receives an annual bonus of Rs. 80,000 and is paid Rs. 170 per hour of over-time work. A permanent worker receives Rs. 14000 monthly as a food and transport allowance, a Rs. 1000 medical allowance and Rs. 7000 annually for medical testing. They are also entitled to a concessionary housing loan of Rs. 1,000,000

In the case of the Ruhunu Magampura Port, the employees of the Port at the very outset were recruited not by the Ports Authority<sup>19</sup> but by a manpower company called Magampura Management Limited which was created by the Ports Authority. Their appointment letters stated that they will be made permanent employees of Magampura Management Limited after the completion of a three year probation period. However, after the new government came into power in 2015,<sup>20</sup> in mid-2016 workers came to know that government was planning to hand over the Ruhunu Magampura port to China for a 99 year lease<sup>21</sup>. With this news workers became agitated as they feared for their job security given that they had been recruited by the Magampura Management Ltd., not directly by the Ports Authority.<sup>22</sup>

While Sri Lanka Telecom is a semi-government institution and Ruhunu Magampura Port was a government institution, the

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and a motorbike loan of Rs. 40,000 but the manpower workers are not entitled to any of these perks.

<sup>19</sup> This has been a trend even in the Colombo harbor. As in the Sri Lanka Telecom, Colombo harbor has two types of workers i.e. government workers (workers recruited to Ports Authority) and private workers (workers hired through private manpower supplying companies). In Ruhunu Magampura Port 100% of the workers were hired through a subsidiary company created under the Ports Authority.

<sup>20</sup> Ruhunu Magampura port was constructed by the former government headed by President Mahinda Rajapaksa from a \$307million loan granted by the Chinese government' Export-Import Bank. Rajapaksa government lost power in 2015 elections.

<sup>21</sup> The rumours of handing over the Ruhunu Magampura port to China first appeared in mid-2016. On 09<sup>th</sup> December 2017 Sri Lankan government formally handed over the port to a joint venture set up by China Merchant Port Holdings Company and Sri Lanka Ports Authority for 99 year lease. According to the agreement China Merchant Port Holdings Company owns 85% of the joint venture and the Sri Lanka Ports Authority owns 15%.

<sup>22</sup> Sagara, Interview, July 22, 2018.

Associated Battery Manufactures is a private company under Indian ownership. For the past 6 - 7 years, this company too has engaged in the practice of recruiting manpower workers from private manpower supplying companies in addition to regular permanent workers. Hazardous and difficult work was assigned to manpower workers who were also burdened with longer day shifts as well as most of the night shifts despite the comparatively lower salaries paid to them.<sup>23</sup>

#### **4. Precarious Labour and Labour Struggles**

Over 2000 SLT Solutions workers have been continuously demanding to be recruited directly to Sri Lanka Telecom and in December 2016 these workers launched a strike action which lasted for over three months. Over 1200 workers were actively engaged in this strike action.<sup>24</sup> In December 2016, the Ruhunu Magampura Management Ltd. workers launched a *Satyagraha* movement<sup>25</sup> demanding to be recruited directly to the Ports Authority. This movement later turned into a strike action. During the course of their trade union action workers forcibly held two ships from leaving the port which resulted in Sri Lanka Navy using force to control the situation framing it as an act of piracy.<sup>26</sup> Similarly, the workers of the Associated Battery Manufactures

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<sup>23</sup> Ibid.

<sup>24</sup> Gurusinghe, Interview, August 15, 2018.

<sup>25</sup> *Satyagraha* is a particular form of non-violent resistance developed by Mahatma Gandhi which became popular in many freedom and civil rights movements.

<sup>26</sup> "Hambantota Port employees continue strike action," Newsfirst.lk, accessed October 6, 2018,

<https://www.newsfirst.lk/2016/12/09/hambantota-port-employees-continue-strike-action/>

initiated their strike demanding to be recruited directly to the factory.<sup>27</sup>

The challenges faced by these workers throughout the entire period of these trade union actions clearly demonstrated the precarious nature of ‘manpower labour’. When workers are hired through manpower agencies, they have to deal with the manpower agency which recruited them for their rights issues while the company they actually supply their labour has no responsibility towards them. Accordingly, manpower workers who were employed at these three companies - Sri Lanka Telecom, Magampura Port and Associated Battery Manufactures - had to deal with the management of manpower supply agencies (SLT Solutions, Magampura Management Ltd., and the manpower agency from which Associated Battery Manufactures obtained workers) which recruited them rather than the management of the place in which they were employed. Whenever there is an agitation over the issues of worker’s rights, the management of their places of work could conveniently claim that ‘we have no liability towards you’ and transfer the matter to the manpower agency. This could end up with the dismissal of the employees. When an employer seeks to fulfill their labour requirement through a manpower agency such as SLT Solutions or Magampura Management Ltd., which are subsidiary companies of their own institution, the parent company can terminate the service of all its employees by dissolving the subsidiary company (which is a separate legal entity) without facing any adverse impact to the existence of the parent company. Thereby it is a well-known fact that the precarious labour produces ‘tame workers’ who continue to work tolerating even the

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<sup>27</sup> Lenus Jayatilake, Interview, July 15, 2018.

harshest and most unfair working conditions. Furthermore, lack of job security in this precarious labour arrangements become a decisive factor when fighting for workers' rights. When Telecom manpower workers started their struggle they had to face all these challenges.

In 2011, both the permanent workers and the manpower workers at SLT had carried out a strike action for 10 days making several demands including a pay hike and making their jobs permanent. However, only the permanent workers were able to successfully realize most of these demands while the manpower workers were offered only a meagre pay hike. Although the 2015 interim budget and Prime Minister's speech on SLT issue made in the Parliament in 2016 expressed the willingness to absorb the manpower workers (who had completed a service period of 07 years) to the SLT carder, it was never implemented.<sup>28</sup> This inaction on the part of the government occurred in a context which the majority of the manpower workers had fulfilled the qualifications needed to make an employee permanent (NVQ Level 4<sup>29</sup>) at Sri Lanka Telecom. Permanent workers did not join in the trade union action launched by manpower workers as they thought absorbing manpower workers into the permanent cadre will result in a reduction of the privileges and perks they were already enjoying.<sup>30</sup> This was a fear

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<sup>28</sup> Gurusinghe, Interview, August 15, 2018.

<sup>29</sup> NVQ (National Vocational Qualifications) is a nationally recognized vocational educational framework introduced by the Tertiary and Vocational Education Act No 20 of 1990. NVQ Level 4 is considered as the level of full national level craftsmanship. ([http://www.tvec.gov.lk/?page\\_id=140](http://www.tvec.gov.lk/?page_id=140))

<sup>30</sup> Gurusinghe, Interview, August 15, 2018.

that is constantly being spread among the permanent workers by the management.<sup>31</sup>

Those who were recruited by the Magampura Management Ltd. to be employed in the Ruhunu Magampura Port were recruited with the condition that they will be made permanent only after the completion of a three-year probation period. Hence, they did not join the *Satyagraha* before the completion of the three-year period. Instead, it was their parents who joined the *Satyagraha* in their place.<sup>32</sup> They completed three years of service while the *Satyagraha* was going on and then they too joined the protest. On the fourth day of the strike, the management responded by issuing an ultimatum ordering that any employee who did not return to work by 2.00 p.m. on the next day would be considered as a deserter. The first action taken by the management of Associated Battery Manufactures was to terminate the services of both the convener and the treasurer of the union.<sup>33</sup>

#### ***4.1 Organized power of the workers or the political affiliations?***

It is interesting to note how the politicians tried to exploit the precariousness of the manpower workers (especially in the cases of SLT and Magampura Port) to gain political mileage. The Magampura Management Ltd. had given these employment opportunities to people as a strategic move to ensure continuous support to the then government. The employees who accepted these employment opportunities were aware that their jobs are not secure unless the government remained in power. Since they were

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<sup>31</sup> S. Rajapakse, Interview, May 22, 2018.

<sup>32</sup> Sagara, Interview, July 22, 2018.

<sup>33</sup> Amarasinghe, Interview, July 12, 2018.

employees of a manpower company, the Ports Authority could, at any time, wind up the manpower company. To prevent that from happening, it was obvious that they will continuously support the ruling party to secure their jobs.<sup>34</sup> It is believed by many that most of the people recruited to Telecom Solutions have connections to a particular political party and as a result there is a close connection between the politicians of that party and manpower workers.<sup>35</sup> Thus, workers tend to turn towards politicians more often to express their grievances instead of becoming a part of the workers movement and fighting collectively for their rights.

Trade union action by the Magampura Port workers had to be halted when the matter was referred to compulsory arbitration by the Labour Minister.<sup>36</sup> Before the compulsory arbitration process made any progress the authorities were successful in getting the workers to consent to a solution convenient to them with the involvement of *Bhikkus* who were active in politics and have connections to various Ministers. Ultimately, the workers agreed to allow those with NVQ Level 4 qualification to be recruited to permanent service and accept a compensation amount of Rs.1 million each for the others. After the workers and authorities agreed to this settlement, compulsory arbitration process was halted as it was not needed anymore. This marked the end of the Ruhunu Magampura port manpower workers' struggle.

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<sup>34</sup> Sagara, Interview, July 22, 2018.

<sup>35</sup> Gurusinghe, Interview, August 15, 2018.

<sup>36</sup> Under the section 4 of *the Industrial Disputes Act* (Act No. 53 of 1950) Minister of Labour can order to settle a dispute by compulsory arbitration or industrial court.

Nominations were called for the local government elections in the country during the same period<sup>37</sup> and the secretary of the trade union contested representing the Sri Lanka *Podu Jana Peramuna* (SLPP). This made him distracted from his trade union activism. Few others who were actively engaged in organizing workers had become strong supporters of a Minister from the United Peoples' Freedom Alliance (UPFA). Although the NVQ4 was the agreed criterion to be given permanent positions, it was not applied uniformly in all the cases. Almost all the persons who were offered permanent jobs were from two Districts (Kalutara and Hambantota). Kalutara District got 40 permanent job opportunities while the workers from Hambantota were given 95 jobs. If a worker wanted to secure one of these jobs, they were compelled to become a supporter of either the then Minister in-charge of the Labour Department who represented the Kalutara District or the Minister who was the most powerful United Peoples' Freedom Alliance politician from Hambantota District.<sup>38</sup> Also in the case of Telecom Manpower workers, many interventions had been made by politicians based on various connections they had with the workers. At one point a politician had stated that he is in a position to resolve this matter as he is the third most powerful figure in the government.<sup>39</sup> Nevertheless, Telecom strike which was mobilized in a more urban political setting took the shape of a struggle with greater independence and

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<sup>37</sup> From 15 November 2017 to 18 December nominations were accepted for the Local Government Elections in Sri Lanka and the election was held on 10 February 2018.

