

## Chapter 7 Sri Lanka

# Examining the Weave

*The Law and Society Trust\**

### Introduction

Minorities in Sri Lanka are typically classified along reductive ethno-religious lines, identifying as Sinhalese (74.9%), Tamil (15.3%), Sri Lankan Moor (9.3%), and other minority groups (0.5%), including Dutch-Burgher, Malay, Sri Lankan Chetty, and indigenous groups such as the Veddhas (Sri Lanka Department of Census and Statistics 2012). The religious classifications are Buddhist (70.1% of the population), Hindu (12.6%), Islam (9.7%), Roman Catholic (6.2%), and other groups accounting for 1.4%. Since the overlap of ethnic and religious identities is so strong, such classifications are arguably reductive and fail to capture the contentious issue – especially patterns of discrimination, which occur between and across these classification lines. Moreover, although the Constitution prohibits discrimination based on caste and descent, and on the surface such discrimination isn't visible, in practice the caste system is a part of the consciousness of the population, with a reported 90% (Silva et al 2009) recognising it to some extent, and the system coming into play especially with regard to employment (Minority Rights Group International 2017: paragraph 3). Livelihood, caste, heritage, and gender all inform the non-visible classifications adopted by communities (ibid.: paragraph 4), resulting in further intersectional discrimination of minority persons.

This chapter seeks to capture these dynamics through the discussion of intersections of class and political relations, access to entitlements,

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\* Law and Society Trust (LST), Colombo, is a legal research and advocacy organisation promoting legal reforms for access to justice, justiciability of rights and public accountability. Widya Kumarasinghe, the writer is thankful to Dinushika Dissanayake, the former Executive Director of LST, for her input and contribution; and to Azra Jiffry, Uda Deshapriya, Megara Tegal and the research team at LST for their notes and contributions. Earlier versions of this chapter were designed by the then Head of Research, Vijay Nagaraj, who sadly passed away in August 2017. The writer and team at LST remember him with warmth and gratitude.

the public's ethnicised narratives pertaining to economic power and resources, and the link between these dynamics and violence.

The chapter was primarily informed by secondary material due to constraints on time. It draws quantitative data from the Household Income and Expenditure and Labour Force surveys, and, wherever relevant, also includes discussion of relevant laws, jurisprudence, policies, and regulations.

## **Commitments towards protecting the socio-economic rights of minorities**

### **Constitutional, International and Policy Commitments**

In 2016 the Parliament of Sri Lanka formed a Constitutional Assembly for the purpose of drafting a new Constitution with a comprehensive Bill of Rights. The sub-committee on fundamental rights affirmed the positive consideration given to socio-economic rights as justiciable rights in the constitution, noting in addition that these recommendations were also included in the Constitutional Bill and proposals of 2009.<sup>1</sup> The sub-committee report recommended a series of rights to this effect, including the right to education, the right to health, and social rights such as the right to clean water and sanitation, sufficient food and nutrition, adequate housing and shelter, appropriate social protection, and decent employment. The Public Representations Committee (PRC) of the Constitutional Assembly is presently discussing the reports of six such sub committees.

In January 2017 Sri Lanka also adopted the National Human Rights Action Plan (NHRAP) for 2017–2021, which contains a chapter on economic, social, and cultural rights.

The Constitution of Sri Lanka (adopted in 1978 and amended up to 2015) pledges to eradicate illiteracy and ensure that all persons have the right to universal and equal education at all levels. The Education Ordinance of 1939 provides the framework on equality in education, and the Education Act of 1945 introduced free education and instruction in the mother language from pre-school to university level (CESCR 2017: 1). The Regulation

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1. The reports of sub-committees can be found at [http://english.constitutionalassembly.lk/index.php?option=com\\_content&view=article&id=126:interim-report&catid=9:uncategorised&Itemid=437](http://english.constitutionalassembly.lk/index.php?option=com_content&view=article&id=126:interim-report&catid=9:uncategorised&Itemid=437)

on Compulsory Education (1997) was enforced to ensure that children aged 5–14 attend school (ibid: 1). However, these provisions do not award legal rights or protections within the Constitution, and are therefore not enforceable in a court or tribunal.

In 2016 the government of Sri Lanka also adopted a National Plan of Action (NPA) for the socio-economic development of the upcountry Tamil/Malaiyaha Makkal community for 2016–2020, particularly addressing housing, including establishing 56,000 individual houses with land ownership; water supply and sanitation; health and nutrition; primary and secondary education; skills development and vocational training; and improving the governance systems around this community. The Estate Health Infrastructure Project 2015–2017 also made budgetary allocations to improve hospitals in areas predominantly populated by the upcountry Tamil community.

The criminalisation of same-sex sexual relationships between consenting adults under sections 365 and 365a of the Sri Lanka Penal Code<sup>2</sup> remains the foremost discrimination affecting LGBT+ persons in Sri Lanka. While there have been no convictions under this section since 1948,<sup>3</sup> it has the effect of perpetuating harassment, violence and discrimination towards LGBT+ individuals.

Article 12 (2) of the present Constitution stipulates that ‘no citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds’. This list is clearly not exhaustive and could include sexual orientation as a ground for non-discrimination. Additionally, the sub-committee on Fundamental Rights of the Constitutional Assembly suggested a formulation including ‘sexual orientation’ as a ground on which arbitrary discrimination cannot occur.<sup>4</sup> Moreover,

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2. Section 365 refers to ‘carnal intercourse against the order of nature’ (which is widely understood to apply to same-sex sexual acts) and section 365a criminalises ‘any act of gross indecency with another person’.
  3. With the exception of one case, where the Supreme Court upheld the conviction on the grounds of the law but treated the convicted person’s sentence as suspended in acknowledgement of the private nature of the act. See: [http://www.supremecourt.lk/images/documents/sc\\_appeal\\_32\\_11.pdf](http://www.supremecourt.lk/images/documents/sc_appeal_32_11.pdf)
  4. ‘No person shall be arbitrarily discriminated against on any ground including race, gender, sex, sexual orientation, gender identity, maternity, marital status, parental status, caste, ethnic or social origin, age, disability, religion, conscience or belief, political or other opinion, culture, language, place of birth or place of residence.

the abovementioned NHRAP 2017–2021, adopted by the GoSL in January 2017, also recommended that the Penal Offences be reviewed to ‘ensure that they are in compliance with international human rights standards and bring legislation where necessary’.

‘Gross indecency’ in section 365a is not defined by the law or in common law but is understood to target acts of affection or sexual acts between two individuals of the same sex. The term being open to interpretation by police officers, judges and prosecutors has allowed abuse of this section (Equal Ground and Center for International Human Rights (CIHR) of Northwestern Pritzker School of Law 2017), extending to incidents of sexual abuse being committed by police officers themselves (ibid: 4).

Section 399 of the Penal Code, which makes it a criminal offence to ‘cheat by personation’, is often used by the police to harass LGBTIQ persons, especially transgender individuals (Human Rights Watch 2016: 16). Further, the Vagrants Ordinance, which prohibits soliciting or committing acts of ‘gross indecency,’ or being ‘incorrigible rogues’ gaining ‘illicit or unnatural intercourse,’ while mostly used to arrest and harass women engaging in sex work, is also engaged to target LGBTIQ individuals (Equal Ground and Center for International Human Rights (CIHR) of Northwestern Pritzker School of Law 2017: 3).

## **Sri Lanka’s Performance on Socio-economic Rights with Respect to Minorities**

### **Assessing Efforts Using Data – a Difficulty**

The domination of a political and civil rights narrative has effectively left out socio-economic rights-based assessment of statistics. The non-existence of this data hides existing violations of socio-economic rights along ethno-religious lines, which in turn has limited the understanding of the ethno-religious tensions that emerge from time to time, causing them to be attributed solely to ethnicity and religion.

### **Health**

Health statistics with regard to ethnic minorities are not available in Sri Lanka. Deductions must be made through general health indicators, including the availability of health personnel and infrastructure at the district level. The districts specifically identified in this chapter are those with a higher

density of minorities. These same districts were also most significantly affected by the civil war.

### **Maternal and Infant Mortality and Health**

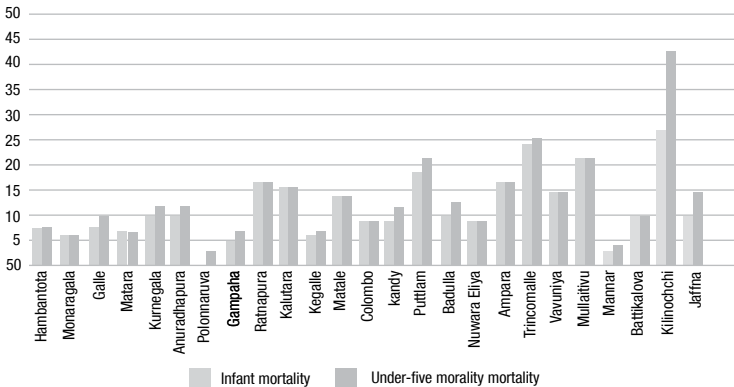
The topics of maternal and infant health and of nutrition offer particularly insightful perspectives on the health status of minorities, especially given that national indices in this area are a great source of pride to the Sri Lankan state.

Although Sri Lanka’s overall health indices have improved, districts with high numbers of minorities demonstrated the highest infant, maternal, and related mortality rates in 2016.

The Sri Lanka Demographic and Health Survey of 2016 (SLDHS) reported the highest rate of under-five mortality in the Kilinochchi district at 44 per 1000 live births in the ten years prior to SLDHS 2016, followed by Trincomalee, Mullativu, and Puttlam at a mortality rate of 26, 22, and 22 per 1000 live births respectively (Department of Census and Statistics 2016). The highest infant mortality rates were reported in same districts: Kilinochchi (28 per 1000 live births), Trincomalee (25), Mullaitivu (22) and Puttlam (19) (Figure 1).

