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**TWO YEARS IN GOVERNMENT:  
A REVIEW OF THE PLEDGES  
MADE IN 2015 THROUGH THE  
LENS OF CONSTITUTIONAL  
REFORM, GOVERNANCE AND  
TRANSITIONAL JUSTICE**

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The Centre for Policy Alternatives (CPA) is an independent, non-partisan organisation that focuses primarily on issues of governance and conflict resolution. Formed in 1996 in the firm belief that the vital contribution of civil society to the public policy debate is in need of strengthening, CPA is committed to programmes of research and advocacy through which public policy is critiqued, alternatives identified and disseminated.

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This report is based on three months of research and interviews with a range of actors. The research and interviews were conducted to gauge the progress made in Sri Lanka since the change in Government in January 2015, in the areas of constitutional reform, governance and Transitional Justice under the overarching theme of Human Rights. The research also focuses on the challenges faced in these spheres and projections for the coming year. An initial desk research was conducted, followed by interviews with different stakeholders in Government, political parties, civil society, victim groups, professionals and others in order to obtain a practical view of the progress, challenges and projections in the identified focus areas.

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## 1. INTRODUCTION

The political transition of January 2015 promised ambitious reforms<sup>1</sup> and raised expectations accordingly. Two years after, serious concerns mount with regard to the National Unity Government's<sup>2</sup> reform project.

The ambitious proposals were made at a time when many Sri Lankans were desperate for change and seized the opportunity to vote in a government promising a return to governance. The primary objectives of the coalition that came together in 2014 were to defeat the government of former President Mahinda Rajapaksa and usher in political reform. Expectations were extremely high and bound to disappoint considering the scale and nature of reforms promised. Despite some successes, the current public perception is of a slow pace of reforms, reflected in their heightened disillusionment and disappointment and questions posed about the ability of the National Unity Government to govern effectively. These sentiments are justified in terms of promises made and the inability or unwillingness to manage expectations via a comprehensive communication strategy.

This report explores the pledges of the government through the lens of constitutional reform, governance and Transitional Justice within the overarching theme of human rights, and examines the progress made, challenges and setbacks. This report does not attempt to address all areas within the reform agenda but specific focus is on three broad areas crucial for the transition. The areas reviewed are those in which proposed reform, if implemented in full, will significantly impact the identity of Sri Lanka and Sri Lankans, the structure of the state, form of government and governance, reconciliation and the culture of impunity.

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<sup>1</sup> Maithripala Sirisena's 100 Day Work Programme; Detailed Diary Description' [Colombo Telegraph, 20 December 2015] <<https://www.colombotelegraph.com/index.php/maithripala-sirisenas-100-day-work-programme-detailed-diary-description/>> accessed 30 January 2017; 'Manifesto: A compassionate Maithri: Governance Stable Country' available at <<http://groundviews.org/wp-content/uploads/2014/12/MS-2015.pdf>> accessed 30 January 2017.

<sup>2</sup> The term "National Government" is used to describe the coalition government between the United National Party (UNP) and the Sri Lanka Freedom Party (SLFP) after the Parliamentary elections in August 2015.

## 2. POLITICAL CONTEXT

The coalition that supported the election victory of President Maithripala Sirisena comprised the broadest alliance of political parties and civil society organisations<sup>3</sup> with significantly varying views on the ethnic conflict and the economy, in particular. It was natural for this diverse coalition, formed within a short period of time,<sup>4</sup> to defer or avoid dealing with issues that could risk the unity of the coalition. The unveiling of the 100 - day programme was rushed as was the formation of the coalition, with limited discourse leading up to the Presidential election on key policy positions outside the campaign platform. However, they were united on the defeat of President Rajapaksa's regime as the political imperative and on the pursuit of 'good governance'. This though, while necessary for the immediate goal of regime change, has proved to be insufficient in terms of the reform project.