<sup>38</sup>Ibid.

<sup>39</sup> Gurusinghe, Interview, August 15, 2018.

strength as a result of multiple interventions.<sup>40</sup> The 87 day strike which was later extended into a fast-unto death had to stop when the Minister of Labour referred the matter for compulsory arbitration. With this move, the intensity of the struggle declined and later approximately 400 workers were absorbed into the permanent cadre. Sri Lanka Telecom organized a ceremony to hand over the appointment letters to the workers with the participation of politicians who sought to portray it as an act of benevolence.<sup>41</sup> Strike action carried out by workers of Associated Battery Manufactures (ABM) continued for 9 days and concluded with the suspension of all manpower workers employed at ABM. Unlike in the case of SLT, permanent employees also joined this strike displaying solidarity with the manpower workers. After the end of the strike, manpower workers were absorbed into the permanent service in small groups recruited from time to time. However, the days in which they carried out the strike had been considered as no-pay leave and their annual salary increment for the respective year has been withheld.<sup>42</sup> In all three labour struggles discussed in this chapter, the precarious nature of labour created by manpower supply is well evident. As a result, workers in the manpower labour arrangements have become apolitical ‘tamed’ workers who always depend on political patronage. The activists who were engaged in these three struggles expressed their frustration as follows:

*‘What we organized was a worker’s struggle. But finally we had to go behind the politicians’ – Trade union leader of the Magampura Port*

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<sup>40</sup> Prominent trade union leaders, various civil society organizations actively supported the Telecom struggle.

<sup>41</sup> L. Hemachandra, Interview, July 3, 2018.

<sup>42</sup> *Amarasinghe*, Interview, July 12, 2018.

*We supported a trade union struggle. But now, some think this is not a victory gained by us but a gift from politicians’ – Female activist who engaged in the Telecom manpower struggle*

*‘Although some manpower workers lost their jobs, some people were made permanent in their jobs. Workers believe that relieving the stress on workers even to some extent is an achievement.’ – Leader of the mother union which was involved in the Associated Battery Manufactures strike*

#### **4.2 Neoliberalism and old authoritarianism**

It is very clear that new form of capital-labour relationship (hiring manpower through third party manpower supplying agencies) created by Neoliberalism through promoting flexible labour and deregulation has made labourers more vulnerable and made them easier to be manipulated by the agendas of the ruling political parties by crippling down the power of the trade unions. In sum, the vestiges of democracy that remained in the country have been defeated by the neoliberal economy. According to Alston Neoliberalism is an anti-democratic phenomena.

*‘In the neoliberal view mass democracy is equated with mob rule. And this typically produces all of the barriers to capital accumulation that so threaten power of the upper classes in the 1970’s. The preferred form of governance is that of the “Public-Private Partnership” in which state and key business interests collaborate closely together to coordinate their activities around the aim of enhancing capital accumulation the result is that the regulated get to write the rules of*

*regulation while “public” division making become ever more opaque.*<sup>43</sup>

Thus, under Neoliberalism powerful semi-governmental bodies that control the Central Bank and fiscal power are being created while the World Bank, International Monetary Fund and international trade organizations are used at the international level to leverage control. All of these exist outside the sphere of democratic lobbying, auditing, accountability and controls.<sup>44</sup> It is in this light we need to understand the present day anti-human rights populist ideas which have started to dominate the discourse. Thus the arguments that are raised against human rights in terms of national security, sovereignty and economic nationalism is an ideological front to legitimate the operationalization of an economic system which has no democracy, accountability and transparency within its management.

If we closely examine the arguments raised against the labour struggles that were discussed in this chapter it becomes very clear how the rhetoric of national security, sovereignty and economic nationalism has been used to crack down the struggles. When the unions of Sri Lanka Telecom and Telecom manpower workers took union action, enjoining orders against them were obtained from courts claiming that their actions obstruct the public and thereby damage the economic activities of the country.<sup>45</sup> In another similar case, the claim was that the objective behind union action was to disrupt the functioning of SLT in order to sabotage

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<sup>43</sup> David Harvey, *Neoliberalism and Restoration of class power*, accessed September 22, 2018, <https://gsnas.files.wordpress.com/2007/10/harvey080604.pdf>.

<sup>44</sup> Phillip Alston, “The Populist Challenge to Human Rights.” *Journal of Human Rights Practice*, Volume 9, Issue 1, (2017): 1–15.

<sup>45</sup> Colombo Magistrate Court Case No.B 4132/16.

its operations.<sup>46</sup> In another instance, Sri Lanka Telecom filed a writ application against the Sri Lanka Police stating that they did not take sufficient action against the protesters after obtaining an enjoining order from the Magistrate Court<sup>47</sup> under section 106 of the Criminal Procedure Code.<sup>48</sup> During the Telecom manpower struggle the sentiment repeatedly expressed in the court cases and media briefings by the government was that the workers are engaged in sabotage activities by damaging the Sri Lanka Telecom properties.<sup>49</sup> In many instances, government authorities accused the workers that they are behaving like ‘mob gangs’. When workers of the Magampura Port occupied the two ships preventing them from leaving the port, the Navy intervened claiming that the situation is an act of piracy and that the Navy has jurisdiction to intervene in such instances.<sup>50</sup> Expressing his views in this regard at Parliament the Prime Minister Ranil Wickramasinghe stated that the situation is imposing a great burden on the national economy

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<sup>46</sup> Colombo District Court Case No. Case No. 3/2017/DSP.

<sup>47</sup> “Sri Lanka Telecom files a writ petition against Police inaction over manpower employees”, accessed October 20, 2018, <http://www.dailynews.lk/2017/03/24/law-order/111439/sri-lanka-telecom-files-writ-petition-against-police-inaction-over>.

<sup>48</sup> According to the Section 106 of the Criminal Procedure Code, in order to prevent obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury to any person or property a Magistrate can issue an order prohibiting a particular person from entering a property in his possession or under his management.

<sup>49</sup> “Enjoining order against SLT trade union protests”, accessed October 18, 2018, <http://www.sundayobserver.lk/2017/01/15/business/enjoining-order-against-slt-trade-union-protests?page=1>

<sup>50</sup> “Sri Lanka Navy breaks up protests at Hambantota Port,” <https://worldmaritimeneews.com>, accessed November 16, 2018, <https://worldmaritimeneews.com/archives/208445/sri-lanka-navy-breaks-up-protests-at-hambantota-port/>

as a result of the consequent economic loss.<sup>51</sup> Deputy Minister of Defence Ruwan Wijewardena justified the involvement of the Navy stating that port workers can no longer be considered as workers but as pirates.<sup>52</sup> Through all these arguments it is endeavored to reinforce the idea that rights struggles have a detrimental effect on national security and national economy. In other words, they seem to argue that human rights can be violated if ‘economic development’ is at stake. The Counter Terrorism Bill which is tabled in Parliament at the time this chapter was written, also challenges human rights based on the same argument.<sup>53</sup>

In this bill ‘Offence of Terrorism’ is interpreted as ‘an act committed by any person with the intention of intimidating a population, wrongfully or unlawfully compelling the government of Sri Lanka, or any other government, or an international organization, to do or to abstain from doing any act, preventing any such government from functioning; or causing harm to the territorial integrity or sovereignty of Sri Lanka or any other sovereign country by:

*Causing serious damage to property including public or private property, any place of public use, a State or governmental facility, any*

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<sup>51</sup> “What happened in Hambantota,” Roar.media, accessed October 7, 2018, <https://roar.media/english/life/reports/what-happened-in-magampura/>

<sup>52</sup> “Attack on Hambantota port workers: state minister rejects allegations,” Sundayobserver.lk, accessed October 6, 2018, <http://www.sundayobserver.lk/2016/12/11/news/attack-hambantota-port-workers-state-minister-rejects-allegations>

<sup>53</sup> Several petitions have been filed by different parties challenging the Counter Terrorism Bill which was tabled in the Parliament on 9<sup>th</sup> October 2018. “Counter Terrorism Bill Challenged in SC”, <https://pressreader.com>, accessed November 11, 2018, <https://www.pressreader.com/sri-lanka/sunday-times-sri-lanka/20181021/281569471706302>

*public or private transportation system or any infrastructure facility or environment;*

*Causing serious obstruction or damage to essential services or supplies;*

*Causing obstruction or damage to, or interference with any critical infrastructure or logistic facility associated with any essential service or supply;*<sup>54</sup>

It is important to note that this new Counter Terrorism Bill is being drafted not to address the security threats which could be justified during a war time, but in a post- war period which development rhetoric has become the popular slogan.

## **5. Which is Central: National Security or Human Security?**

If authoritarianism is becoming the preferred political ideology in this era what is the hope we have about human rights? Is this the end times for human rights?

*"We need to maintain perspective, despite the magnitude of the challenges. Defending human rights has never been a consensus project. It has almost always been the product of struggle. The modern human rights regime emerged out of the ashes of the deepest authoritarian dysfunction and the greatest conflagration the world had ever seen."*<sup>55</sup>

Given this anti-human rights populist atmosphere it is important to understand that the realization of human rights is an ongoing

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<sup>54</sup> Counter Terrorism Bill, the Gazette of Democratic Socialist Republic of Sri Lanka, Part II of September 14, 2018, Sec. 15.3 (2). (d), (g), (h). accessed October 18, 2018. [http://www.documents.gov.lk/files/bill/2018/9/528-2018\\_E.pdf](http://www.documents.gov.lk/files/bill/2018/9/528-2018_E.pdf)

<sup>55</sup>Phillip Alston, "The Populist Challenge to Human Rights," in *Journal of Human Rights Practice*, Volume 9, Issue 1, (2017): 1–15.

struggle. Therefore, it is important to analyze how theoretically and practically sound the human rights discourse is to face these new challenges. The main argument behind the present populist challenge to human rights is that human rights can be curtailed for the sake of national security, sovereignty and national economy. We need to explore the counter arguments human rights discourse has produced against this rhetoric.