Statistics considered by sector of residence reflect that the estates, where a majority of the population are Tamils of Indian origin/Malaiyaha

**Figure 1: Infant mortality rate and under-five mortality rate by district**



(Data source: Demographic and Health Survey of 2016)

Malkal origin, have a higher under-five mortality rate (15 per 1000 live births) than urban or rural areas (11 and 12 respectively) (Figure 2). However, these rates have declined by nearly half in the estate and rural sectors since the SLDHS in 2006/2007.<sup>5</sup>

Additionally, the level of education of the mother also demonstrated an effect on these indices (Figure 3).

The under-five mortality rate is higher for mothers with education only up to Grade 5 (14 per 1000 births) than mothers with higher education (6 per 1000 births). The poorest households reported a higher rate of mortality than the richest households (17 and 9 per 1000 births).

### ***Disparities in Resource and Health Personnel Allocation***

These indices may be explained by the distribution of health personnel in these districts, particularly with respect to preventive services concerning maternal care. The highest number of medical officers per 100,000 population is in the Colombo district (Figure 4) (Ministry of Health 2015: 6–7).

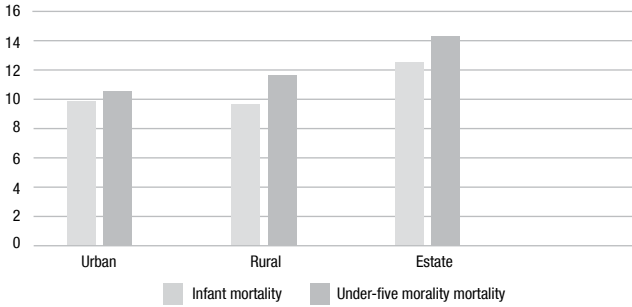
Medical officers appointed centrally through the ‘Line Ministry’ are not present in Vavunia, Mannar, Kilinochchi and Mullaitivu, and these districts consequently report the lowest district-wise presence of medical officers: 130 officers in Vavunia, 83 in Mannar, 88 in Kilinochchi and only 64 in Mullaitivu (ibid: 6). A similar trend is demonstrated in the distribution of nursing staff as well, with the same districts also having the lowest numbers of provincial nursing staff – 188 in Vavunia, 150 in Mannar, 65 in Killinochchi, and 44 in Mullaitivu (Figure 5) (ibid: 9)

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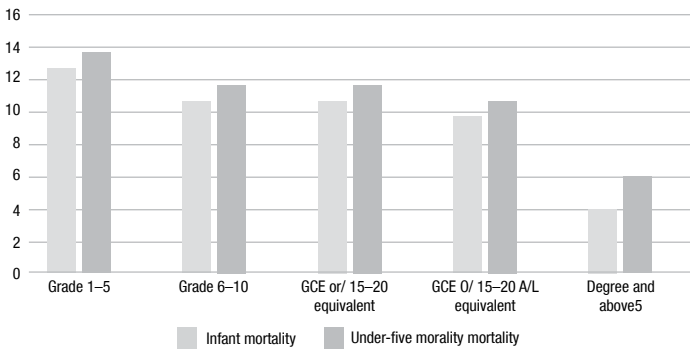
5. The SLDHS reported an under-five mortality rate of 33 per 1000 live births in the estate sector and 23 per 1000 in the rural sector in 2006/2007 (Department of Census and Statistics 2007: 106).

**Figure 2: Infant mortality rate and under-five mortality rate by sector of residence**



(Data source: Demographic and Health Survey of 2016)

**Figure 3: Infant mortality rate and under-five mortality rate by mother's education level**



(Data source: Demographic and Health Survey of 2016)

The lowest numbers of public health midwives are documented in Mullaitivu (51), Kilinochchi (60), Vavunia (90) and Mannar (108). The lowest numbers of public health inspectors are documented in Nuwara Eliya (28), Killinochchi (17), Mullativu (18), Mannar (21), Vavunia (22) (Figure 6).

***A case study: Health in situations of direct exposure to the civil war***

A study by the Family Health Bureau and the Ministry of Health (2009) on the health conditions of people internally displaced by the civil war is able to offer data on a particular ethnic minority, and on a population of people

directly exposed to the civil war. The families studied were originally from Mullaitivu and Killinochchi districts, and then resettled in Trincomalee and Vavuniya districts (ibid: 9). In the early phases of evacuation in May 2009 the level of mortality was 0.7 per 10,000 persons per day; by June 2009 this reduced to 0.5 per 10,000. For reference, according to Sphere Project guidelines, the baseline for mortality in emergency situations in South East Asia is 0.25 per 10,000 per day, and the emergency threshold is 0.5 per 10,000 per day (ibid: 7).

An interesting pattern was found when analysing the ages of children against a monthly age distribution between March and December 2009: there was an increase in infants conceived during the August to September period, which was the most peaceful time in the nine month period (March to July was the most volatile due to evacuation, and resettlement began in October, unsettling the population for a second time during this period). This data suggests that people are more likely to reproduce when they are settled (ibid: 31).

The study also found that the overall dependency ratio of 65.2% among the war-affected sample population was much higher than the national average of 55.1% (ibid: 19).<sup>6</sup> The ratio reflects the burden that has to be assumed by the working population to provide for the needs of the dependent population. Sri Lanka is enjoying a demographic window in which it is experiencing the lowest dependency ratio in its history; however, the study population demonstrated a relatively high ratio, explained by the loss of lives in the productive population as a result of the war.

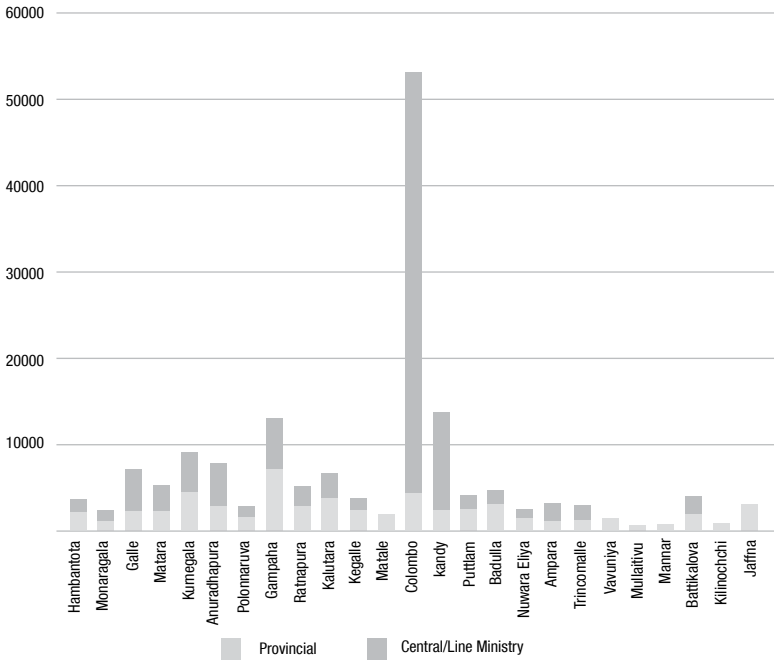
An alarming one fifth of infants (19%) in the study population were born underweight, out of which 4% were severely underweight (ibid: 32). Low birth weight poses a critical risk to child survival and development. Furthermore, 48.9% of infants studied were found to be anaemic (ibid: 34). An uncontrolled flow of formula feeds distributed to welfare villages was a major concern among healthcare workers due to the health risks it poses during infancy. Despite a special campaign to discourage the use of formula feeds, 33.9% of infants were formula fed in the early months of infancy. The prevalence of malnutrition in children was 35.6% in May 2009; this was brought down to 23.9% by August 2009 through the joint nutrition rehabilitation interventions of the Ministry of Health and UNICEF.

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6. The dependency ratio is the ratio of dependent population (0–14 years and 65 years and over) to working (productive) age population (15–65 years).



**Figure 4: Distribution of Medical Officers by District**



(Data source: Human Resource Profile – Ministry of Health 2015)

## Food Security and Nutrition

Sri Lanka demonstrates alarming statistics in food security and nutrition, with an estimated 5.2 million people considered undernourished (World Food Programme, GoSL and SAPRI 2017: 2). Ethnic minorities living in the estate sector, districts affected by the war, and farming areas such as the northern mixed and south-eastern rain-fed areas demonstrate the worst levels of under-nutrition. Rural and low-income households are also at risk, demonstrating a predictable link between poverty, food security and nutrition.

Sri Lanka was ranked 85 out of 118 countries in the Global Hunger Index (GHI) and 65 out of 113 countries in the Global Food Security Index (GFSI). The Global Nutrition Report also places Sri Lanka as a country with one of ‘the highest “wasting” prevalence in the world’ with a ranking of 128 out of 130 countries (World Food Programme 2017, as cited in World Food Pro-

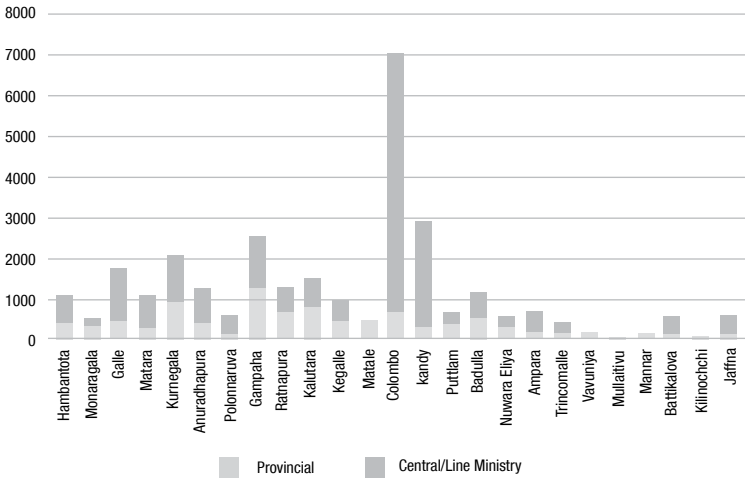
gramme, GoSL and SAPRI 2017: 2). A national nutrition and micronutrient survey by the Medical Research Institute reports that wasting has increased to 19.6% in 2012 from 11.7% in 2009, revealing a serious concern regarding public nutrition (World Food Programme, GoSL and SAPRI 2017: x). Killinochchi and Monaragala districts reported the highest rates of wasting at 34.9% and 28.8% respectively (ibid: 12).