The political dynamics that followed the January 2015 elections are noteworthy. President Sirisena became the leader of the Sri Lanka Freedom Party (SLFP) and the United People's Freedom Alliance (UPFA) soon after the Presidential election – two entities that had till then worked against him during a bitterly contested election.<sup>5</sup> Despite losing the Presidential election, former President Mahinda Rajapaksa continued to enjoy the support of a large part of the party machinery and voter base, enabling him to challenge the leadership of the SLFP and UPFA. Rajapaksa support within the party and country at large contributed to President Sirisena's decision to give nomination to his predecessor, a move critiqued by some as providing a political lifeline to the Rajapaksa camp and decisively facilitating the formation of the Joint Opposition. The general election served several purposes: it affirmed the mandate given at the January elections, it ensured that the two main parties were reliant on each other and confirmed the popularity of former President Mahinda Rajapaksa with the Sinhala vote, making him politically relevant but not predominant. The spectre of the return to power of former President Mahinda Rajapaksa thus becomes a critical aspect in Sri Lanka's political landscape.

The early months of the National Unity Government thus were fraught with many internal and intra party battles, facilitating the re-emergence of particular partisan interests and politics, testing the new president on many fronts including his grip over

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<sup>3</sup> With a critical role played by Venerable Maduluwawe Sobitha thero, former President Chandrika Bandaranaike Kumaratunga, political parties, civil society and others.

<sup>4</sup> The Cabinet spokesperson indicated about early elections in October 2014: 'Sri Lanka Calls Early Presidential Election' [BBC News, 20 October 2014] <<http://www.bbc.com/news/world-asia-29693336>> accessed 30 January 2017; The election was officially announced in November 2014: 'Sri Lanka President Calls Early Election' [ALJAZEERA, 20 November 2014] <<http://www.aljazeera.com/news/asia/2014/11/sri-lanka-president-calls-early-election-20141120132039968850.html>> accessed 30 January 2017

<sup>5</sup> INFORM, 'Repression of Dissent in Sri Lanka: 22 Nov 2014- 31 January 2015 Presidential Election Coverage', February 2015; 'Dummy Sirisena Swallows Rs. 2 Million Public Money' [Asian Mirror, 1 February 2015] <<http://www.asianmirror.lk/keyhole/item/6778-dummy-sirisena-swallows-rs-2-million-public-money>> accessed 30 January 2017; Lahiru Fernando, 'Abducted child used to defame presidential candidate- alleges mother' [News 1st, 2 January 2015] <<http://newsfirst.lk/english/2015/01/abducted-child-used-defame-presidential-candidate-alleges-mother-watch-report/70489>> accessed 30 January 2017

government, the coalition, the SLFP as well as his own popularity, legitimacy and potential legacy.

With neither of the two main coalitions being able to form a government by itself<sup>6</sup>, the United National Party (UNP) (the main constituent of the UNF) and the SLFP (the main constituent party of the UPFA) signed a Memorandum of Understanding (MoU) to form a National Unity Government for the period of two years.<sup>7</sup> This historic move was the first time the SLFP and the UNP entered into a coalition to form a government<sup>8</sup> but was also met with opposition by a section of the SLFP/ UPFA who continued to stay in opposition (described as the Joint Opposition). This group, with the leadership of former President Mahinda Rajapaksa, has successfully managed to dominate the narrative, slow down reforms and continuously challenge President Sirisena's hold on the SLFP. Despite the continuing challenges, the government has failed to formulate a counter strategy, thus exposing the fragility of the coalition.

The Tamil National Alliance (TNA), which has dominated electoral politics in the Northern province and parts of the Eastern province, supported the election victory of President Sirisena<sup>9</sup> and the political alignment between the UNP-SLFP. The relationship between the President, Prime Minister and Opposition Leader, indeed unprecedented, provides a unique opportunity for Sri Lanka to confront and resolve its vexed ethnic problem. Contrast this to the continuing challenges facing the government and the urgent need to restore political momentum, via a strategic communication campaign setting out a vision and rationale for reforms. Failure in this holds both immediate and broader consequences, of a government unable to communicate with the public, and the more sinister dimension of all politicians being the same, with the possibility of favouring a more dominant and decisive ruler and the inevitable slide towards authoritarianism.