*“It is now time to make a transition from the narrow concept of national security to the all- encompassing concept of human security. People in rich nations seek security from the threat of crime and drug wars in their streets... People in poor nations demand liberation from the continuing threat of hunger, disease and poverty.”<sup>56</sup>*

The 1994 Report of the UNDP identified seven main categories of human security: economic, food, health, environmental, personal, community and political security.

UN endorsed a common understanding based on the General Assembly resolution 66/290 adopted on 10 September 2012 emphasizing the human centeredness of human security. This centrality of human being has been continuously emphasized in numerous human rights instruments such as UN Declaration on Right to Development (1986),<sup>57</sup> Rio Declaration on Environment and Development (1992)<sup>58</sup> and the Sustainable Development Goals (2015).<sup>59</sup> According to the 1994 UNDP Human

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<sup>56</sup> Human Development Report 1994, United Nations Development Programme (UNDP) Oxford: Oxford University Press, 1994, 22.

<sup>57</sup><http://www.un.org/documents/ga/res/41/a41r128.htm>

<sup>58</sup> [http://www.unesco.org/education/pdf/RIO\\_E.PDF](http://www.unesco.org/education/pdf/RIO_E.PDF)

<sup>59</sup>[http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/70/1&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E)

Development report the stability of basic income derived from either a productive and remunerative employment or a public safety net dependent on public finance is essential for economic security.<sup>60</sup> Labour arrangements that create precarious jobs compromise economic security:

*"...the global shift towards more 'precarious' employment reflects changes in the structure of the industries... Employment is much more likely to be temporary or part time – and less protected by trade unions."*<sup>61</sup>

Therefore, the arguments raised in this populist challenge are already outdated. However, it is quite common to observe these outdated arguments being presented in the West as well as in societies like Sri Lanka. This has happened mainly due to the dominant status attributed to civil and political rights in the human rights discourse. According to Phillip Alston, the elite in society are more interested in civil and political rights because their economic and social rights are hardly challenged due to their privileged status in society<sup>62</sup>. On the contrary, the vast majority of the communities, who are outside the elite privileged circles, face more and more challenges to their economic and social rights.<sup>63</sup>

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<sup>60</sup> Human Development Report 1994, United Nations Development Programme (UNDP) Oxford: Oxford University Press, 1994, 22.

<sup>61</sup>Ibid, 25.

<sup>62</sup> Phillip Alston. "The Populist Challenge to Human Rights." in *Journal of Human Rights Practice*, Volume 9, Issue 1, (2017): 13.

<sup>63</sup> Virginia Bras Gomes, "Beyond civil and political rights: Economic, social and cultural rights are human rights too," Interview by Vidura Prabath Munasinghe, *LST Review* Vol.9 Issue 346. (Colombo: Law & Society Trust, 2018), 27-32.

Sri Lanka has ratified the International Convention on Economic, Social and Cultural Rights (ICESCR) and 43 ILO conventions.<sup>64</sup> When we consider the current anti human rights populist context, human security is a better approach to demand the Sri Lankan state to adhere to these international obligations. Within this approach it is important to explore the new strategies being developed by the victims of economic rights violations. In this respect we need to keep emphasizing the need to radicalize the conventional approaches to the worker’s struggles as much as the need to broaden the conceptualization of human rights.

## **6. Empathy and Solidarity**

Although the Telecom manpower struggle initially displayed signs of dependence on politicians (as explained above), it later evolved into a movement comprised of multiple progressive actors such as left-oriented trade union leaders, social activists, public intellectuals and artists. As a result, it became an intense radical site which collaborated with the other rights struggles which were unfolding in the island at that time. For instance, the Telecom manpower workers participated in the initial discussions organized to mobilize the people who were economically and environmentally affected by the construction of the Colombo International Financial City (commonly known as the Port City project).<sup>65</sup> They also joined the

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<sup>64</sup> 8 Fundamental conventions, 3 Priority conventions, 32 Technical conventions including Forced Labour Convention, Freedom of Association and Protection of the Right to Organize Convention, Right to Organize and Collective Bargaining Convention, Equal Remuneration Convention, Abolition of Forced Labour Convention, Discrimination Employment and Occupation) Convention, Minimum Age Convention and Worst Forms of Child Labour Convention.

<sup>65</sup> Colombo International Financial City (CIFC) is a special financial zone which is planned to be built on a reclaimed land of 262 ha adjacent to the Colombo harbor. This project has been criticized by many parties for different reasons.

protests organized demanding the government to return private lands occupied by the military in the North.<sup>66</sup> As a result of these solidarity movements, people who were engaged in the other rights struggles extended their support towards the SLT workers who were facing economic difficulties as a result of their involvement in the strike action. Farmers who were protesting against the destruction caused by the Uma Oya project<sup>67</sup> brought a portion of their vegetable harvest while fishermen who were protesting against Port City due to the negative effects it makes on their livelihood supplied a portion of their fish harvest to the Telecom workers who were suffering economically. Ajith Kumarasiri (an alternative musician) performed at the protest venue encouraging the workers.<sup>68</sup> These solidarity actions helped Telecom workers to gain momentum and to continue their struggle for 87 days.

An activist who was actively involved in the Magampura Port manpower struggle stated that their struggle had relatively less support from the outside groups for two reasons: Hambanthota is a remote location, and the political bias of the workers was a

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Environmentalists have argued this will make many adverse environmental impacts. After the project was started in 2014 it affected the livelihoods of the fishermen in the areas north to the Colombo harbor due to land filling activities. With the creation of new land coastal erosion intensified in an area which stretches about 75kms from the project site. Fishing communities affected by these adverse results of the project

<sup>66</sup> L. Hemachandra, Interview, July 3, 2018.

<sup>67</sup> Uma Oya is one of Sri Lankan government's large scale multi-purpose projects carried out in Bandarawela. Under this project drilling of a 3.35 km tunnel for the hydro power plant began in December 2014. After a few days ground water started seeping into the tunnel resulting in damage to over 7,000 houses on the surface of the tunnel. Also ground water dried out in the large extent of the farm lands. Public unrest over this sudden devastation erupted and protests were organized by an umbrella organization named 'People's Front against Uma Oya Multi Destructive Project'.

<sup>68</sup> K. Kottegoda, Interview, 27 June 2018.

known fact. Although most of the workers were supporters of the former government and it was obvious that former President's political camp could make a great influence in their stronghold, workers were careful not to obtain any other support from them apart from the legal assistance for the court cases. When economic hardships became severe, they opted to visit weekly fairs in the nearby areas such as Sooriyawewa, Hambantota and Walasmulla and made people aware of their struggle and sought their support.<sup>69</sup>

On the other hand, the workers' struggle in Associated Battery Manufacturers was unique as permanent workers also joined the strike in support of the manpower workers. In most of the workplaces, the workforce is split into two categories: permanent workers, and manpower workers. Employers purposely maintain a division between these two categories by portraying that one group is a threat to the other group. This way the management makes sure that they can have an uninterrupted production even if one set of the workers decides to carry out a trade union action. But in the case of Associated Battery Manufactures both sets of workers were united in their trade union action.

When we consider the various approaches and strategies adopted in these three struggles it is evident that there are positive lessons to be learned apart from the most common narrative of party politics undermining the workers' solidarity and collective struggle. One female activist who actively took part in the Telecom manpower struggle reflected on her experience:

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<sup>69</sup> Sagara, Interview, July 22, 2018.

*“People are more radical than we think but they act radically only within the site of the struggle. We can witness empathy and solidarity only within that specific site. It does not extend to other spaces of their everyday life.”<sup>70</sup>*

This is the sentiment commonly expressed at the end of almost all rights struggles. People who took strong radical decisions and displayed astonishing militancy during the Uma Oya and Rathupaswala<sup>71</sup> and Panama<sup>72</sup> struggles did not display the same progressiveness outside the site of the struggle.<sup>73</sup> The sentiments expressed today on the three workers' struggles we discussed in this chapter show no difference to this common narrative.

## **7. Looking Beyond 2017...**

Arguments that favour the populist challenge to human rights continue to create an environment which is conducive to the

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<sup>70</sup> L. Hemachandra, Interview, July 3 2018.

<sup>71</sup> After revealing that ground water in 28 Grama Niladhari Divisions in Weliveriya-Rathupawala in Gampaha District have been contaminated from the disposed chemicals of a rubber gloves manufacturing company local people organized as ‘Siyane Environment Protection Movement’ to demand the removal of the factory from the area and for provision of clean water. On August 1 2013 Army troops attacked one of the protests killing three youth and injuring over 50. Finally factory was removed from the area.

<sup>72</sup> In 2010 the government forcibly removed about 350 families who had been cultivating land for over 40 years in the Panama area in Ampara District and acquired lands for a military establishment. Later the government decided to use these lands to promote tourism. The people who cultivated these lands formed an organization named ‘Movement to Protect Pananpaththuwa’ and launched a prolonged protest campaign demanding their lands back. During 2015 Presidential election campaign, opposition party promised to release these lands back to the villagers. With the new hopes people halted the protest campaign. But after the election win no action was taken to fulfill the promises. By that time the protest campaign had become disintegrated.

<sup>73</sup> Vidura Munasinghe “Waiting for Mahinda mahaththaya: 2018 Local Government Election.” In *LST Review* Vol. 29 Issue 345. (Colombo: Law & Society Trust, 2018), 10-19.

existence of economic authoritarianism in total disregard of the principles of democracy, accountability and transparency. At the same time, the strategies of deregulation and flexible accumulation which are being implemented under this economic authoritarianism undermine the economic and social rights of the people. This was the reality depicted in all three rights struggles in 2017 which were discussed in this chapter. The populist argument against human rights on the basis of national security is no longer a valid one. Human security cannot be secured when peoples' economic rights are in danger. In this context, it is imperative that economic and social rights struggles which are attributed lesser importance in liberal elite rights discourse needs to be prioritized in the agenda. It is important to identify human rights as an ongoing struggle and develop solidarity networks among those who are suffering from a variety of human rights violations. This is the most important lesson to be learnt from the human (labor) rights struggles in 2017. Furthermore, it is necessary to understand that the full realization of human rights cannot be achieved without eradicating all forms of inequalities in a society. It is this understanding which will lead us to extend solidarity and empathy beyond our own sites of human rights struggles.