A survey of 25 districts in 2012 showed high levels of acute malnutrition, ranging from 14–35%, with huge regional disparities. Low Birth Weight rates are reported to have remained ‘stagnant over the last decade, with almost 1 in 5 (18%) newborns in Sri Lanka having a low birth weight, indicating a vicious cycle of malnutrition and the need for improved maternal nutrition’ (ibid: 12). The level of stunting was reported to be three times higher in estate sector children than in children in urban areas (23.8% in Nuwara Eliya and 22.3% in Badulla versus 8% in Colombo), and two times higher in the poorest quintile than the wealthiest quintile (18% versus 9%) (ibid: 12). Data from the Household Income and Expenditure Survey (HIES) reports that households headed by ‘agricultural or non-agricultural labourers’, ‘skilled agriculture workers’, and ‘persons who are disabled or too old to work’ are the poorest in Sri Lanka (ibid: 16).

The lack of organisation and the political environment in national food production has caused instability in food production and prices (IPS 2008, as cited in World Food Programme, GoSL and SAPRI 2017: 18). Intra-district distribution of food stocks and patronage networks extending from administrative centres may also be a factor affecting access to food, despite food being available at a National level. Additionally, poor infrastructure for distribution including the lack of storage, and refrigeration facilities also hinder the distribution of food produced rurally by farmers, contributing to low productivity, income, poverty, and further food insecurity.

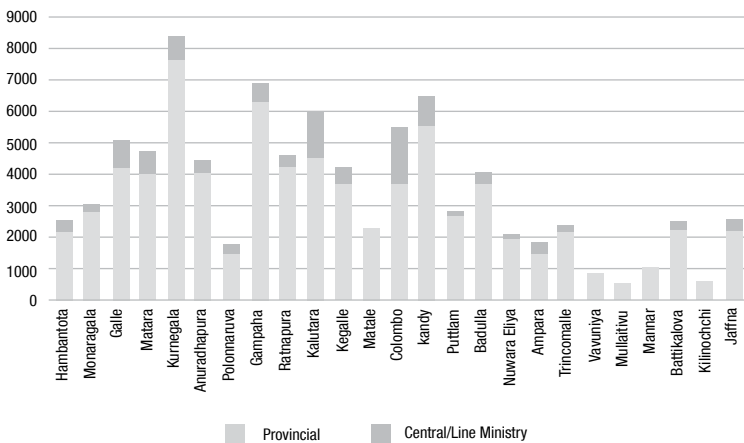
Samurdhi Welfare programmes launched in 1995 by the state sought to improve the socio-economic conditions of those living under impoverished conditions but has been criticised for the misallocation of resources, and failure to identify sectors of the population in need of support. The Samurdhi dry ration programme benefited 105 families in 2007 by distributing Rs. 1.2 billion; in 2012 this funding was reduced to Rs. 54 million (Central Bank of Sri Lanka 2012: 93). The nutrition programme which benefited 102,020 families through the distribution of Rs.594 million in 2007 was cut down to Rs. 250 million being distributed among 55,299 families. While funding is supposed to have shifted to livelihoods programmes supporting

**Figure 5: Distribution of Nursing Staff by District**



(Data source: Human Resource Profile – Ministry of Health 2015)

**Figure 6: Distribution of Public Health Midwives by District**



(Data source: Human Resource Profile – Ministry of Health 2015)

home gardening, animal husbandry, and cottage industries, the cut back in welfare payments towards nutrition and dry rations to already impoverished households is likely to have had a significant negative effect in the nutrition levels in the population depending on the Samurdhi welfare programmes (Glinskaya and The World Bank 2003).

Physical access to food and markets due to poor condition of roads and infrastructure is also a challenge. The Northern and Eastern provinces face road accessibility issues, and the quality and width of roads affect physical access to food markets especially in the Estate sector (World Food Programme, GoSL and SAPRI 2017: x). An important observation from the 2017 report is that areas with the highest rates of poverty also demonstrated poor road access.

Moreover, only 50% of the landmass in Sri Lanka is considered arable due to forest conservations, inland water bodies, and unsuitable terrain. Issues with policy concerning land, the market for land, and competition for limited arable land further affect food production. Moreover, the competition for arable land also appears to be an underlying insecurity in racially charged controversies and violence.

The Sri Lankan Military has been using the Land Acquisition Act of 1950 and the Strategic Development Act of 2008 to bring land under their control (MRG, IMADR and WDI 2017: paragraph 6). The former allows for the seizure of land for undefined and ambiguous ‘public purposes’. Vast amounts of land in the north and east are occupied as military camps, dispossessing local Tamil communities. The land is also used for commercial purposes by the military, including the practice of selling such land for the building of hotels (Human Rights Watch 2018 and Sri Lanka Brief 2018), which has been particularly harmful to local fishing communities losing access to the sea. The militarization of land in the North and East, despite some efforts by the present *‘Yahapalayana’* government to return such land, continues to be a source of displacement, loss of livelihoods and poverty, and tensions affecting minority communities. The continued displacement of these minority communities is a violation of Article 11 of the International Covenant on Economic, Social, and Cultural Rights (CESCR 2009).

## **Education**

There are no statistics analysing secondary education from the perspective of ethnicity to ascertain any disparities affecting minorities, and the

additional lack of district level statistics on schools also makes it difficult to make deductions regarding minorities based on regional demographics.

A study commissioned by the National Education Commission (Ranasinghe et al 2016) identified that the demand for general education will remain constant with no increase or decrease in social demand in the next decade. These findings confirmed that the new education sector development plan should focus on improving the quality of existing schools rather than increasing the number of schools (ibid: 21–22).<sup>7</sup>

Regional disparities in the availability of schools, trained personnel, and resources are a main drawback in Sri Lanka's secondary education system. This is evident in the statistics concerning schools where both the highest number of AB1 schools and overall number of schools in the island are concentrated in the Western Province (Ministry of Education 2016).

According to the available population statistics, Sri Lankan Tamils are a majority in northern and eastern Provinces (Sri Lanka Department of Census and Statistics 2012). The highest numbers of Sri Lankan Moors live in eastern and north western Provinces, though they are still a minority in these districts (ibid). Schools in Mullativu, Mannar and Killinochchi (in northern provinces) suffer from a lack of electricity, water, and sanitary facilities (Ranasinghe et al 2014: 23–24). In 2012, 80% of schools in Mannar district, 75% of schools in Killinochchi district and 53% of schools in Mullativu district had no electricity and Mullativu reported the highest number of schools with 'unacceptable sanitary facilities' (11.7% in 2012 and 37% in 2005 (ibid: 24)) (Figure 7).

These same districts also have the lowest numbers of English, IT and science teachers (ibid: 29–31) (Figure 8). The continued effects of these disparities at the tertiary level is evident in Mullativu, Mannar and Killinochchi admitting the least number of students to state universities despite the z-score system being in place for the purpose of mitigating the regional disparities (ibid: 30).

The highest numbers of upcountry Tamils/Malaiyaha Makkal live in the Central and Uva Provinces, with greater concentrations in Nuwara Eli-

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7. The study stipulates an exception: 'other than re-construction of schools destroyed in war affected districts and those due to natural disasters' (ibid: 22).

ya and Matale districts in the Central Province (Sri Lanka Department of Census and Statistics 2012). Although the Central province is among the provinces with highest number of type AB1 schools (Ministry of Education 2016), these are concentrated in the Kandy district, and these facilities may not be accessible to the upcountry Tamils/Malaiyaha Makkal population, who mainly live in the estate sectors in the Nuwara Eliya district. A breakdown of statistics according to schools in the estate sector and other government schools demonstrates a significant disparity in the quality of resources available to schools in the estate sector. In 2012, 27.16% of schools in the estate sector did not have electricity, in contrast to 13.91% of the other schools on the island. 89.2% did not have a telephone (versus 67.14%), and 20.71% did not have water (versus 15.48%).

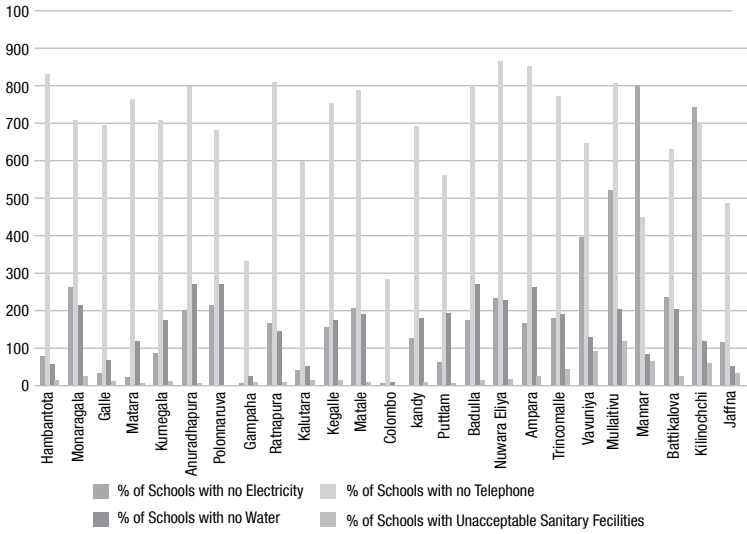
Nuwara Eliya district has 22.91% schools without provision of water, 23.09% schools without electricity, and 86.78% without telephones, according to 2012 school statistics (Ranasinghe 2016: 23) (Figure 7). Nuwara Eliya district also suffers from a lack of English, IT, and A/level science teachers while also being burdened with a high number of teachers who are not professionally trained (26.25%) in 2012 (ibid: 27). Uva Province, which reports the second highest presence of up-country Tamils/Malaiyaha Makkal, has the lowest number of Type AB1 schools (Ministry of Education 2016).