## 2.1 Key trends and challenges of the two years

The following areas are relevant in terms of defining the progress of the reform agenda.

**A break from the past:** Although there are criticisms of the status quo, the two elections in 2015 led to a change in the political trajectory of Sri Lanka, contributing significantly to an improved democratic space.<sup>10</sup> Differences in approach were also evident from 2015 particularly from the President's preference to build consensus and

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<sup>6</sup> UNP- 106 Seats, UPFA- 95 Seats, ITAK- 16 Seats, JVP- 6 Seats, SLMC-1 Seat, EPDP-1 Seat, See 'Final Results of General Elections 2015' [Adaderana.lk] <<http://www.adaderana.lk/general-election-2015/index.php>> accessed 30 January 2017.

<sup>7</sup> Tharushan Fernando, 'UNP and SLFP reach a two-year agreement' [News 1<sup>st</sup>, 21 August 2015] <<http://newsfirst.lk/english/2015/08/unp-and-slpf-reach-a-two-year-agreement/107750>> accessed 30 January 2017.

<sup>8</sup> These two parties have been traditional rivals for more than 60 years and have significant differences in the way they approach government.

<sup>9</sup> There is wide agreement among those CPA interviewed that there is a great deal of mutual respect between the President, Prime Minister and Opposition leader.

<sup>10</sup> While a notable difference from the previous regime is that protestors are not met with violence, as seen with incidents such as protests in Rathupaswala and Free Trade Zone, However there seem to be other tactics used at controlling protests and demonstrators such as obtaining court orders preventing protests and the government attempting to limit areas where protests can take place.

discussions around the 19<sup>th</sup> Amendment, which went through several rounds of negotiations.<sup>11</sup> This was repeated in 2016 when the President preferred a consensus resolution to establish the Constitutional Assembly to draft a new constitution<sup>12</sup>, dragging the process and negotiating with key actors including the Joint Opposition and senior leadership of the SLFP. This proclivity for consensus government, runs counter to the manner in which significant political and socio economic reform has previously taken place in Sri Lanka.<sup>13</sup> This approach is both welcome and an overall positive change, however the government needs to manage any public perception of a weak government and executive.<sup>14</sup>

**Divergence of Issues and Positions:** The two years witnessed numerous instances when the National Unity Government was tested on its positions and prioritisation of issues. In the area of constitutional reform, despite broad consensus in 2015, growing divergence is evident as seen on the abolition of the Executive Presidency. The distinct models of economic reform are also a testament to the tensions within the coalition.<sup>15</sup> The tensions within are rife with senior ministers contesting and challenging decisions and positions.<sup>16</sup>

**Erosion of Public Support and Confidence:** A widespread perception at present is of the limited progress being made in the last two years. Considering the centrality of addressing corruption in the campaign, the slow pace of investigations and prosecutions into cases of financial crimes have resulted in pervasive criticism against the government of inaction and heightened perceptions of interference and collusion.<sup>17</sup>

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<sup>11</sup> This could also be because of the political configuration of Parliament and the fact that the government needs to build support in order to have its proposals passed.

<sup>12</sup> The Hindu, 'Sri Lanka's Historic opportunity' [The Hindu, 11 September 2016] <<http://www.thehindu.com/opinion/editorial/Sri-Lanka%E2%80%99s-historic-opportunity/article13992154.ece>> accessed 30 January 2017; The Hindu, 'The Resolution Passed to convert Sri Lankan Parliament to Constitutional Assembly' [The Hindu, 9 March 2016] <<http://www.thehindu.com/news/international/Resolution-passed-to-convert-Sri-Lankan-Parliament-into-Constitutional-Assembly/article14145596.ece>> accessed 30 January 2017.

<sup>13</sup> Key economic policy reform and constitutional reform during the 1970's and 1980's happened primarily according to the vision of the government in power. Furthermore all constitutional amendments to the 1978 Constitution except the 17<sup>th</sup> and 19<sup>th</sup> amendment were passed whilst a single party/ coalition controlled 2/3<sup>rd</sup> majority in Parliament.