# VI

## HUMAN RIGHTS AND INCOME TAX IN SRI LANKA

*Dr Shivaji Felix\**

### 1. Introduction

The enactment of the Inland Revenue Act, No 24 of 2017 has helped to refocus our attention on income tax in Sri Lanka and its compliance with human rights standards, particularly the imperatives demanded by the rule of law. The Organisation for Economic Cooperation and Development's (OECD) working definition of a tax is that it is a compulsory unrequited payment to the government.<sup>1</sup> A tax payment is regarded as unrequited in view of the fact that there is no proportionality between the tax paid by a taxpayer and the perceived value of the benefits received from

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The author would like to thank Oliver Friedmann for his assistance with the chapter on Human Rights and Income Tax in Sri Lanka.

<sup>1</sup> Organisation for Economic Co-operation and Development. 2008. *OECD glossary of statistical terms*. Paris: OECD. <http://site.ebrary.com/id/10251720>

the state.<sup>2</sup>This question of proportionality inevitably raises questions regarding the fairness of a given tax system. What must be the contribution of different persons in society and how much must they pay? What should be exempt from tax and how should tax be utilised? These are legitimate questions that have a direct bearing on the economy and the operations of government. However, they also carry strong moral and ideological implications which raise searching and penetrating questions regarding individual liberty, personal responsibility and our mutual obligations as citizens in a democratic society committed to the rule of law.<sup>3</sup>

Within the field of human rights, the legitimacy of taxation has become a matter of concern. Robert Nozick argues that the taxation of earnings from labour is tantamount to slave labour. He states as follows:

*Taxation of earnings from labor is on a par with forced labor. Some persons find this claim obviously true: taking the earnings of n hours labor is like taking n hours from the person; it is like forcing the person to work n hours for another's purpose. Others find the claim absurd. But even these, if they object to forced labor, would oppose forcing unemployed hippies to work for the benefit of the needy. And they would also object to forcing each person to work five extra hours each week for the benefit of the needy...*<sup>4</sup>

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<sup>2</sup> See, e.g., Barry Larkin (ed), *IBFD International Tax Glossary* (Amsterdam: IBFD, 5<sup>th</sup>edn., 2005), at p. 393.

<sup>3</sup> See, e.g., Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford: Oxford University Press, 2002).

<sup>4</sup> Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books Publishing Co., 1974), at p. 169.

The currently applicable statute in relation to the taxation of income in Sri Lanka is the Inland Revenue Act, No 24 of 2017, which has been operational since 1 April 2018. Sri Lanka taxes persons on the basis of a self-assessment. The new Inland Revenue Act has a number of features that have the potential to violate a taxpayer's fundamental rights and be contrary to the rule of law. Furthermore, the new tax assessment system, appeal structure, payment of penalties and interest charge structure is weighted against the tax payer and is a matter of serious concern.

This chapter will proceed by first introducing the inclusion of a new fundamental right — the right to information — in Sri Lanka's Constitution. The importance of beginning with an introduction to this 2015 amendment lies in the fact that a right to information and the functioning of a taxation system that adheres to a country's human rights responsibilities have the potential to conflict. This new right raises questions about an individual's right to have their personal tax information protected. In raising these concerns and determining that they are indeed concerns from which the citizen may not be protected, the remainder of the paper will spend time analysing tax and rights with respect to Sri Lanka's conception and adherence to the rule of law. Adherence to the rule of law is the most important feature of a democratic society that aims to protect its citizens rights under circumstances where fundamental rights provisions designed for one purpose may in fact have the potential to endanger other rights in need of protection. Specific attention will be paid to the new Inland Revenue Act to determine the extent to which its provisions align with Sri Lanka's obligations under the rule of law, and further how these provisions may or may not impede upon an individual's human rights.

## 2. The Right to Information.

It was relatively recently that Sri Lanka explicitly recognised the right to information as a fundamental right. In 2015 the Constitution of Sri Lanka was amended so as to provide a citizen with the right of access to information.<sup>5</sup> Article 14A of the Constitution provides 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 Minister 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 a 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 the reputation or the rights or others, privacy, prevention of contempt of court, protection of parliamentary privilege, for preventing the disclosure of information*

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<sup>5</sup> The Nineteenth Amendment to the Constitution which was certified on 15 May 2015.

*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.*

In order to give meaningful and practical effect to the constitutional recognition of the right to information, the Parliament enacted the Right to Information Act, No 12 of 2016. Section 3 of the Act provides that:

*3 (1) Subject to the provisions of section 5 of this Act, every citizen shall have a right of access to information which is in the possession, custody or control of a public authority.*

*(2) The provisions of this Act, shall not be in derogation of the powers, privileges and practices of Parliament.*

Section 5 of the Right to Information Act, No 12 of 2016 provides the circumstances under which the right of access to information may be denied. This right has an important bearing on the functioning of taxation in Sri Lanka as it relates to human rights. In the context of taxation, the right to information can be denied if “disclosure of such information would cause serious prejudice to the economy of Sri Lanka by disclosing prematurely decisions to change or continue government economic or financial policies relating to ... taxation.”<sup>6</sup> Furthermore, Article 14A(2) of the Constitution explicitly recognises that there can be lawful

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<sup>6</sup> Vide section 5 (1) (c) (iii) of the *Right to Information Act, No 12 of 2016*.

constraints on the right to information where such information is disclosed in confidence (which is often the case in the context of tax reporting by taxpayers). This exception is also recognised by the Right to Information Act, No 12 of 2016.<sup>7</sup> Where purely personal information is concerned there can be no public interest in its disclosure unless the larger public interest justifies such disclosure.<sup>8</sup> The disclosure of commercial information is also constrained by law. Whilst the term phrase “commercial information” is not exhaustively defined it could encompass trade secrets, commercial confidence and intellectual property rights which if disclosed could confer an unfair advantage on competitors or harm a person’s competitive advantage.<sup>9</sup> Where there is a statutory constraint imposed restricting the disclosure of information, the public authority is required to undertake a balancing exercise by weighing the individual’s right to privacy or a person’s right to the protection of sensitive commercial information from disclosure against the larger public interest in making such information available.<sup>10</sup>

The question that requires consideration is whether an individual’s right to information overrides a taxpayer’s right to have information relating to his/ her or its affairs treated with confidence. Furthermore, if the tax information relates to the person requesting the information and no third party is involved,

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<sup>7</sup> Section 5 (1) (i) of the *Right to Information Act, No 12 of 2016*, provides as follows: “subject to the provisions of section 29 (2) (c), the information has been supplied in confidence to the public authority concerned by a third party and the third party does not consent to its disclosure.”

<sup>8</sup> Section 5 (1) (a) of the *Right to Information Act, No 12 of 2016*.

<sup>9</sup> Section 5 (1) (d) of the *Right to Information Act, No 12 of 2016*.

<sup>10</sup> Section 5 (1) (a) and section 5 (1) (d) of the *Right to Information Act, No 12 of 2016*.

can Inland Revenue refuse to provide such information and on what grounds? It appears that specific information concerning a taxpayer cannot be refused by seeking refuge under the statutory provision which permits a public authority to deny access to information when the Inland Revenue Act, No 24 of 2017, also preserves a taxpayer's right to information.<sup>11</sup> This taxpayer right must necessarily supplement a right that any citizen possesses under and in terms of the Right to Information Act, No 12 of 2016.

It is also relevant to note that Sri Lanka does not have a Data Protection Act to cover the holders of personal data or data of commercial significance — these matters are usually covered in the private sphere by entering into a nondisclosure agreement between the party providing the data and the party holding the data. However, where there is a statutory requirement to provide personal or commercial information to the Department of Inland Revenue the secrecy provisions of the relevant fiscal enactment will be engaged to the extent provided by law.

It is vitally important that the collection of taxation is subject to the principles demanded by the rule of law. Fidelity to the rule of law is the single most important factor that differentiates democratic states that collect tax from a totalitarian state.

### **3. The Rule of Law**

The conceptual notion of the rule of law traces its origins to classical Greek thought and relevant passages are found in the works of Plato and Aristotle. Brian Tamanaha, a leading scholar on

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<sup>11</sup> Section 5 (1) (c) (iii) of the *Right to Information Act, No 12 of 2016* and Section 118 of the *Inland Revenue Act, No 24 of 2017*.

the rule of law, argues that the rule of law as a continuous tradition took root more than a thousand years after the heyday of Athens.<sup>12</sup> The modern use of the term “the rule of law” is attributed to A. V. Dicey, the Vinerian Professor of English Law at Oxford who discussed it in detail in his famous book on constitutional law.<sup>13</sup> According to Dicey’s conception of the term, when applied in the context of English law, “the rule of law” had three distinct meanings:

- (1) the absence of arbitrary power on the part of the government;<sup>14</sup>
- (2) every man being subject to ordinary law administered by ordinary tribunals;<sup>15</sup>
- (3) the fact that the general rules of constitutional law are the result of ordinary laws of the land.<sup>16</sup>

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<sup>12</sup> Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), at p. 7.

<sup>13</sup> A. V. Dicey, *An Introduction to the Study of the Law of the Constitution* (London: Macmillan Press, 1885).

<sup>14</sup> A. V. Dicey, *An Introduction to the Study of the Law of the Constitution* [London: Macmillan Press, 10<sup>th</sup> edn., 1959], at p. 188: “We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.”

<sup>15</sup> A. V. Dicey, *An Introduction to the Study of the Law of the Constitution* (London: Macmillan Press, 10<sup>th</sup> edn., 1959), at p. 193: “We mean in the second place, when we speak of the “rule of law” as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.”

<sup>16</sup> A. V. Dicey, *An Introduction to the Study of the Law of the Constitution* (London: Macmillan Press, 10<sup>th</sup> edn., 1959), at p. 195: “We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public

Dicey's conception of the rule of law has had a profound impact on public law theory and was widely regarded as the benchmark for the rule of law in the Commonwealth. Carol Harlow and Richard Rawlings, referring to the influence of Dicey's theory, make the following observation:

*Dicey's Introduction to the Law of the Constitution, published in 1885, might almost be described as a substitute for a written constitution. His influence on the development of administrative law has been equally pervasive. Dicey's ideas lock up together to form the ideal of a "balanced" constitution, in which the executive, envisaged as capable of arbitrary encroachment on the rights of individual citizens, will be subject, on the one side, to political control by Parliament, on the other, to legal control through the common law by the courts.*<sup>17</sup>

Dicey's notion of the rule of law required, as necessary preconditions for its validity, a laissez-faire economic system and a liberal democracy — conditions that were prevalent in England at the time when his theory was first formulated. However, since the rule of law was perhaps the weakest limb of the wider economic and political philosophy to which Dicey subscribed, it acted as a lightning conductor for his critics.<sup>18</sup> Dicey experienced difficulty

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meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts ...”