While degree of disparity between districts in the availability of facilities is significantly high, however, there is also an appreciable progress over time. Districts with the highest percentage of schools with no electricity in 2005 also demonstrated a significant reduction in this percentage by 2012: Mannar (95.79% to 80.21%), Kilinochchi (99.03% to 74.51%), Vavuniya (65.9% to 39.5%), and Trincomalee (65.52% to 17.97%) (Ranasinghe et al: 23). Mannar (8.3%), Kilinochchi (10.78%) and Mullaitivu (19.68%) reported the lowest percentage of schools with computer labs in the island, however, these are still an encouraging increase from the statistics in 2005, when the percentages were 0%, 4.85% and 6.45%, respectively.

## **Funding Towards Education – Structural Problems**

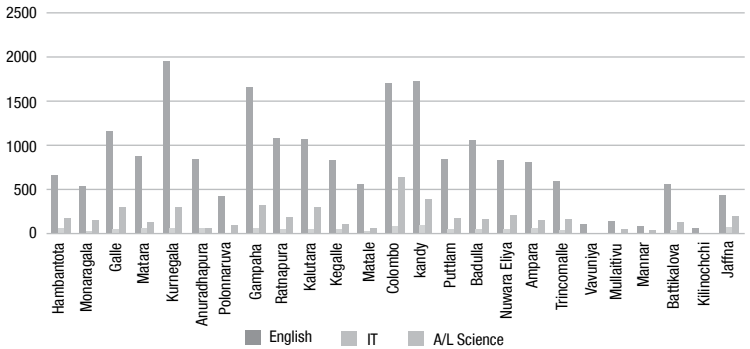
Structural problems in resource allocation and funding can be seen in the distribution of teachers across districts. While the national students to teacher ratio was 19 in 2012 and student-teacher distributions have remained consistent across the country, there are pockets of excess teachers, notably in Matara and Kandy in 2005, and Jaffna and Mullaitivu in 2012 (ibid: 27). The report also notes the lack of professionally trained teachers,

**Figure 7: Lack of Facilities in Schools by District**



(Data source: School Census – 2012)

**Figure 8: Availability of English, IT, and Advanced Level Science Teachers**



(Data source: School Census – 2012)

and in particular subject specific teachers for English, A/L Science, and IT. In 2012, there were 217 pupils per English Teacher in Colombo, and 375 pupils per English teacher in both Mannar and Kilinochchi.

Funding for schools is secured through a centralised school level committee as directed by a national circular (ibid: 41) from the government; NGOs and other organisations; and funds raised by the school itself. National schools receive all funding directly from the Ministry of Education. Provincial schools, however, receive funds through provincial education offices in the form of a Block Grant, a major portion of which is used to pay salaries, wages, and other recurring expenses.

Capital expenses to schools are provided through Provincial Specific Development Grants (PSDP), Criteria Based Grants (CBG), and the Education Quality Inputs (EQI) programme, according to a centrally determined formula in order to ensure equity in the distribution of funds. However, while the purpose of these grants is to improve the socio-economic status of the province, the inequities created by unequal resource allocation and funding actually originate here because the provinces themselves are left to decide how these funds can be allocated towards various development activities (ibid: 42).

EQI is often the only regular source of funding received by schools annually, however, these funds are reportedly not received on time or at all. The latter was the case in 2012 when the north western province was not given funds through EQI (ibid: 44). When the province receives insufficient funds for development under the EQI programme, funds allocated to education are used for other projects. This disrupts planned activities in schools and compromises quality of education schools are able to offer, and creates inequity in the quality of schools across provinces, even if they were technically allocated an equal amount of funding.

The PSDP is primarily designed to fund sector and subject specific infrastructure projects in-line with the National Development Policy Framework of the Government, and once received by the province is distributed across various sectors including education. Additionally, Parliamentarians also receive block grants through de-centralised funds such as the *manthri prathipadana* (facilitations granted for parliamentarians), which are distributed at the discretion of parliamentarians according to the needs of local schools.



## **Profile of a vulnerable minority Gender and Sexual Minorities**

The discrimination and disregard of LGBTQI+ persons through legislation, administrative infrastructure, and limitations in accessing socio-economic rights due to a lack of resources and poor policy consideration, have effectively minoritised these communities in Sri Lanka. The main contribution to the issues faced by the LGBTQI+ community in Sri Lanka is the existence (and lack of) legal instruments, which are used to further discriminate against the community.

There is no specific data on their numbers in the country. Mapping studies such as one by Equal Ground reported that 19.6% of people over 18 living in Colombo, Matara, Nuwara Eliya and Galle identify as LGBT. This figure could be skewed, however, as enumerators conducting the study may have approached more LGBTQI persons for the study.<sup>1</sup> Nonetheless, the community exists in the sidelines, victim to a hostile state and society.

### **Criminalising same-sex sexual acts**

As mentioned earlier, Sri Lanka criminalises consensual same-sex sexual relationships between adults under sections 365 and section 365A<sup>2</sup> of the Penal Code.<sup>3</sup> Section 399 of the Penal Code,<sup>4</sup> which makes it a criminal offence to ‘cheat by personation,’ is often used by the police to harass LGBTQI persons, especially transgender individuals (Human Rights Watch 2016: 16). Further, the Vagrants Ordinance, which ‘prohibits soliciting or committing acts of “gross indecency,”’ or being ‘incorrigible rogues’ gaining ‘illicit or unnatural intercourse,’ is also engaged to target LGBTQI individuals (Equal Ground and CIHR of Northwestern Pritzker School of Law 2017: 3).

These laws allow for a range of rights of LGBTQI individuals to be violated, while legalising their discrimination in society. Police officers have used these laws to threaten, harass, and extort LGBTQI individuals, and the existence of the laws prevents victims of crime from reporting to the police for fear of additional abuse or retribution. Abuse by the police is not uncommon, with a report by Human Rights Watch (2016) reporting that 24 out of

1. ‘Counting in LGBT’, 22 January 2018. <http://www.dailymirror.lk/article/Counting-in-LGBT-144350.html>
2. S365 refers to ‘carnal intercourse against the order of nature’ (which is widely understood to apply to same-sex sexual acts) and s365a criminalises ‘any act of gross indecency with another person’. ‘Gross indecency’ is not defined by the law or in the common law, but is understood to target acts of affection or sexual acts between two individuals of the same sex.
3. Sri Lanka Penal Code S356 and S365a
4. Sri Lanka Penal Code S399

*Contd...*

Dependency on funds allocated through the province faces the additional burden of being affected by patronage networks. Members of Parliament and local government authorities offer preference and ensure funding to their own voter area, leaving areas with weaker representation with less funding.

## **Access to Higher Education – Controversy on District Quotas for University Admission<sup>8</sup>**

In the early 1970s a district quota system for admission to state universities was introduced, which allowed 55% of the placements to be distributed on the basis of the population ratio in the district, guaranteeing a precise number of seats for each district. As the proportion of the students to be admitted on merit was reduced to a mere 30%, the students who depended on their merit results, specifically the students from Colombo and Jaffna who entered the university in large numbers before 1970s, were deprived of university admission. This had the effect of aggravating the discrimination Tamil persons were subject to during the period, and in turn further intensified resentment between the communities (Devanesan 2012). In spite of this, the GoSL continued to hold their stance that the introduction of district quota was for the less privileged to access tertiary education, and it was necessary in order to encourage and uplift the education in the provinces where there was a lack of resources for education.

## **Judicial take on Socio-economic Entitlements of Minorities**

In this context, in *Seneviratne v The University Grants Commission*,<sup>9</sup> a group of students who were denied the opportunity to be admitted to state universities as a result of the new quota system challenged the measure on grounds of equality. They argued that distributing university placements according to a population ratio had no rational nexus to the government's objectives. The court went beyond analysing it as affirming action to taking the stance that the new system in fact promoted equality and dismissed

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8. This section has been written by Azra J

9. *Seneviratne and Another v University Grants Commission and Another* (1980) 1 Sri L.R. 170, 211. Available at: [http://www.hrsl.lk/PFF/Right\\_to\\_Equality/Seneviratne%20And%20Another%20V.%20...pdf](http://www.hrsl.lk/PFF/Right_to_Equality/Seneviratne%20And%20Another%20V.%20...pdf)

*... Profile of a vulnerable minority continued ...*

61 respondents in interviews carried out with LGBTQI Sri Lankans 'had suffered sexual, physical, or severe verbal abuse by the Sri Lankan police', 16 respondents report having suffered sexual or physical abuse by the police, and over half the respondents were detained by the police without cause.

### **Lack of Legal Protection from Discrimination**

Sri Lanka's Constitution and laws do not prohibit discrimination on the grounds of sexual orientation and gender identity. Although Article 12(1) of the Constitution states that 'all persons are equal before the law and are entitled to the equal protection of the law', the list of various grounds in Article 12(2) under which discrimination is prohibited does not include sexual orientation or gender identity. However, in 2014 the Sri Lankan government made a statement to the Human Rights Committee that Article 12 of Sri Lanka's Constitution does protect persons from discrimination on the grounds of gender identity and sexual orientation. While this statement was welcome, it must be viewed against a backdrop of a legal system that continues to retain laws criminalising same-sex conduct and a deep-rooted hostility in society towards gender and sexual minorities. As such, any prohibition on discrimination must be explicitly stated in a constitution if it is to effectively guarantee the protection of gender and sexual minorities in Sri Lanka.

The report by Equal Ground and CIHR (2017: 6) makes the additional argument that even such an amendment to Article 12 may be compromised by Article 15(7), which allows for the restriction of fundamental rights on the grounds of 'morality', and Article 16(1), which provides a judicial challenge to the constitutionality of preceding laws (such as the Penal Code) which cannot be considered to violate Article 12 Right to Equality.

This lack of legal protection has resulted in the violation of the socio-economic rights of LGBTQI persons in Sri Lanka, compromising access to healthcare, education, employment, housing, and legal protection. In a 2012 study (Equal Ground 2016: 4), 35.22% of respondents believed they had been refused employment, 12% reported they had been denied a promotion or experienced an adverse change in their role, and 24% of respondents reported the loss of a job in the previous two years because of their sexual orientation or gender identity. 24% of respondents reported that they had been unable to rent housing or were forced to change residence in the last two years because of their sexual orientation and gender identity.