<sup>14</sup> As an example when the President decided to negotiate with private bus operators regarding the increase in fines for certain offences there was widespread social media posts stating that the government caved in to pressure. Including posts juxtaposing the President's actions with the former Prime Minister of Singapore's response during the Singapore airlines pilot strike.

<sup>15</sup> The fact that the UNP taking the lead on these areas, with what seems to be limited consensus within the National Government, demonstrates the divergences and different priorities among actors from two parties and distinct political bases.

<sup>16</sup> One of the most controversial aspects around Transitional Justice has been the government's agreement to foreign judges in an accountability mechanism in the consensus resolution at the UNHRC in September 2015. Although this was negotiated by the Foreign Minister initially and finalised by the Prime Minister, there were contrary views expressed by the Justice Minister who insisted of a constitutional bar to foreign judges working in Sri Lanka. This tension has remained over the subsequent months, with the President entering the fray. Similar tensions among key actors in government were evident in other instances such as the Budget, the Central Bank Bond Scandal and the COPE report on the issue, development projects such as the Colombo Port City and Hambantota Industrial Park and others.

<sup>17</sup> While individuals involved in the investigations of financial crimes state that time and care are needed and such complex cases cannot be resolved overnight, there is a communication gap with the public



The expectations were high, and possibly unfair, considering that many of the reforms promised would take time to deliver. Successive governments contributed to authoritarian rule and corruption, with these areas requiring structural reforms. Sri Lanka was also confronted with an ethnic conflict for decades. This said, despite the delays with structural reforms, the government has been unable to move significantly on confidence building measures<sup>18</sup> as discussed in detail in this report.

The promises on economic revival have also come into sharp criticism from a cross-section of society. The promised economic revival has yet to translate into tangible benefits for the masses. On the contrary, growing criticism is evident across the middle class and lower middle class of increase in the cost of living and insufficient job creation. The lack of policy coherence coupled with public disagreements among member of the government has lead to an increasing sense of instability.<sup>19</sup> In addition, media reports also indicate to several development zones being created<sup>20</sup> but limited information is available in the public domain as to how they are to benefit the ordinary citizen including addressing critical areas such as job creation and reducing the cost of living.

There is criticism of the government's failure to hold local government elections. Although officially blamed on the delays with the delimitation report, suspicion is rife of delays being linked to politics, with the two major parties concerned about their popularity and voter base and because elections could lead to a split within the SLFP. The delays in holding these elections impacts the credibility of the government and has enabled the Joint Opposition's narrative that the government is undermining representative democracy on account of fears for the political popularity and survival of its key constituent members.

Moreover, the discontent and the erosion of support are witnessed on a regular basis in the number of protests and demonstrations across Sri Lanka. Although some are politically motivated, many of the protests are a way of voicing disillusionment with the lack of tangible progress on promises made in 2015 and of change yet benefitting significant sections of society.

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increasingly becoming disgruntled with the perception that nothing is being done or continuing interference to halt investigations proceeding.

<sup>18</sup> In the case of militarisation and land releases, many in the North and East expected a change and turned up in significant numbers at both elections in 2015. In the two years of the present government, some lands in the North and East were released to legal owners with resettlement taking place but thousands of acres still continue to be occupied by the military and others. Similarly, despite the government's promises to establish mechanisms and introduce legislation within the UNHRC resolution, limited progress has been made since September 2015. For example, the legislation on the Office on Missing Persons (OMP) was speedily rushed through Parliament with limited consultation in August 2016 but no attempts have yet been made to actually establish the OMP. Similarly, despite the government's promises to enact domestic legislation to correspond with the Convention on Disappearances, there is nothing publicly available to indicate there is tangible progress in this area.

<sup>19</sup> For an example the bundling of the VAT scheme and the numerous revisions made to the 2016 Budget. 'Govt's policy inconsistency irks Ceylon Chamber' [Daily FT, 10 May 2016] <<http://www.ft.lk/article/541095/Govt-s-policy-inconsistency-irks-Ceylon-Chamber>> accessed 30 January 2017; 'Ceylon Chamber's Mixed View on Budget' [the Sunday times, 20 November 2016] <<http://www.sundaytimes.lk/161120/business-times/ceylon-chambers-mixed-view-on-the-budget-217136.html>> accessed 30 January 2017.