<sup>17</sup> Carol Harlow and Richard Rawlings, *Law and Administration* (London: Butterworths, 2<sup>nd</sup> edn., 1997), at p. 38.

<sup>18</sup> See, e.g., W A Robson, *Justice and Administrative Law* (London: Macmillan & Company Limited, 1928); W Ivor Jennings, *The Law and the Constitution* (London: University of London Press, 5<sup>th</sup> edn., 1959). See also, M J C Vile, *Constitutionalism and the Separation of Powers* [Indianapolis: Liberty Fund, 2<sup>nd</sup> edn., 1998], at pp. 258 – 260.

in conceptualising the rule of law as something general and common divorced from its social and political context. Dicey's conception of the rule of law was essentially a construct of a laissez-faire economic and liberal democratic political philosophy which sprung from his antipathy towards the welfare/ regulatory state. It was his considered view that the enlargement of state power constituted a threat to the rule of law — it essentially meant that unrestrained power had the potential danger of being arbitrary.

In the context of the British Constitution, Dicey recognised that the protection afforded to an individual by way of the rule of law (which included the separation and independence of judicial power) was dependent on the will of a temporary majority of the legislature.<sup>19</sup> F A Hayek, a leading libertarian, provides the following important explanation of the rule of law:

*NOTHING distinguishes more clearly conditions in a free country from those in a country under arbitrary government than the observance in the former of the great principles known as the Rule of Law. Stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand – rules that make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge. Though this ideal can never be perfectly achieved, since legislators as well as those to whom the administration of the law is entrusted are fallible men, the essential point, that the discretion left to the executive organs wielding coercive power should be reduced as much as possible, is clear enough.*

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<sup>19</sup> See, e.g., T R S Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001), at p. 13.

*While every law restricts individual freedom to some extent by altering the means which people may use in the pursuit of their aims, under the Rule of Law the government is prevented from stultifying individual efforts by ad hoc action. Within the known rules of the game the individual is free to pursue his personal ends and desires, certain that the powers of government will not be used deliberately to frustrate his efforts.*<sup>20</sup>

It has been observed that Hayek's emphasis on the role of general rules demonstrated a strong commitment to a liberal political ideal. It, essentially, envisaged a largely formal conception of the rule of law in aid of a powerful conception of substantive political freedom.<sup>21</sup> It is Trevor Allan's view that Dicey's conception of the rule of law was closely analogous to Hayek's formulation of the same concept.<sup>22</sup>

Professor Sir Jeffrey Jowell QC argues that the values underlying Dicey's conception of the rule of law encompass (i) legality; (ii) certainty; (iii) consistency; (iv) accountability; (v) efficiency; (vi) due process and access to justice.<sup>23</sup> However, Jowell also indicates that some of Dicey's critics were right to point out that discretionary power is sometimes desirable and, in certain contexts, inevitable.<sup>24</sup>

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<sup>20</sup> F. A. Hayek, *The Road to Serfdom* (London: Routledge, 1944), at p. 54.

<sup>21</sup> T. R. S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001), at pp. 20 - 21.

<sup>22</sup> T. R. S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001), at p. 20.

<sup>23</sup> Jeffrey Jowell "The rule of law and its underlying values" in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (Oxford: Oxford University Press, 6<sup>th</sup>edn., 2007), pp. 5 – 24, at pp. 9 – 13.

<sup>24</sup> Jeffrey Jowell "The rule of law and its underlying values" in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (Oxford: Oxford University Press, 6<sup>th</sup>edn., 2007), pp. 5 – 24, at p. 15.

These views are echoed by Lord Bingham, one of Britain’s former senior Law Lords and undoubtedly one of the world’s most acute legal minds, in his celebrated book entitled *The Rule of Law*.<sup>25</sup> Lord Bingham points out that the rule of law is not a barren or arid legal doctrine but constitutes the foundation of a just and fair society, an enduring legacy of a responsible government and an impetus for economic growth. The rule of law offers the best prospects for securing peace and co-operation. John Finnis in his famous work, *Natural Law and Natural Rights*,<sup>26</sup> points out that the name given to a state of affairs so as to affirmatively indicate that the legal system is “legally in good shape” or “working well” is “the Rule of Law.”

Finnis postulates that a legal system exemplifies or reflects the rule of law to the extent that its rules are: (i) prospective, not retroactive; (ii) not impossible to comply with; (iii) promulgated; (iv) clear not vague; (v) coherent with another (vi) sufficiently stable so as to permit people to be guided by the content of the rules; (vii) derived from specific decrees and orders that are themselves guided by rules duly promulgated, clear, stable and relatively general; (viii) the persons who administer the rules in an official capacity are accountable for their compliance with rules applicable to their performance and actually administer the law consistently with their tenor.<sup>27</sup>

Sri Lanka has a modern democratic tradition as old as most liberal democracies and is a country governed by the rule of law. Long before fundamental rights were accorded constitutional status, the

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<sup>25</sup> Tom Bingham, *The Rule of Law* (London: Allen Lane, 2010).

<sup>26</sup> John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), at p. 270.

<sup>27</sup>*Ibid.*, at pp. 270 – 271.

Supreme Court of Ceylon (as Sri Lanka was then known) recognised in 1937 a core constitutional principle associated with the rule of law and held that no person could be deprived of his liberty except by judicial process when it ordered the release of Bracegirdle.<sup>28</sup> Chief Justice Abrahams pointed out that under our law there was a definite body of well-known legal principles that excluded arbitrary executive action.<sup>29</sup> Our constitutional statutes provide for the enforcement of the rule of law and the rights of persons so as to curtail or circumscribe the abuse of power.<sup>30</sup> In 1980 Sri Lanka acceded to the International Covenant on Civil and Political Rights. Furthermore, the prerogative writs of *certiorari*, *mandamus*, *prohibition* and *quo warranto* are frequently issued by Sri Lankan courts against public officers and state agencies so as to constrain them from abusing their powers. This has been coupled with an expansion of the scope of the fundamental rights jurisdiction of the Supreme Court.<sup>31</sup> However, the efficacy of these remedies has been the subject of critical scrutiny and comment in recent times.<sup>32</sup> Despite this, the Supreme Court has on many

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<sup>28</sup>*In re Mark Anthony Lyster Bracegirdle*, (1937) 39 NLR 193.

<sup>29</sup>*Ibid*, at p. 212.

<sup>30</sup>See, e.g., chapter III and XVI of the Constitution.

<sup>31</sup> See, e.g., S Sharvananda, *Fundamental Rights in Sri Lanka: A Commentary* (Colombo: 2003); Jayampathy Wickramaratne, *Fundamental Rights in Sri Lanka* (Pannipitiya: Stamford Lake, 2<sup>nd</sup> edn., 2006); Shivaji Felix, *Towards Rights Consciousness: A Study of the Expansion of the Frontiers of Fundamental Rights Jurisprudence in Sri Lanka* (Colombo: 2000); Mario Gomez, *Emerging Trends in Public Law* (Colombo: Vijitha Yapa Bookshop, 1998); Radhika Coomaraswamy, *Ideology and the Constitution: Essays on Constitutional Jurisprudence*(Colombo: ICES, 1996).

<sup>32</sup> See, e.g., R K W Goonesekere, “Arm of the Law’ oration delivered on the occasion of the 60<sup>th</sup> Anniversary of the Faculty of Law, University of Colombo on 24 October 2008; Faisz Musthapha, “Fundamental Rights – Changing Judicial Attitudes?” Kamalabayson Memorial Oration 2011 delivered on 23 September 2011; Param Coomaraswamy, “An Independent Judiciary: Beacon of

occasions explicitly recognised that the rule of law lies at the heart of our constitution.<sup>33</sup>

For the purpose of this article it is intend to examine the modern values underlying Dicey’s conception of the rule of law as a rubric for assessing the extent to which Sri Lanka’s new income tax statute complies with the standards contemplated by the rule of law. Therefore, I will examine the extent to which the Inland Revenue Act, No 24 of 2017 and its application in certain judicial decisions and departmental practices complies with the core principles of legality, certainty, consistency, accountability, efficiency, due process and access to justice — desiderata demanded by the rule of law.

#### 4. Legality

The principle of legality or fidelity to law makes the twin demand of (i) obedience to law; and (ii) that those exercising public power must act within the confines of law. However, in the context of the tax regime in Sri Lanka one often observes this principle being breached.

Our income tax law has very clear and specific provisions on refunds of taxes and interest payable on such refunds<sup>34</sup> similar to prior fiscal legislation.<sup>35</sup> Past experience suggests that these

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Constitutionalism in a Democracy,” 14<sup>th</sup> Dudley Senanayake Memorial Oration delivered on 14 October 2011.

<sup>33</sup> See, e.g., *In re the Nineteenth Amendment to the Constitution*, [2002] 3 Sri LR 85; *Jayanardena v. Wijayatilake*, [2001] 1 Sri LR 132.

<sup>34</sup>See, e.g., section 150, 158 and 159 (2) of the *Inland Revenue Act*, No 24 of 2017.

<sup>35</sup>See, e.g., section 200 (refunds) and section 201 (interest payable on refunds) of the *Inland Revenue Act*, No 10 of 2006 (as amended); section 58 (refunds) and

provisions are very rarely implemented in favour of the taxpayer and are breached with impunity. The Revenue officers often act as if such statutory provisions did not exist in our law. However, where penalties have to be imposed on a taxpayer for tax in default the Revenue office fails to demonstrate a similar disinterest.<sup>36</sup>

Another area of concern relates to the making of assessments in the context of the statutory time bar. It has been previously held by our courts that it is the assessment alone that must be made within the prescribed period albeit the notice of assessment can be served after the relevant period.<sup>37</sup> Consequently the Department of Inland Revenue has taken up the position that for the purpose of engaging the time bar, referred to in various fiscal enactments, what is imperative is the date of the assessment and not the date of the *notice* of assessment. For this purpose reliance is placed upon English decisions on this point.<sup>38</sup> However, it is relevant to note that in England the applicable statutory provisions are different from those applicable in Sri Lanka.