With respect to education, of the 20 respondents who had attended school in the past two years, 70% had been dismissed, suspended, or prevented from attending school on the basis of their sexual orientation or gender

*Contd...*

the application.<sup>10</sup> The court ruled that the policy has a rational nexus to the objective of the state. In order to serve the objective, which was to ‘provide equitable access to education’<sup>11</sup> 55% of seats were allocated based on population ratio, because it would ensure ‘that districts having larger populations and consequently a greater number of school-going children will obtain a larger number of places within the 55%.’ As a result of the effect of the standardisation policy and the fact that the scheme’s distribution severely limited the seats received by Tamil students in Jaffna on previous occasions, the Tamil community received its imposition with antagonism. The court, however, made no reference to the population that was affected by said scheme, reflecting an insensitivity to the intersections of class and race affected by the issue.

However, during a period of intense tension and mistrust between communities, the context in which said policy of equality applied became important. Even after witnessing the consequences of the Sinhala Only Act and the standardisation policy, the government failed to bring in any sustainable policy to reverse the outright discrimination promoted through said laws and policies. Therefore the district quota scheme further entrenched the systemic discrimination towards the ethnic Tamils of the island.<sup>12</sup> Further, Justice Wanasundera’s holistic approach towards equality – ‘...every class of citizens must have a sense of equal participation...’ – did not hold true in this instance, because one cannot discount the systemic violation of Tamils to view the policy as a standalone measure of access to education – especially in the context of mistrust and insecurity between communities.

It is worth noting that although the facts of the case did not concern minority rights, the issue is of importance because of the impact it had on

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10. Substantiating the claims of equality, Justice Wanasundera cited the following from the Indian case of *Pathumma And Others v State Of Kerala And Others* (1978): ‘...equality means equality to all and not merely to the advanced and educated sections of the society. It follows, therefore, ... every class of citizens must have a sense of equal participation in building up an egalitarian society, where there is peace and plenty, where there is complete economic freedom, where there is equal opportunity to education, to work... so that the goal of social justice is achieved.’ See: <https://indiankanon.org/doc/1959928/>.

11. Imposed ‘to make available the limited number of places to as wide a number of qualifying candidates as possible from various parts of the country, so that access to high education provided by the State will be equitably distributed and also subserve the objectives of the national interest and policies.’ See: [http://www.hrsl.lk/PFF/Right\\_to\\_Equality/Seneviratne%20And%20Another%20V.%20...pdf](http://www.hrsl.lk/PFF/Right_to_Equality/Seneviratne%20And%20Another%20V.%20...pdf)

12. Only to be rectified in 1993 by the identification of Jaffna as one of the qualifying districts for special quota.

... Profile of a vulnerable minority continued ....

identity. In a subsequent study conducted in 2016, it was reported that bullying and marginalization had forced many LGBTQI students to drop out of school (ibid, as cited in Equal Ground and CIHR 2017: 7).

### **Administrative and policy making issues**

Sri Lanka does not have an administrative procedure whereby a transgender person, simply on request, may apply to obtain legal identity documents that reflect their name and gender identity (Equal Ground and CIHR 2017: 7). A new policy introduced in June 2016 to obtain a 'gender recognition certificate' could be used to obtain an amended birth certificate, which can then be used to obtain an identity card and other legal documents conforming to a person's gender identity. This new policy presents serious concerns with its requirement for evaluation from a psychiatrist who is required to refer individuals to 'hormone and necessary surgical treatment' and certify that a 'transformation process' must be completed (ibid: 10). This policy effectively implies that only those who have undergone full treatment, which many individuals may either not want or are unable to access or afford, may be granted their chosen legal identity.

The ability to choose one's name and identity is a key aspect of self-determination and freedom.<sup>5</sup> Identity documents are especially important in Sri Lanka as their absence hinders the carrying out of day-to-day activities, including maintaining a bank account, seeking public healthcare, interacting with the police, or applying for a job. In these situations, a transgender or gender fluid person whose identity documents do not match their chosen name and gender identity are subject to humiliation, discrimination, and the possibility of violence. This disparity in a person's documented and chosen identity is the root cause of much of the discrimination and abuse that transgender persons are subject to.

Activism or advocacy for LGBTQI issues and attempts to engage state parties by organisations that are involved in this work (such as Equal Ground) are also viewed with scepticism, or are ignored at policy-making levels. This issue of 'non-recognition' (Equal Ground and CIHR 2017: 8) demonstrates how LGBTQI persons are neither recognised as a minority in Sri Lanka, nor are their issues viewed as legitimate. Without a legitimate identity in front of the state or society, they continue to be marginalised and disempowered, relegated into a life of social and economic deprivation.

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5. Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, Principle 3 (2007), available at [http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm), as cited in Equal Ground and CIHR 2017: 7

society. In this instance, barring access for a large number of Tamil students to state university education and depriving them of their right to education jeopardised the students' access to employment and an adequate standard of living. The judiciary in this instance did not appreciate the context in which the state policy was formulated, which resulted in effective discrimination against an ethnic minority.

The ability to relate and therefore express sensitivity in legal reasoning is distinctly felt where Justice Sharvananda, in his eminent work *Fundamental Rights of Sri Lanka: a Commentary* (1993), disagrees with the decision of the case on the ground that the fundamental rights chapter of the Constitution only provides for individual rights and not community rights. He further criticises the decision, stating that the objective of the state is to admit the best students on individual merit instead of enforcing the unenforceable Directive Principles of State Policy. However, a categorical stance on community rights as such can also be precarious because it defeats the claims of economic social and cultural entitlements of the people. The different ways of approaching the case by both judges, despite their sound *stare decisis* and reasoning, speak to the inevitable flavour of personal beliefs and values involved in judicial decision-making. It also indicates that having a more diverse judiciary would ensure sensitivity to the diverse views of society in the judicial decision-making process and thereby enrich the decisions (Hunter 2015).

## **Housing and Land**

### ***Eviction and Alternative Accommodation***

Land remains a contentious and largely politicised issue among the different ethnicities of Sri Lanka, which is attributed to the fact that 82% of land in Sri Lanka is vested with the State (GoSL et al 2018: viii). The ad hoc administrative and executive actions pertaining to state land distribution are often not transparent, and some of the laws are outdated – or, at least, not relevant in our 'post-conflict' society.<sup>13</sup> Further, the state acquisition of private lands for 'development purposes' has intensified tensions among the people. However, because minority communities often live together, concentrated in particular parts of each district, any state action affecting the land rights of the people residing in the region may be deemed to be a systematic violation of the economic rights of the ethnic minorities residing in

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13. Ibid.

the region. In the North and Eastern provinces of the country, this issue is further complicated due to the demographics of the regions.

The case *Mowjood v. Pussadeniya*<sup>14</sup> concerned alternative accommodation. The Rent (Amendment) Act No. 26 of 2002,<sup>15</sup> which was the related legislation in the case, required landlords to provide the tenants with alternative accommodation before obtaining a decree against them. In this case, the tenants contended that the alternative accommodation provided to them was not proper as their circumstances were not taken into consideration when providing the accommodation, and they therefore sought to obtain a writ of certiorari. The court analysed the purpose of the provision for alternative accommodation and observed,

*'In view of this social objective, the needs and circumstances of the tenant ought to have some relevance if the offer of alternative accommodation is to be meaningful and not be illusory.'*

This bears relevance to the evictions that take place for beautification and development plans undertaken by the state. Those who are evicted from their houses are in a vulnerable state and many of their intersecting rights are violated, namely the right to food and the right to education. As far as ethnic minority groups are concerned, forcible eviction increases their vulnerability or results in an 'aggravated violation' of their rights.<sup>16</sup> The necessity of offering the most conducive alternative accommodation is felt in this instance because minorities tend to live in communities that are concentrated in a given locality and, therefore, uprooting them from that place and placing them in a completely new environment severely jeopardises their belonging to a given community and risks several of their social and cultural rights.<sup>17</sup>

Further, setting out the standards of an alternative accommodation that should be provided upon the ejection of a tenant, Sharvananda CJ stated

14. Available at: <https://www.lawnet.gov.lk/1987/12/31/mowjood-v-pussadeniya-and-another/>

15. Available at: [http://www.commonlii.org/lk/legis/num\\_act/ra26o2002200/](http://www.commonlii.org/lk/legis/num_act/ra26o2002200/)

16. See Centre on Housing Rights and Evictions (COHRE) v Italy (2010): 'The Committee considers that an aggravated violation is constituted when the following criteria are met: on the one hand, measures violating human rights specifically targeting and affecting vulnerable groups are taken; on the other, public authorities not only are passive and do not take appropriate action against the perpetrators of these violations, but they also contribute to such violence.' Available at: <https://www.escr-net.org/caselaw/2011/centre-housing-rights-and-evictions-cohre-v-italy-collective-complaint-no-582009>

17. Judicial Mind p 86; no access to sunlight etc.

that the accommodation had to be habitable and appropriate to the affected individual and the family members, and that it must have the elementary amenities. The court also made an important observation on the alternative accommodation with regard to the lifestyle of ethnic minorities who will not be able to thrive in an entirely unfamiliar environment because of their tendency to dwell among their own community:

*‘It must not be located in a far-off area with which he has no local connection, an area where, because of his religion, race or caste etc, it is unsafe for him to dwell. The nature of the environment where the proposed accommodation is located is a relevant consideration in determining whether the new accommodation can fairly be described as ‘alternative’.*’

As far as the cases during the latter stages of the war are concerned, the observation holds relevance in respect of the acquisition of lands by the military in the north and the east, affecting people’s lifestyles and the demographics. However, in the cases filed regarding eviction and displacement during the latter stages of the war, and inability to return to homeland after the war, the court failed to give weight to the concept of ‘demographic choice and behaviour’ of ethnic minorities.<sup>18</sup> Due considerations to ‘choice and behaviour’ call for a sensitive approach from the court to the requirements of minorities. Erratic stances from the Supreme Court have, however, resulted in court orders ranging from the upholding of violation of the rights of the people who were evicted, to an instance in which the court accused the petitioner of merely ‘creating news for international consumption’ and dismissed the petition. Such instances portray the frail and unsettled jurisprudence on the land and housing rights of the ethnic minorities who were subject to aggravated violation of rights.