<sup>20</sup> Including the Western Region Megapolis, the Ruhunu Development Zone and other industrial zones likely to be created in Trincomalee and Jaffna districts. CPA interview January 2017

In the absence of the government's ability to communicate its policy direction in a coherent and cogent manner, a defensive stance responding to the narrative set by the opposition and critics is evident. This critical failure, a weakness that continues to erode the support for the government and questions its credibility continues unabated with ministers relaying misleading information and contradictions with the government as well as their failure to highlight achievements.<sup>21</sup> In the absence of a comprehensive communication strategy by the government, Non-Government actors including civil society and media entities have stepped in to explain the need for reform but the onus remains with the government. This is critical at a time of increasing disillusionment and the credibility of the government being at a low.

**Political Will:** Although preparatory work for drafting a new constitution continued in 2016, there is growing concern as to whether the political will to carry through with far reaching reforms is being held hostage by some actors.<sup>22</sup> The extent of reforms to be introduced, if any, will likely be seen in the next few months and indicate whether the National Unity Government is able to deliver on one of its most far reaching pledges. It is indeed too soon to comment on how the process will proceed, but concerns are growing of divisions within government with the overall prognosis looking bleak.<sup>23</sup> Some indicate that insufficient work has been done for a referendum and that it is politically prudent to take the safe route of incremental constitutional reform than face defeat at a referendum.<sup>24</sup> This is backed by sentiments of whether the government will be able to govern post a possible defeat in a referendum.

With regards to Transitional Justice, many fear that the government is shirking from commitments made in 2015.<sup>25</sup> Despite the numerous failings, there is likely to be some

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<sup>21</sup> A significant worry in terms of the reform agenda and communication is the limited understanding and awareness outside of particular circles on the Constitutional reform process presently underway. Despite the island-wide consultations undertaken in 2016 and statements by the President and others, significant numbers continue to be unaware of this critical process at reforms. Similarly, the inability of the government to convey the truth seeking mandate of the OMP and explain why such an entity was needed in the context of thousands across Sri Lanka who are disappeared and missing. The failure to simply explain the humanitarian purpose of such an entity resulted in the critics mobilising and spreading untruths, resulting in many misconceptions at the time of enactment of the legislation which continues today.

<sup>22</sup> Allegations are made against those within government and outside of attempting to water down reforms.

<sup>23</sup> While the President and Prime Minister have consistently spoken of the need for a new constitution during the past two years, some others from both parties are starting to comment on the need to merely amend the present constitution, and thus avoid a referendum. 'UNP, SLFP poles apart on Constitutional Reforms' [the Sunday Times, 22 January 2017] <<http://www.sundaytimes.lk/170122/columns/unp-slfp-poles-apart-on-constitutional-reforms-225740.html>> accessed 30 January 2017.

<sup>24</sup> 2016 witnessed several global referenda defeated and some in government are hesitant to proceed with a similar exercise in Sri Lanka claiming that the necessary preparatory work has not yet been done to obtain a favourable outcome and there is insufficient time to create a momentum. CPA interview December 2016 and January 2017.

<sup>25</sup> Despite the passage of legislation, the OMP is yet to be established. Furthermore, there is no information in the public domain regarding the other mechanisms, despite the Foreign Minister's statement of having legislation ready in March 2017 for two of the mechanisms- the TRC and Office for Reparations, with legislation on the court to be followed later in the year. Similarly, very little is known of other reforms including security sector reforms or legal reforms including enacting legislation on disappearances and the repeal/reform of the PTA.

movement as the government is due to report back to the 34<sup>th</sup> Session of the UNHRC in March and negotiations are held around the Generalised System of Preferences Plus (GSP+) application. These though are moves to placate international opinion and timelines rather than genuine buy-in from the political leadership who continue to entertain the misplaced notion that Transitional Justice is likely to anger key constituencies.<sup>26</sup> This is analysed in detail further on this paper.