The earlier decision of the Supreme Court of Sri Lanka in *Hamid Marikar v Commissioner of Income Tax* has now been superseded by the decision of the Supreme Court in *Fernando v Ismail*.<sup>39</sup>

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section 59 (interest on refunds) of the Value Added Tax Act, No 14 of 2002 (as amended).

<sup>36</sup>See, e.g., Chapter XIV and Chapter XVII and section 157, 159 (1) of the *Inland Revenue Act*, No 24 of 2017.

<sup>37</sup>See, e.g., *Hamid Marikar v Commissioner of Income Tax*, (1954) 1 CTC 541; (1954) 56 NLR 359.

<sup>38</sup>See, e.g., *Piero's Restaurant and Pizzeria*, LON/01/927 (VTD 17711), cited in *Tolley's VAT Cases 2008*, para 3.44.

<sup>39</sup>(1982) IV Sri Lanka Tax Cases 184.

In the Court of Appeal this case was identified as *Ismail v Commissioner General of Inland Revenue*.<sup>40</sup> Victor Perera J, who was one of the judges of the Court of Appeal that decided on this matter refers to the time period involved in sending a notice of assessment. Perera J stated as follows:

*It is necessary that the respondents should realise that the specific duties imposed on them as these provisions have been repeated in the Inland Revenue Act, No 28 of 1979, which is the Law now in operation in the year commencing 1<sup>st</sup> April, 1978, so that the Inland Revenue Department could recover the tax found to be due from tax payers with expedition as provided in this law without jeopardising the rights of the State to collect the revenue due to it. The law gives an Assessor a period of 3 years to examine and investigate a return while an assessee keeps on paying the tax instalments on the specified dates.*

*In regard to the date of the notice of assessment, it was conceded that the relevant date is the date of posting as a notice sent by post shall be deemed to have been served on the day succeeding the day on which it would have been received in the ordinary course of business. In this case the notice was admittedly posted on 21<sup>st</sup> April, 1979, long after the effective date referred to in section 96 (C) (3), namely 31<sup>st</sup> March 1979. In this case it cannot be considered a valid notice under section 96 (C) (3) or even a valid notice under section 95 as there has been an absolute non-compliance with the mandatory provisions of section 93 (2) even if the assessment was made on 30.03.1979.<sup>41</sup>*

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<sup>40</sup>(1980) IV Sri Lanka Tax Cases 156.

<sup>41</sup>(1980) IV Sri Lanka Tax Cases 156, at p. 182.

Therefore, the above decision of the Court of Appeal, which has not been varied by the Supreme Court, indicates that, where a notice of assessment is concerned, the relevant date is the date on which the notice of assessment was posted and not the date on which the assessment was made.

The resulting position is that no lawfully valid assessment can be made without serving a notice of assessment. Thus, serving a notice of assessment is a necessary precondition that must be satisfied to confer validity on the assessment. The notice of assessment must be served on the taxpayer prior to the expiry of the time bar.<sup>42</sup>

## **5. Consistency and Certainty**

The principle of certainty, as an aspect of the rule of law, demands that the law should be clear and predictable. Consistency postulates that like cases must be treated alike.

Although retroactive legislation is abhorrent to the rule of law, it has been the practice during the last decade to collect certain taxes and levies pending the enactment of relevant legislation and to subsequently validate such unlawful administrative action.<sup>43</sup> This has now unfortunately become the norm rather than the exception,

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<sup>42</sup> Chapter XII of the *Inland Revenue Act, No 24 of 2017*, has detailed requirements regarding self-assessments, default assessments, advance assessments, amended or additional assessments and making an application for amending a self-assessment.

<sup>43</sup> See, e.g., section 47 of the *Inland Revenue (Amendment) Act, No 10 of 2007*; section 55 of the *Inland Revenue (Amendment) Act, No 9 of 2008*; section 27 of the *Inland Revenue (Amendment) Act, No 19 of 2009*; section 56 of the *Inland Revenue (Amendment) Act, No 22 of 2011*; the several retroactive amendments made to the *Value Added Tax Act, No 14 of 2002*, the last being section 22 of the *Value Added Tax (Amendment) Act, No 9 of 2011*.

giving rise to the development of a culture of impunity and a total lack of sensitivity where the enactment of fiscal legislation is concerned. This is hardly compatible with our professed allegiance to the rule of law.

A good example is the Tax Appeals Commission Act, No 23 of 2011, which was enacted as law on 31 March 2011. It was amended by the Tax Appeals Commission (Amendment) Act, No 4 of 2012,<sup>44</sup> and the amendment was to retrospectively come into effect on 1 April 2011. This amendment was further amended by the Tax Appeals Commission (Amendment) Act, No 20 of 2013, and some statutory provisions in it came into effect retrospectively from 1 April 2011.<sup>45</sup> Certain statutory amendments enacted in 2013 retrospectively wiped out the amendments that had previously been retrospectively introduced in 2012. This created a great deal of uncertainty and had the effect of eroding taxpayers' rights.

## **6. Accountability**

As an aspect of the rule of law accountability requires: (i) a published standard against which the legality of official action could be measured; and (ii) that the public is provided with an opportunity of assessing whether the enacted rules comply with their legislative purpose.

The Inland Revenue Act, No 24 of 2017, was enacted without meaningful consultations and many amendments were effected to the Bill prior to its enactment as law. People who had made long term investment decisions based on the prevailing tax law were

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<sup>44</sup> Section 13 of the *Tax Appeals Commission (Amendment) Act, No 4 of 2012*.

<sup>45</sup> Section 14 of the *Tax Appeals Commission (Amendment) Act, No 20 of 2013*.

penalised since certain qualifying payments were no longer permitted (without a cut off period).

Sudden and *ad hoc* changes to tax laws result in fiscal legislation falling short of the accountability standard that is demanded by the rule of law.

## 7. Efficiency

Action based on rules help people to know the official position beforehand and is, therefore, an imperative for the rule of law.

It was due to the gross inefficiency, incompetence and lack of impartiality on the part of the various Boards of Review appointed for the purpose of hearing second tier tax appeals, that the government decided to appoint a statutory Tax Appeals Commission.<sup>46</sup> This law, like the curates egg, was excellent in parts. The track record of the Tax Appeals Commission has been rather disappointing — albeit far better than the Board of Review that it replaced.

To begin with, the law stipulates that the three members of the Tax Appeals Commission should comprise retired judges of the Supreme Court or Court of Appeal who have a wide knowledge and have gained eminence in the fields of taxation, finance and law.<sup>47</sup> This necessarily narrows the field. A retired judge of the Supreme Court would usually be over sixty five years of age whilst a retired judge of the Court of Appeal would be over sixty three years of age.<sup>48</sup> The Act does not contain a sunset provision for appointments, as far as age is concerned, and it is presumed that,

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<sup>46</sup>*Tax Appeals Commission Act, No 23 of 2011* (as amended).

<sup>47</sup>Section 2 (2) of the *Tax Appeals Commission Act, No 23 of 2011* (as amended).

<sup>48</sup>*Vide* article 107 (5) of the Constitution.

like vintage wine, people will improve with age. The law also requires that the appointees should have gained eminence in the fields of taxation, finance and law — and these requirements are not mutually exclusive. The Act is silent regarding any quorum requirement and does not indicate what happens where there is a division of opinion among members of the Commission.

The Act also makes provision for the appointment of a panel of legal advisors who have gained eminence in the field of law.<sup>49</sup> However, the functions of the legal advisors have not yet been articulated.

The Act does not contain any provisions for granting refunds of taxes paid where an appeal has been decided in favour of the taxpayer. The determinations of the Tax Appeals Commission take many years to be handed down and the Commission seems unable to cope with the steadily increasing number of appeals. The resulting position is that the Tax Appeals Commission Act, although enacted with good intentions, is a highly unsatisfactory piece of legislation which requires radical reform if it is to satisfy the test of efficiency demanded by the rule of law.

## **8. Due Process and Access to Justice**

The principles of due process and access to justice demands procedural fairness — which encompasses the right to a fair hearing and an impartial tribunal — as an adjunct to the rule of law. It also requires that a remedy be available when a right has been violated. Procedural fairness also requires access to information and participation in the decision-making process.

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<sup>49</sup>Section 4 (1) of the *Tax Appeals Commission Act, No 23 of 2011* (as amended).

The Inland Revenue Act makes provision for making a public ruling setting out the Commissioner General of Inland Revenue’s interpretation of the application of the Act.<sup>50</sup> This gives the public an idea of the Inland Revenue’s thinking on a matter and the Inland Revenue is bound by such a public ruling — although the taxpayer themselves is not bound.<sup>51</sup> There is also provision to withdraw a public ruling without retrospective effect.<sup>52</sup>

This is an innovation introduced by the Inland Revenue Act, No 24 of 2017. Previously, rulings were issued by a committee of officials setting out the Department of Inland Revenue’s interpretation of a provision of law.<sup>53</sup> The previous law did not expressly provide that the Commissioner General of Inland Revenue was bound by such a ruling. A public ruling under the new law is binding on the Commissioner General of Inland Revenue until it is withdrawn.<sup>54</sup> A public ruling is not binding on taxpayers.<sup>55</sup> However, a taxpayer who enters into a transaction which could be considered a tax avoidance scheme — a tax avoidance scheme contrary to a public ruling — runs a high risk of an assessment engaging the general anti-avoidance rule. Such a taxpayer will have to satisfy an appellate tribunal or court of the legitimacy of the transaction in order to avoid having to make a large payout in the form of taxes, penalties, interest and possibly criminal sanctions.

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<sup>50</sup> Section 104 and 105 of *the Inland Revenue Act, No 24 of 2017*.

<sup>51</sup> Section 104 (3) of the *Inland Revenue Act, No 24 of 2017*.

<sup>52</sup> Section 106 of the *Inland Revenue Act, No 24 of 2017*.

<sup>53</sup> See, e.g., section 208A of the *Inland Revenue Act, No 10 of 2006* (as amended).

<sup>54</sup> Section 104 (2) of the *Inland Revenue Act, No 24 of 2017*.

<sup>55</sup> Section 104 (3) of the *Inland Revenue Act, No 24 of 2017*.