### ***State’s Acquisition of Lands and Discrimination Against the Vulnerable***

In another case, *Manel Fernando v. Minister of Land*, the petitioners challenged the state acquisition of their land, which was mala fide and in violation of the equal protection of the law guaranteed by Article 12 of the Constitution. The Garama Sevaka had harassed the petitioners, calling them ‘terrorists’ on account of the fact that one of them was a Tamil, and forcibly removed them from their premises. The decision upheld discrimi-

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18. Manivannan case.



### **Good practice case study**

## **The movement calling for the release of the Justice Saleem Marsoof Committee report on the Muslim Marriage and Divorce Act**

During the period under review there have been a number of civil society-led efforts to protect rights of the Muslim minority in the country. These include protests against attacks on Muslims, various expressions of solidarity, as well as supportive participation in the campaigns demanding for reforms to the law governing Muslim marriages that discriminate against Muslim women.

One of the more recent outbreaks of anti-Muslim violence occurred in the Kandy District in early March 2018, leading to the declaration of a state of emergency in the country. The violence raged on for nearly a week, with scattered attacks in other parts of the island as well. During this time three Muslims were reported killed, several were injured and millions worth of damage to homes, shops and livelihoods has been recorded to date.

While the fires burned in Kandy, some monks and young Buddhists set out to protect mosques in Colombo, even overnight. Monks in charge of five temples in the capital visited four Jumma Mosques in Colombo's Ratmalana and Mount Lavinia boroughs to express solidarity with the Mosques.<sup>1</sup> In some areas Buddhist Monks stood in solidarity with the Sri Lankan Muslims during Friday prayers.

The support of civil society in times of ethnic violence is not unheard of in the melting pot that is Sri Lanka. In May 2017 a chilling image of a young woman bandaged from head to toe in Puttalam District after being set on fire by her husband went viral on Sri Lanka's social media networks. The young mother of two, who eventually succumbed to her injuries, was married while she was still a child. Under Sri Lanka's law governing Muslim marriages – the Muslim Marriage and Divorce Act (MMDA) – child marriages are permitted, and a campaign to abolish or amend the Act was already afoot, as grassroots level activists have been working on the issues for the past few decades.

On 29 May 2017, Muslim women from Puttalam, along with civil society from across the island, marched to demand justice for the young woman torched by her husband. In early 2018 a protest was staged near the Justice Ministry highlighting Muslim women's call for justice and equality in Sri

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1. 'In Colombo Buddhist monks express solidarity with Muslims victims of attacks', 3 October 2018. <http://www.asianews.it/news-en/In-Colombo-Buddhist-monks-express-solidarity-with-Muslims-victims-of-attacks-43317.html>

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nation against the petitioners, in addition to the authority's abuse of power to forcibly evict the owners.

Mark Fernando J stated the following on the unlawful state acquisition:

*'The statutory power given in order to enable the State to acquire land needed for a public purpose cannot be used for any other purpose. That would be a gross abuse of power, particularly in this case, where the owner's wish to dispose of his land had been brought about by unlawful and improper harassment on account of race.'*

The case law on state acquisition of land provides some guidance on the scope of 'public purpose', which has not been defined under the Land Acquisition Act of 1950. In the Manel Fernando case, the judiciary refers to a 'truthful public purpose' and the need for a statutorily required 'Section 2 notice' stating the public purpose.<sup>19</sup> However, in said case, the officials had harassed the petitioners on a number of occasions, had deliberately made their lives difficult in the said premises and had requested the government to acquire the property although there was no prior plan for such acquisition, invalidating the claim for any truthful public purpose.

The judgment of *Manel Fernando* acknowledged the explicit discrimination the petitioners were subject to by the state officials in the context of the war that was ongoing at the time, and was ground-breaking, hence, because an established precedent of upholding discrimination against minorities is unknown to Sri Lankan fundamental rights jurisprudence.

The decision is of relevance in the post-war context because the war-affected communities had been left vulnerable and prone to exploitation by public officials, specifically in relation to acquisition of private lands. Three important instances post-war must be highlighted in the state's acquisition of private lands for disguised 'public purposes', namely, the forced eviction of *Manal Aru* residents upon the acquisition of Mahaweli Economic Agency in 1988, the acquisition of 6380 acres of land in Jaffna for purposes of military cantonment, and land in Sampur for industrial development (Fonseka and Jegatheeswaran 2013). The three situations put forward a strong case for 'aggravated violation' of the rights of victims who constitute the ethnic

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19. 'Public purpose' was further crystallised in the *Water's Edge* case (see: <http://www.island.lk/2008/10/12/features16.html>.) 'Public purpose' should not be construed broadly but for public utility and should be directly attributable to the benefit of the community as a whole.

*... Good practice case study continued ...*

Lanka. The silent protest was for the release of the Marsoof report. In 2009 a 17-member Committee, led by Justice Saleem Marsoof, was appointed by the then Justice Minister to review the discriminatory provisions and recommend amendments to the MMDA. The committee was unable to reach a consensus and the report was put on hold for seven years, until it was revitalised in 2016, as grass roots level activists created a public campaign on their work, drawing attention to the burning need to amend the MMDA.

As anti-Muslim attacks have grown in frequency and intensity, this small and dispersed population in Sri Lanka find themselves in a precarious place. Support from other communities – especially the majority Sinhalese community – while they demand for justice provides them with a certain degree of protection; it (unjustifiably) legitimises their demands, and it amplifies their voices. Where Sri Lanka is concerned it is important to note that those from other communities who have joined the protests, campaigns and the fight for justice have done so only in a respectful supportive role. Taking the lead on such matters can detract from the issue at hand; it can result in the issue being hijacked for other agendas ; the Muslims can lose their voice; and, in the case of the MMDA, it can easily turn into an anti-Muslim campaign or be perceived as such. By assuming a more supportive role, members of the Sinhalese community, among others, show that they are not against Islam, but against the discrimination and grave abuse of Muslim women that is permitted under a faulty law.

The Sinhalese as a majority community use their place of privilege to ensure the Muslim women leading the campaign and the victims who have chosen to go public remain unharmed. As Professor Gayathri Spivak argues in her essay ‘Can the Subaltern Speak’, given their position in society, women within a minority group are often not allowed to speak or be heard. Therefore, while it is not ideal, in a space where minority communities lack the means or freedom to do speak, support from the majority community can enable them to achieve their demands. This applies to ethnic violence as well. The monks who chose to be at the mosques that day provided protection with merely their presence.

The Marsoof report was released in July 2018, and the support of the Sinhalese community does not in any circumstance overshadow the work done by Muslim grass root level activists. Having worked on the issue for the past 20 to 30 years, first educating and empowering Muslim women to seek justice, only then were they able to compile case studies and pursue justice for all Muslim women in Sri Lanka.

minorities who were affected by the war and were further targeted by the state for their land and property. Quite contrary to the *Manel Fernando* case, when a fundamental rights case was filed on behalf of the residents against the eviction of Sampur residents (ibid: 50), the then Chief Justice dismissed the petition remarking that the petitioner was merely ‘creating news’ for ‘international consumption’ and that the government should be given ample time to complete the security measures in the area. The statement indicates the judiciary’s pro-government stance and complete disregard for the victims in the immediate postwar context, despite the visible violation of right to equal protection of law. While the controversial Sampur project was abandoned with the President’s intervention in 2016, more than 4000 acres of land acquired in Jaffna have not been released to date.

### ***The History of Violence and its Economic Consequences on Minorities***

Much of the violence towards minorities viewed as post-war phenomena are in fact, historical and longer standing tensions that date back to 1915 (Haniffa and Nagaraj 2017: 2). Many of the incidents of violence towards Muslims in particular and the anti-Muslim rhetoric following the 1970’s were overshadowed by the tensions between the state and armed Tamil groups, the JVP insurrection, and the ethnic conflict. These incidents, which are widely viewed as communal in nature and are often initiated as minor disputes between individuals within a background of general tensions between two ethnic groups in a local community, in fact always have an economic and political background.

The anti-Muslim violence of 1915 must be considered in context of a number of economic and political factors, including the end of an export-oriented boom of the late 19th century, and the fact that resentment towards increasing prices and high inflation was taken out on Muslim traders (Jayawardena 1970). The ‘revival’ of Sinhala-Buddhist nationalism that integrated a prejudiced view of Muslims by Anagarika Dharmapala, a champion of this cause, is also central (Roberts 2013). The ‘othering’ of Muslims, and the propagation of the idea of Muslim prosperity (versus Sinhala weakness and poverty) through ‘Shylockian methods’ – appealed to later by multiple others, including religious leaders seeking to justify the removal of or violence towards Muslims in their local areas – appears here:

*‘The Muhammedans, an alien people, who in the early part of the 19th century were common traders, by Shylockian methods became prosperous like the Jews. [...] The Muhammedan [...] is an alien to*

*the Sinhalese by religion, race and language [...] The whole nation in one day have risen against the Moor people. The causes are economic and spiritual...'* (Dharmapala 1915)

The episodes of violence in Puttalam in 1976 are attributed to a series of incidents when the newly settled and increasing<sup>20</sup> Sinhalese population was viewed to be receiving favourable treatment from the State, including when land belonging to Muslims was taken and redistributed through the Land Reform Act, and when a newly established Cement Corporation factory in Puttalam hired Sinhalese workers who had migrated to the area for this purpose, despite Puttalam having a significant population (largely Muslim) of its own.

Incidents of violence in Galle in 1982, Mawanella in 2001, and Aluthgama in 2006 also demonstrate how the anxieties surrounding apparent economic weakness and prosperity, in the Sinhalese and Muslims respectively, also manifested themselves in the way violence was used to re-organise economic capital, with many cases in which businesses or the contents of shops were completely burnt, thereby completely destroying the capital.