A ruling given by the Commissioner General of Inland Revenue can be challenged by way of a writ of certiorari and will necessarily be subject to the fundamental rights jurisdiction of the Supreme Court in appropriate cases.

The tax appeal structure under the new law leaves much to be desired. The law envisages an escalating appeal process without ensuring that a taxpayer's due process rights are safeguarded at each stage of adjudication. The Act contains a rudimentary ouster clause which provides that except as provided in the Act, no decision relating to the payment of tax can be disputed before the Tax Appeals Commission or any other proceedings.<sup>56</sup> The provisions of the Act will override any other written law if there is any inconsistency between the Act and such written law.<sup>57</sup>

A taxpayer who is dissatisfied with an assessment or any other decision may request the Commissioner General to administratively review the decision within thirty days from the date of notification of the decision.<sup>58</sup> Whilst under the previous law a taxpayer could only appeal against an assessment, under the new law it is possible to seek administrative review of any assessment or other decision of the Inland Revenue with which one is dissatisfied.<sup>59</sup> It is unfortunate that the Act does not make it mandatory that the person seeking administrative review must be granted a hearing. There does not appear to be an entitlement to be represented or to make oral or written submissions at a hearing. These appear to be a grace and favour privileges which are

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<sup>56</sup>Section 137 of the *Inland Revenue Act*, No 24 of 2017.

<sup>57</sup>Section 138 of the *Inland Revenue Act*, No 24 of 2017.

<sup>58</sup>Section 139 of the *Inland Revenue Act*, No 24 of 2017.

<sup>59</sup> Vide section 139 (1) and 139 (6) of *the Inland Revenue Act*, No 24 of 2017.

dependent upon the good sense of the Commissioner General rather than purely statutory rights that can be demanded as a matter of law. However, the Act does provide that where evidence is heard by the Commissioner General a record of such evidence must be maintained.<sup>60</sup>

Once administrative review of a decision is sought the Commissioner General is expected to convey his/ her decision to the aggrieved taxpayer within ninety days.<sup>61</sup> The taxpayer is then given an opportunity to appeal to the Tax Appeals Commission.<sup>62</sup> However, the Act makes it implicit that an appeal to the Tax Appeals Commission can only be made against an assessment.<sup>63</sup> Appeals to the Tax Appeals Commission are governed by a separate enactment.<sup>64</sup> The Schedule I and II to the *Tax Appeals Commission Act, No 23 of 2011* (as amended), enumerates the statutes in relation to which a determination may have been made by the Commissioner General of Inland Revenue or the Director General of Customs and from which an appeal to the Commission can be made. The *Inland Revenue Act, No 24 of 2017* is not listed in the Schedules to the Tax Appeals Commission Act but the Commission is conferred jurisdiction to hear and determine a case by virtue of the explicit provisions contained in the *Inland Revenue Act, No 24 of 2017*. However, the *Inland Revenue Act, No 24 of 2017* makes no reference to the Tax Appeals Commission Act and does not provide a definition of the term Tax Appeals Commission. It is up to the taxpayer to assume that the term refers to the Tax

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<sup>60</sup>Section 139 (7) of the *Inland Revenue Act, No 24 of 2017*.

<sup>61</sup>Section 140 (2) (b) of the *Inland Revenue Act, No 24 of 2017*.

<sup>62</sup>Section 140 of the *Inland Revenue Act, No 24 of 2017*.

<sup>63</sup>Section 140 (3) and 141 of the *Inland Revenue Act, No 24 of 2017*.

<sup>64</sup>*Tax Appeals Commission Act, No 23 of 2011* (as amended).

Appeals Commission constituted under the Tax Appeals Commission Act, No 23 of 2011 (as amended).

Under the Tax Appeals Commission Act it is only possible to make an appeal to the Commission if there is a determination from the Commissioner General of Inland Revenue in relation to the enumerated statutes. It is not possible to appeal when there is no determination, albeit the Inland Revenue Act, No 24 of 2017 makes specific provision for same. There is also the logistical difficulty of having to presume that the decision was against the taxpayer and to visualise grounds of appeal. The taxpayer who appeals to the Tax Appeals Commission also has to make a non-refundable payment of 10% of the tax in dispute or make a refundable payment or provide a bank guarantee for 25% of the tax in dispute. None of these costs need be incurred by the taxpayer if the administrative review function had been properly performed in the first place. Previously, the Commissioner General of Inland Revenue was given a period of two years to make a determination relating to an appeal and if he/ she failed to do so the appeal was deemed to have been allowed.<sup>65</sup> This statutory sanction was salutary since it safeguarded a taxpayer's right to due process. However, the new Act punishes the taxpayer for bureaucratic delay and compels him/ her/it to bear the cost of escalating an appeal without having the benefit of a statutory adjudication.

Under the new Act either party is permitted to appeal to the Court of Appeal even if an appeal has been made to the Tax Appeals Commission and no response has been received within ninety

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<sup>65</sup> Vide section 165 (14) of the *Inland Revenue Act, No 10 of 2006* (as amended).

days.<sup>66</sup> Under the Tax Appeals Commission Act an appeal can only be made to the Court of Appeal by way of a stated case on a question of law arising for the opinion of the court.<sup>67</sup> The case must include the determination of the Tax Appeals Commission. It is difficult to imagine how a case can be prepared or questions of law formulated if there is no decision from either the Commissioner General of Inland Revenue or the Tax Appeals Commission in respect of an appeal against an assessment. The Act imposes no sanction on the Department of Inland Revenue or the Tax Appeals Commission for refusing to perform its statutory duty on time. Furthermore, the Commissioner General of Inland Revenue is permitted a right of appeal even if he/ she has made no decision in the first place and the Tax Appeals Commission has ruled against him/ her or the Tax Appeals Commission has made no decision at all.

The present law appears to reward the Inland Revenue for tardiness and has the effect of rapping the taxpayer on his knuckles for invoking the Appellant provisions of the Act. The Act makes no reference to a right to appeal to the Supreme Court from the decision of the Court of Appeal by way of Special Leave to Appeal. It could be argued that this is a right conferred under the Constitution and that there is no need to make specific reference to this right in a statute.<sup>68</sup> However, previous Inland Revenue

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<sup>66</sup> Vide section 144 (2) (b) of the *Inland Revenue Act, No 24 of 2017*.

<sup>67</sup>Section 11A of the *Tax Appeals Commission Act, No 23 of 2011* (as amended).

<sup>68</sup> Vide Article 128 of the Constitution.

statutes<sup>69</sup> and the Tax Appeals Commission Act<sup>70</sup> made explicit reference to this right.

The cumulative effect of such cascading sanctions is to increase the possibility of settling a tax dispute by having recourse to bribery or corruption. It is perhaps in this context that for the first time a very stringent penalty regime has been introduced for tax officials for failing to carry out the provisions of the Act by taking a payment, reward or other benefit.<sup>71</sup> It is a disgrace for the Revenue Officers of the state and an affront to their dignity for such a provision to be specifically included in the Revenue Statute. The bribery and corruption laws of Sri Lanka are more than adequate to deal with this issue. However, the incorporation of this provision is an explicit statutory acknowledgement of bribery and corruption at the Department of Inland Revenue. It is also an acknowledgment of the excessively oppressive character of the statute.

The Act also makes it an offence to impede tax administration.<sup>72</sup> This is not an unusual provision as previous revenue statutes had similar provisions.<sup>73</sup>

This overall evaluation of the Appellate provisions of the new Act shows that it is draconian, leaves much to be desired and cannot

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<sup>69</sup>See, e.g., section 170 (9) of the *Inland Revenue Act, No 10 of 2006* (as amended).

<sup>70</sup>Article 11A (9) of the *Tax Appeals Commission Act, No 23 of 2011* (as amended).

<sup>71</sup>Section 192 of the *Inland Revenue Act, No 24 of 2017*.

<sup>72</sup>Section 190 of the *Inland Revenue Act, No 24 of 2017*.

<sup>73</sup>See, e.g., Chapter XXIX of the *Inland Revenue Act, No 10 of 2006* (as amended).

be justified in a society committed to the rule of law and principles of good governance.

## **9. Interest, Penalties and Charges**

The new Act makes provision to pay interest to taxpayers where there is a refundable amount.<sup>74</sup> The interest rate will be one half (0.5%) per cent per month compounded. This is less than what a commercial bank pays a depositor. However, obtaining a refund from the Inland Revenue will be akin to finding the proverbial pot of gold at the end of the rainbow!

Where there has been an underpayment of income tax in general, the interest charged will be three times what a taxpayer will receive as interest for a refund (one and a half per cent per month compounded — 1.5%).<sup>75</sup> This means that a taxpayer who has been assessed and makes an appeal to the Commissioner General of Inland Revenue – which is not heard - and an appeal to the Tax Appeals Commission – which is also not heard – and, then, appeals to the Court of Appeal has already incurred interest at the rate of 1.5 % per month compounded for a minimum period of six months. Thereafter, when the appeal is pending in the Court of Appeal or Supreme Court the taxpayer continues to incur an interest cost of 1.5% per month compounded.

In such a context when an assessment is made it is cheaper for the taxpayer to obtain a bank loan and pay the tax because the bank will charge a lower rate of interest than the amount payable under the new Inland Revenue Act. If the Court ultimately holds in

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<sup>74</sup>Section 158 of the *Inland Revenue Act, No 24 of 2017*.

<sup>75</sup>Section 157 of the *Inland Revenue Act, No 24 of 2017*.

favour of the taxpayer and the amount is not due the taxpayer will be entitled to a refund and perhaps compound interest.

The Act provides that where tax is due and not paid it is considered to be a tax in default.<sup>76</sup> A delinquent taxpayer, in addition to being liable to pay tax in default, will also be subject to penalties,<sup>77</sup> interest compounded monthly,<sup>78</sup> and possibly penal sanctions.<sup>79</sup> The new default tax regime is excessively oppressive and vicious.

## 10. Conclusion

The new Inland Revenue Act has certain salutary features. We are still having teething problems with this new Act since it was rushed through the Parliament without adequate, meaningful and robust consultation and discussion. Taxpayers, tax advisors and tax officers have not had adequate time to understand the implications of many of the relevant statutory provisions and their application in practical situations. The Internal Revenue Manual was made available to taxpayers after the Act had come into force.

Whilst it is true that the new Inland Revenue Act is likely to bring a great deal of money into the state coffers in the short term, it is very unlikely that this state of affairs can be sustainable over the long term. The current tax policy will not make us prosperous as a nation. Sir Winston Churchill once said “I contend that for a nation to tax itself into prosperity is like a man standing in a bucket and trying to lift himself up by the handle.” My own view is that

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<sup>76</sup>Section 152 of the *Inland Revenue Act, No 24 of 2017*.

<sup>77</sup>Sections 176 – 185 of the *Inland Revenue Act, No 24 of 2017*.

<sup>78</sup> Section 157 and section 159 of the *Inland Revenue Act, No 24 of 2017*.

<sup>79</sup> Section 186 (criminal proceedings), section 187 (aiding and abetting) and section 189 (tax evasion) of the *Inland Revenue Act, No 24 of 2017*.

taxation is necessarily a fall out of economic growth and if there is national prosperity, tax revenues will automatically grow. The theory is that a large tree with overarching branches and exposure to adequate sunlight gives a bountiful harvest in comparison to a small tree which has had its branches chopped off. Furthermore, tax legislation must be consistent with the imperatives demanded by the rule of law if Sri Lanka is to continue to be recognised as a democratic state.



## SCHEDULE I

### **UN Conventions on Human Rights Environmental treaties & International Conventions on Terrorism signed, ratified or acceded to by Sri Lanka as at 31st December 2017**

*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

*Cartagena Protocol on Bio Safety*

Acceded on 26 July 2004

*UN Convention on Biological Diversity*

Acceded on 23 March 1994

*UN 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 6<sup>th</sup> September 2000

*International Convention against the Taking of Hostages*

Acceded on 8 September 2000

*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 8 September 2000

*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*

Ratified on May 2016

*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

*Optional Protocol to the Convention against Torture (OPCAT)*

Acceded on 05 December 2017

*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 11 as amended on 03 May 1996) annexed to the Convention on Prohibitions or Restrictions on Use of certain Conventional Weapons*

Acceded on 24 September 2004

*Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children – Supplementing the United Nations Convention against Transnational Organised Crime*

Signed on 15 December 2000

*Protocol on Prohibitions and Restrictions on the use of Mines, Booby-traps and Other Devices (Protocol 11 as amended on 03rd May 1996) annexed to the Convention on Prohibitions or Restrictions on Use of certain Conventional Weapons*

Acceded on 24 September 2004

*The Ramsar Convention on Wetlands*

Acceded on 15 October 1990

*United Nations Convention against Transnational Organised Crime*

Signed on 15 December 2000

*United Nations Convention on the Law of the Sea*

Acceded 19 July 1994

*Vienna Convention on Consular Relations*

Acceded on 4 May 2006

*Vienna Convention for the Protection of the Ozone Layer*

Acceded 15 December 1989

## SCHEDULE II

### ILO Conventions Ratified by Sri Lanka as at 31 December 2017

<i>No</i>	<i>Convention Name</i>	<i>Ratified Date</i>	<i>Present Status</i>
<i>C4</i>	<i>Night work (Women ) Convention, 1919</i>	<i>08.01.1951</i>	<i>Denounced</i>
<i>C5</i>	<i>Minimum Age (Industry) Convention, 1919</i>	<i>27.09.1950</i>	<i>Denounced</i>
<i>C6</i>	<i>Night Work of Young Persons (Industry) Convention, 1919</i>	<i>26.10.1950</i>	<i>Denounced</i>
<i>C7</i>	<i>Minimum Age (Sea) Convention, 1920</i>	<i>02.09.1950</i>	<i>Denounced</i>
<i>C8</i>	<i>Unemployment Indemnity (Shipwreck) Convention, 1920</i>	<i>25.04.1951</i>	
<i>C10</i>	<i>Minimum Age (Agriculture) Convention, 1921</i>	<i>29.11.1991</i>	<i>Denounced</i>
<i>C11</i>	<i>Rights of Association (Agriculture) Convention, 1921</i>	<i>25.08.1951</i>	
<i>C15</i>	<i>Minimum Age (Trimmmers &amp; Stockers) Convention, 1921</i>	<i>25.04.1951</i>	<i>Denounced</i>
<i>C16</i>	<i>Medical Examination of Young Persons (Sea) Convention, 1921</i>	<i>25.04.1950</i>	

C18	<i>Workmen's Compensation (Occupational Diseases) Convention, 1925</i>	17.05.1952	
C26	<i>Minimum Wage Fixing Machinery Convention, 1928</i>	09.06.1961	
C29	<i>Forced Labour Convention, 1930</i>	05.04.1950	
C41	<i>Night Work (Women) Convention (Revised), 1934</i>	02.09.1950	<i>Denounced</i>
C45	<i>Underground Work (Women) Convention, 1935</i>	20.12.1950	
C58	<i>Minimum Age (Sea) Convention (Revised), 1936</i>	18.05.1959	
C63	<i>Convention concerning Statistics of Wages and Hours of Work, 1938</i>	25.08.1952	<i>Denounced</i>
C80	<i>Final Articles Revision Convention, 1946</i>	19.09.1950	
C81	<i>Labour Inspection Convention, 1947</i>	03.04.1950	
C87	<i>Freedom of Association and Protection of the Right to Organise Convention, 1948</i>	15.11.1995	
C89	<i>Night Work (Women) Convention (Revised), 1948</i>	31.03.1966.	<i>Denounced</i>

C90	<i>Night Work of Young Persons (Industry) Convention (Revised), 1948</i>	18.05.1959	
C95	<i>Protection of Wage Convention, 1949</i>	27.10.1983	
C96	<i>Pre-charging Employment Agencies Convention (Revised), 1949</i>	30.04.1958	
C98	<i>Rights to Organise and Collective Bargaining Convention, 1949</i>	13.12.1972	
C99	<i>Minimum Wage Fixing Machinery (Agriculture) Convention, 1951</i>	05.04.1954	
C100	<i>Equal Remuneration Convention, 1951</i>	01.04.1993	
C103	<i>Maternity Protection Convention (Revised), 1952</i>	01.04.1993	
C105	<i>Abolition of Forced Labour Convention, 1957</i>	07.01.2003	
C106	<i>Weekly Rest (Commerce and Offices) Convention, 1957</i>	27.10.1983	
C108	<i>Seafarers' Identity Documents Convention, 1958</i>	24.04.1995	

C110	<i>Conditions of Employment of Plantation Workers Convention, 1958</i>	24.04.1995	
C111	<i>Discrimination (Employment and Occupation) Convention, 1958</i>	27.11.1998	
C115	<i>Radiation Protection Convention, 1960</i>	18.06.1986	
C116	<i>Final Articles Revision Convention, 1961</i>	26.04.1974	
C131	<i>Minimum Wage Fixing Convention, 1970</i>	17.03.1975	
C135	<i>Worker's Representatives Convention, 1971</i>	16.11.1976	
C138	<i>Minimum Age for Admission to Employment, 1973</i>	11.02.2000	
C144	<i>Tripartite Consultations to Promote the Implementation of ILO Convention, 1976</i>		
C160	<i>Labour Statistics Convention, 1985</i>	01.04.1993	

### **SCHEDULE III**

#### **Humanitarian Law Conventions Ratified by Sri Lanka as at 31st December 2017**

*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 and Humanitarian Instruments NOT Ratified by Sri Lanka as at 31<sup>st</sup> December 2017**

*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)*

*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 11)- 8 June 1977 (date of adoption), 7 December 1978 (entered into force)*

*Protocol to the Convention relating to the Status of Refugees* - 16 December 1966  
(date of adoption), 4 October 1967 (entered into force)

*Rome Statute of the International Criminal Court (ICC)* – 17 July 1998 (date of  
adoption), 1 July 2002 (entered into force)

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*Cokeman v. Attorney General* SC (FR) 136/2014, Supreme Court Minutes 15 November 2017

*De Silva v. Prime Minister, Ranil Wickremasinghe* SC (FR) 308/2015, Supreme Court Minutes 22 February 2017.

*De Silva v. Principal and Chairman Interview Board, Dharmashoka Vidyalaya Ambalangoda, Parakramawansa* SC (FR) 50/2015, Supreme Court Minutes 2 August 2017.

*Dharmasuriya v. Mahaveli Authority of Sri Lanka* SC (FR) 330/2015, Supreme Court Minutes 9 January 2017.

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*Gunasekara v. Sub Inspector Athukorala, Meetiyagoda Police Station* SC (FR) 126/2008, Supreme Court Minutes 11 July 2017.

*Mendis v. Director General, Rubber Department, Premadasa* SC (FR) 32/14, Supreme Court Minutes 16 June 2017.

*Muhammed v. Election Commissioner of Sri Lanka* SC (FR) 35/2016, Supreme Court Minutes 15 December 2017.

*Naidos v. Inspector Damith, Moratuwa* SC (FR) 608/2008, Supreme Court Minutes CM 19 January 2017.

*Nandasiri v. N. A. T. Jayasinghe, Assistant Superintendent, Special Investigation Unit, Police Headquarters* SC (FR) 12/2012, Supreme Court Minutes 4 August 2017, 8.

*Perera v. IGP Ilangakoon* SC (FR) 372/2015, Supreme Court Minutes 17 November 2017.

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*Saman v. Principal, Dharmashoka Vidyalaya Ambalangoda, Weththemuni* SC (FR) 43/2017, Supreme Court Minutes 05 December 2017.

*Sivarajah v. OIC, TID* SC (FR) 15/2010, Supreme Court Minutes 27 July 2017.

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*Wijesekara v. Principal, Maliyadeva Balika Vidyalaya, Kurunegala* SC (FR) 05/2017, Supreme Court Minutes 31 October 2017.

*Sabar v. University of Moratuwa* SC (FR) 424/2013, 427/2013, Supreme Court Minutes 2 February 2017.

*Mendis v. Premadasa, Director General, Rubber Department,* SC (FR) 32/14, Supreme Court Minutes 16 June 2017.

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*Bandara v. National Gem and Jewellery Authority* SC (FR) 118/2013, Supreme Court Minutes 13 December 2017.

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*Jayaweera v Fernando* SC (FR) 484/2011, Supreme Court Minutes 16 January 2017.

*Thavarajanie v Kanaganayagam, Acting Principal College of Nursing Ampara*, SC (FR) Special 04/2014, Supreme Court Minutes 4 August 2017.

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