Six days of violence in Galle in 1982 resulted in two deaths and millions of rupees worth of property damage, when 27 businesses in Galle alone were attacked, and some of the larger shops and lorries belonging to Muslim businesses were completely destroyed (Haniffa and Nagaraj 2017: 20, 26). Two separate narratives regarding the initial trigger both involve an altercation between a Sinhalese and a Muslim: one with a Muslim landowner and a Sinhalese tenant who had refused to move despite not paying rent, and the other involving a Sinhalese fruit vendor and a Muslim neighbour. The government had declared an island-wide emergency and curfew within Galle city limits, and the riots eventually required the intervention of the military.

An incident involving the extortion of money from a Muslim business in Mawanella in 2001 eventually escalated to a full-scale riot that extended over a few days. The inaction of the police in Mawanella and surrounding areas sparked off protests and further clashes in Colombo and Maradana. Tensions boiled over when Muslim shops were attacked, and the largest

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20. The influx in the 1970s was a continuation of the Sinhalese of Puttalam. Calculations by Catherine Brun report that the Sinhalese made up approximately 39.2% of the population in 1901, and that the district was 82.6% Sinhalese by 1981. See Haniffa and Nagaraj (2017: 2).

businesses that were destroyed belonged to Muslims. What is also concerning regarding Mawanella are reports that the Police were complicit in the attacks (ibid: 33).

In 2006 an altercation between a Muslim shop-owner and three Sinhalese youth over the alleged theft of a mobile phone sparked large-scale violence in Aluthgama, mostly targeting Muslim businesses and homes. Minister Rauf Hakeem, the leader of the Sri Lanka Muslim Congress (SLMC), noted that much of this occurred during 'curfew hours in the presence of the police and the armed forces, before their very eyes; while some of the shopkeepers were pleading for the police to intervene they did nothing to stop the mobs from setting fire to these shops.' He went on to suggest that the violence was systematic: 'the shops owned by Muslims... [have] been set on fire' but where 'Muslims have been carrying on business as tenants, things have been taken out of the building and set on fire without damaging the building since that building did not belong to Muslims' (Hansard). While the incidents in Puttalam involved the police opening fire at those running towards a Mosque for refuge, Mawanella and Aluthgama involved prejudicial and complicit behaviour by the police, which has led to a loss of confidence in the police among locals. Minister Hakeem called for a commission to investigate the conduct of the police.

While Silva et al (2001) suggest that tensions in Mawanella emerged out of resentment felt towards Muslims dominating the Mawanella bazaar by local Sinhalese entrepreneurs, and Nagaraj and Haniffa (2017: 37) demonstrated a shift in economic, political power and resources away from the Muslims in Mawanella as context for the background of tensions, the violence in Mawanella can also be considered as the peak point in a series of anti-Muslim rhetoric and violence, influenced by proceedings on the national political stage.

The emergence of the SLMC as a key player<sup>21</sup> in 1994 in a fractured electoral mandate gave the SLMC and other minority parties 'unprecedented bargaining power and influence'.<sup>22</sup> The SLMC thus represented political

21. See 'A tiring battle', *Frontline*, 26 March 2004, available at <http://www.frontline.in/static/html/fl2106/stories/20040326004211600.htm>; 'SLMC: Liability on the Muslim community', Lathief Farook, *The Daily FT*, 23 December 2014, available at <http://www.ft.lk/2014/12/23/slmc-liability-on-the-muslim-community/>; and 'Rendering the SLMC inconsequential', *The Sunday Observer*, 30 August 2015, available at <http://www.sundayobserver.lk/2015/08/30/polo6.asp>

22. See 'SLMC: Liability on the Muslim community', Lathief Farook, *The Daily FT*, 23 December 2014, available at <http://www.ft.lk/2014/12/23/slmc-liability-on-the-muslim-community/>.

power in the east, while the Liberation Tigers of Tamil Eelam (LTTE) was holding military power in the North. Haniffa and Nagaraj (2017) argue that this led to further insecurities and anxieties in the Sinhalese regarding minorities yielding power, which is demonstrated in the dominant theme it took at a meeting to mark the first anniversary of the bombing of the temple of the Tooth Relic by the LTTE (with the bombing in itself viewed as a mark of cultural vulnerability of the Sinhalese) by a 'lament that the Sinhala majority was being held hostage politically by the Muslims and militarily by the LTTE'.<sup>23</sup>

Against a backdrop of peace talks with the LTTE and opposition to devolution of power in the late 1990s, there was also a growth in Sinhala–Buddhist nationalist organisations.<sup>24</sup> Among these the Sinhala Veera Vidana (Sinhala Heroes Forum, SVV) and the United Sinhala Traders Association (UST) in particular represented the economic interests of the Sinhalese, with the SVV attempting to arrange for Sinhalese paddy farmers to sell rice to Sinhala traders at more favourable rates than the government-determined price, provided they joined the SVV and endorsed its policies on racial exclusion. This must also be viewed against the setting of widening inequalities and a decrease in government funding towards agriculture and the open-economy reforms initiated in 1977. The latter gave an extra edge to competition among the Tamil, Muslim and Sinhalese business interests, which invariably took on racial character in an already ethnicised political environment.

#### Propagating the idea of 'Muslim prosperity' and 'Sinhalese weakness'

The economic interests these organisations sought to mobilise targeted and involved a largely working- and middle-class Sinhala population. An old narrative of Muslim traders being 'Shylockian' and more economically prosperous, against the Sinhalese being economically vulnerable in this environment, reappeared again in a series of post-war attacks directed at Muslim businesses or economic elements that concerned the Muslims (such as the controversy surrounding an apparent cost to a general consumer when buying halal certified products).

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23. Buddhist clergy lament, 'Sinhala community faces annihilation due to power crazy leaders', *The Island*, 28 January 1999.

24. Organisations such as the National Movement Against Terrorism (NMAT), Sinhala Urumaya, Sinhala Veera Vidhanya (Sinhala Heroes' Forum, SVV, a predecessor of the Jathika Hela Urumaya (JHU) a Sinhala-Buddhist right-wing political party) and the United Sinhala Traders Association (USTA).

The same narrative is now commonly used in other ways within wider political controversies, but the contemporary reincarnation of the SVV, with the economic interests of the Sinhalese at heart, appears in the more sophisticated form of The Chamber of Young Lankan Entrepreneurs (COYLE). COYLE's membership is (demonstrated to be) exclusively Sinhalese, however, unlike SVV or UST, COYLE is distinctly more elite, with its membership reportedly contributing 600 billion per annum to the Sri Lankan economy and its meetings bringing together 116 chairmen and key shareholders of some of the largest companies in Sri Lanka.<sup>25</sup> The dangers of such an organisation are threefold: firstly, it demonstrates how the narrative of needing to secure the economic interests of the Sinhalese has permeated across all classes of society; secondly, it yields so much power and benefit within the business community at the point of joining that its membership is now attractive, especially to young businesspeople; and thirdly, its economic interests are now much wider, with the organisation commanding meetings with key ministers and executives to influence national policy<sup>26</sup>; and its market presence across its membership, many of which are conglomerates, controlling a significant portion of Sri Lanka's economy.

The anxieties are also further affected by class dynamics, with the Sinhalese-Buddhist extremist movements primarily gaining traction and popularity among young working-class Sinhalese men operating within an environment of aspiration, who are affected by economic anxieties worsened by inflation, increased cost of living and unemployment, and are therefore most prone to accepting the narratives around an apparent Sinhalese economic weakness. The flow of capital and internet penetration has further intensified the sharing of this narrative, as was demonstrated in the recent riots in Digana, where calls to join the riots were most widely perpetuated through a series of viral videos shared on social media.

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25. See <http://coyle.lk/>.

26. 'COYLE is a chamber that always renders its untiring efforts and support in resolving national issues. It also possesses a remarkable position in the Sri Lankan economic and financial arena due to the significant contribution made to the GDP and GNP of Sri Lanka' – at <http://coyle.lk/coyle> under 'About COYLE'. The section goes on to state that organisation's vision is to be the 'most influential and vibrant chamber of young business leaders whose views on the matters of national importance are sought by the government' (accessed online: 4/08/2017).

27. <http://coyle.lk/coyle-member-company/>



## Conclusion and Recommendations

Sri Lanka's overall outcomes with respect to the socio-economic indices concerning minorities have seen positive improvement; however, these generalised patterns have also not always been able to capture the pockets within communities – particularly minorities within traditional ethnic minority regions who sit at the intersections of class, gender, caste, and population, who are most affected by issues pertaining to the violation and lack of protection of their socio-economic rights. The chapter has also sought to note how the framework of minorities is contested and mobilised in different ways in Sri Lanka, particularly in the way minority and majority identities are shifted based on economic and political dynamics, further blurring the situations in which socio-economic rights are compromised.

Gender and caste in particular are important axes by which such consideration and analysis must occur. The report was not able to draw these out due to constraints on time, however, a snapshot perspective of the former is attempted in our case study on war-affected women with disabilities and our good practice case study on civil society's advocacy with respect to the Muslim community in Sri Lanka.

The chapter highlights the reductive manner in which minority rights are approached in Sri Lanka and the resulting discursivities in guaranteeing human rights for all. If Sri Lanka is to move forward on guaranteeing economic, social and cultural rights to all its citizens along with civil and political rights, one of the first steps required is to resolve the ambiguities, contradictions and regressions within the constitutional and legislative framework in the country. An imperative first step is to recognise economic and social rights as justiciable rights in the constitution. This has been recommended by the consultative process on constitutional reform, which consulted across the island in formulating its recommendations. Other laws that discriminate against minority groups must also be amended or repealed; these include sections 365 and 365a of the Penal Code and the Vagrants Ordinance.

Secondly, inequalities in resource allocation for the health and education sectors must be addressed. The data reviewed in this chapter highlight the manner in which discretionary funding for local schools and cut backs on social welfare schemes directly affect the most marginalised in the country. National budget allocations should continue to sustain or increase allocations to basic economic and social indicators, including health and edu-

cation, in keeping with Sri Lanka's international obligation to progressively realise economic, social and cultural rights.

Thirdly, the policy decisions that discriminate against minority groups must be addressed. Addressing the competition for resource allocations would allow for the reversing of discriminatory quota changes in university admissions; the increased allocation of resources to the poorest regions with the lowest social indicators; and increased diversity of representation in the public sector, including the judiciary. Some of the ethnic and religious based groupings, whether historical or presently forming, would lose their divisive powers if inclusive language policies, university and school admission policies, resource allocations and economic opportunities becomes a part of state policy in Sri Lanka. State policy, if implemented effectively, will permeate every rung of state service, and will challenge divisive narratives along ethnic and religious lines that may be pushed by extremist groups belonging to any ethnic or religious affiliation.

It is our view that if these three major plans are addressed by the government in the short term, medium term and long term, as a part of a national trajectory, guarantee of economic, social and cultural rights to all persons in Sri Lanka will become an increasingly achievable goal.

## **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;  
Introduction Chapter (Law & Society Trust, April 2017)

### **Context**

1. Coming two years after a political transition from post-war authoritarianism, this Shadow Report to the United Nations Committee on Economic Social and Cultural Rights is framed in the backdrop of two concurrent processes of 'transformation' currently underway in Sri Lanka. The first is the process of constitutional reform initiated by the Government that was elected on the platform of restoring democratic, inclusive and accountable governance. The second is the transitional justice process whose contours continue to be shaped by the interplay of domestic and international political dynamics.
2. This year also marks forty years since President J.R. Jayawardene initiated the open economy reforms, almost twinned to which was the

second republican constitution that also firmly entrenched the executive presidency as well as the majoritarian character of the State. Soon thereafter, in 1980, came the massive crackdown on trade unions and, in July 1983, the pogrom against Tamils. If the former forced a violent repudiation and redrawing of the social contract between state and society, especially organised labour, the latter firmly entrenched violence as a defining feature of the new social contract, especially between the State and minority communities.

### **Sri Lanka's political economic landscape**

3. Sri Lanka's economic geography, a legacy of post-1977 liberalisation policies and the war, has its epicenter in the Western Province and was bolstered by extraction from the inner peripheries, such as the plantations. With the exception of the two-year (1988–90) Southern Insurrection and periodic suicide bomb attacks, the war was contained largely in the Northern and Eastern outer peripheries. Almost throughout all of the war years, the Sri Lankan economy continued to grow steadily, remittances from migrants escaped the war and rural joblessness added to the economy.
4. The legacy of decades of economic liberalisation and the war has shaped a state-society contract characterised by serious deficits in political and economic democratisation, power sharing, inclusion, and accountability. Alongside the political marginalisation and exclusion of minorities, and ethnicisation of political economic relations, also entrenched is economic precariousness due to inadequate levels of investment in health, education and social protection, attacks on permanent jobs and burgeoning informalisation. In the North and East especially these add to many harms from the war that are yet to be addressed, including killings, disappearances, displacement, sexual violence and post-war militarisation.

### **Constitutional Reforms and Transitional Justice**

5. Hundreds of submissions to the Public Representations Committee on Constitutional Reforms (PRC) on the one hand and thousands of submissions to the Consultation Task Force on Reconciliation Mechanisms (CTF) on the other, sought a fundamental redrawing of the social contract between the State and its citizens. Taken together and read expansively, the reports of the PRC and the CTF reflect an aspiration for political, civil, social and economic justice. Both reports also stress the importance of a state that is committed to equality, equity, inclusion, democratic participation and accountability. Yet, it is the Government's

near identical response to both reports—consigning them to a ‘display only’ shelf or in the case of the CTF virtually disowning it domestically—that defines this moment and sets the stage for the critique offered in this report.

6. The far-reaching proposals of the PRC call for the recognition of a raft of economic and social rights—especially with regard to education, food, health, housing, social security, labour—coupled with protection from forced evictions as well as an expansive equality and non-discrimination clause, which are also reflected in the report of the Fundamental Rights Sub-Committee of the Constitutional Assembly. This assumes great significance in the context of the major concerns raised in this report: Entrenched poverty and widening inequality; weakening social protection; precarious wages and employment; union busting; declining investment in education and health; worsening food insecurity and malnutrition; large-scale evictions and land grabs, and exclusion or discrimination on grounds of disability, gender and sexual orientation, economic status, ethnicity, caste, etc.
7. The transitional justice agenda has all but sidelined the question of economic or distributive justice and the structural as well as gendered violence inherent in economic relations—be it before, during or after the war. The critique from the Malaiyaha Makkal or Up-Country People regarding the exclusion of their experiences from the scope of transitional justice hinges precisely on this point<sup>1</sup>. As discussed in this report, the high levels of economic insecurity and precariousness in the post-war North and East also stem from post-war policies that focused on debt-driven physical infrastructure, and the militarisation and financialisation of development through the aggressive pursuit of micro-credit measures. The result has been indebtedness<sup>2</sup>, lack of decent work, poor social security, and militarisation of land and economic relations—all of which affect women in very particular ways and cannot be divorced from questions of post-war justice and accountability.

### **Current economic and social policy—Key concerns**

8. There are serious concerns about the current Government’s moves to slash public expenditure, especially on health and education in 2017. Moreover, the push for privatization and the plans to initiate sweeping reforms in critical areas, such as social security, land and labour guided by the World Bank and the International Monetary Fund’s austerity mind-set, raises many serious concerns. Whilst food producers—farmers and fishers—battle dispossession, massive tax concessions and holidays are being given to foreign investors for large and medium-scale

projects; for example, to build the Colombo Port City or establish commercial farms for export. Even as a highly regressive tax system and spiralling cost of living squeezes the poor and near poor, the Government is prioritising 'reforms' of the Samurdhi programme that will almost certainly see reduced net transfers and more debt-oriented schemes.

9. Sri Lanka's much vaunted middle-income status and impressive aggregates of human development, in areas such as health and education, in fact hide much more than they reveal. About 40 percent of the population lives on less than 225 rupees per person per day,<sup>3</sup> multidimensional poverty measures classify an additional 1.9 million people as poor<sup>4</sup> and almost 70% of the labour force is in the informal sector, with low wages and no social security.<sup>5</sup> Add to this a crisis in nutrition in many parts of the country, very low levels of investment (relative to GDP) in public health and education, and a weakened social protection system—all of which are exacerbated by gendered, ethnicised, caste and class-based deprivation as well as exclusions.
10. Decades of inequitable political economic development have generated a landscape with many and expanding pockets of marginality and precariousness. This is evident in places as far apart and diverse as Monaragala, Batticaloa, Puttalam and Mullaitivu, which have entrenched pockets of poverty. Moreover, as discussed in this report, communities ranging from Colombo's urban poor and the Up-Country plantation community to the Veddas and manpower (contract) workers in manufacturing, services and agriculture, as well as fishers and/or farmers fighting for their land in Panama, Kepapulu, Mullikulam, Vallikamam, Kalpitiya and Uma Oya, all suffer forms multiple and shared forms of deprivation and exclusion. All of the above underlines that Sri Lanka's commitments under the ICESCR assume an urgency and significance today that they have perhaps never had before.

#### Enforcing economic and social rights in Sri Lanka

11. Sri Lanka's Constitution includes a chapter spelling out the directive principles of state policy, which call, amongst others, for the:
  - Pursuit of a social order with social, economic and political justice (art. 27 2 [b] and [f])
  - Realisation 'by all citizens of an adequate standard of living for themselves and their families, including adequate food, clothing and housing, the continuous improvement of living conditions and the full enjoyment of leisure and social and cultural opportunities' (art. 27 2 [c])
  - 'Equitable distribution among all citizens of the material resources of the

community and the social product, so as best to subservise the common good' (art. 27 2 [e])

12. The directive principles however 'do not confer or impose legal rights or obligations and are not enforceable in any court or tribunal' (art. 29). The fundamental rights chapter of the Constitution does not recognise economic and social rights. However, the Court has considered several cases pertaining to economic and social rights concerns in the light of the general equality and non-discrimination provisions in the Constitution.

13. The mandate of the Human Rights Commission of Sri Lanka (HRCSL), in terms of its ability to investigate complaints of rights violations, is restricted to the rights spelt out in the fundamental rights chapter of the Constitution. The HRCSL therefore investigate complaints of economic and social rights violations.

14. Redress for economic and social rights violations is limited but has to be seen in the context of the significant weaknesses in the enforcement of the rule of law and accountability for human rights violations. Whilst the change of Presidency in January 2015 did result in a drawdown in the generalised atmosphere of threats and intimidation faced by human rights defenders, significant challenges still remain. As outlined in the report, activists working on labour and land issues, especially in the context of military occupation, face surveillance, intimidation or threats, including arrest/detention for or restrictions on their activities.

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- 1 Submission by the Malaiyaha Makkal (Up-Country People) to the Consultation Task Force on Reconciliation Mechanisms (2016).
  - 2 In reality, almost seven years after the war, there have not been substantial levels of private sector investments in the North and East, at least not at levels enough to provide decent jobs and secure livelihoods for people struggling to survive. Parallel to that, the State pushed the people to take up micro-credit and self-employment schemes for day-to-day survival. However, a large population in the North and the East are mired in indebtedness and other forms of dispossession due to their severe exposure to credit, and are struggling to survive. Women were the main targets of such microcredit schemes, underlining gendered patterns of suffering central to such political economic arrangements.
  - 3 The World Bank (2016, February 16), Poverty has Fallen in Sri Lanka but Fiscal, Growth, and Inclusion Challenges Need to Be Tackled to Sustain Progress. Retrieved from The World Bank: [http://www.worldbank.org/en/news/press-release/2016/02/16/poverty-has-fallen-sri-lanka-](http://www.worldbank.org/en/news/press-release/2016/02/16/poverty-has-fallen-sri-lanka)

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- 4 The Centre for Poverty Analysis (2017, January 08), Magic 'line' that makes us rich or poor. Retrieved from The Sunday Times: <http://www.sundaytimes.lk/170108/business-times/magic-line-that-makes-us-rich-or-poor-222743.html>.
- 5 Gunasekara, V. (2015), Unpacking the Middle: A Class-based Analysis of the Labour Market in Sri Lanka, Southern Voices Post-MDG International Development Goals, Occasional Paper Series, Vol. 22, Dhaka: Southern Voices.

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