There is also a widely held perception that investigations into and prosecution of financial crimes and high- profile cases of killings and disappearances have progressed extremely slowly due to political pressures and the government's inability to move efficiently. In the absence of any notable convictions, criticism has grown accordingly.<sup>27</sup>

## **2.2 The Need for a Robust Opposition within the Broad Coalition**

In the Parliamentary elections of 2015, the TNA was returned as the single largest political party in opposition with 16 seats and its seasoned leader, Rajavaroatham Sampanthan, became the Leader of the Opposition. The TNA has played an important role in some of the reforms introduced so far<sup>28</sup> but the test of the leadership is whether a political solution of the ethnic conflict is possible at this moment. It appears that the TNA has prioritised the need for a new constitution, over other issues such as accountability, taking a political gamble that could possibly impact its prospects at the next general election and its survival as a single political configuration.

The uniqueness of the broad coalition of 2015 is its diversity. However, despite playing a crucial role in the lead up to the January 2015 elections, the role of civil society post elections was not clearly articulated. Furthermore, despite some efforts to keep the government to its pledges such as the passage of the 19<sup>th</sup> amendment, there has been a muted role so far in influencing the reform agenda. Transformation among those who played a key role in the lead up to elections is evident. While some are in government, many continue to remain outside government and play a watchdog role. This has not only resulted in the 'blurring of lines', there is also a change in the energy and vigour that was witnessed previously. Unlike the ability to come together on some key areas on the lead up to the 2015 elections, many divisions now remain within civil society in the broader reform agenda<sup>29</sup> with divisions likely to arise in terms of a political solution and accountability for crimes during the war. With the reform project at a critical juncture, 2017 will be a crucial year, testing civil society and others in terms of the extent of reform, implications and keeping the pressure on the reform agenda.

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<sup>26</sup> Reports indicate to different sections opposing aspects of transitional justice including accountability and security sector reforms.

<sup>27</sup> Apart from a key case where former parliamentarian Duminda Silva was convicted of the killing of another politician and others, very few cases are able to demonstrate the system is independent and able to function. Instances where alleged perpetrators in the assassination of former Parliamentarian Raviraj and the Kumarapuram massacre were found not guilty made many question whether there is any change in the justice sector.

<sup>28</sup> Including in the passage of the 19<sup>th</sup> amendment and the OMP legislation and in keeping pressure on issues such as the COPE report, repealing and reforming the PTA, the proposed 65,000 housing scheme and others.

<sup>29</sup> The passage of the 19<sup>th</sup> amendment and pressure on the appointments of the Central Bank Governor and the inquiry relating to the COPE report are some instances where civil society was able to put pressure on the government and opposition but this is limited to a few instances.

## 2.3 International Dimension

The government faced three main foreign policy challenges in 2015: repairing relations with those countries that the former government had alienated, securing funds to prevent a balance of payment crisis, and responding to the UN Office of the High Commissioner for Human Rights (OHCHR) Investigation on Sri Lanka (OISL) at the UNHRC. From a purely foreign policy perspective and on a practical level, the Sri Lankan government has responded effectively to all three of these challenges. To sustain these foreign policy successes, the government will need to accelerate progress and abide by its own international commitments.

Regaining international legitimacy was a primary concern of the government. Enthusiasm within the international community was high with visits being made by the President, Prime Minister, Foreign Minister and others to key foreign capitals in 2015 and 2016. The government's engagement with bilateral and multilateral partners resulted in a series of early foreign policy successes such as the deferment of the OISL report<sup>30</sup> and high level visits by VVIPs to Sri Lanka.<sup>31</sup> Sri Lanka's co-sponsorship of the resolution at the UNHRC in October 2015 was critical in providing a framework for reforms aimed at reconciliation and to partner with members in the international community as opposed to the confrontational approach witnessed previously. The government also achieved important successes of its economic diplomacy. In June 2016, the International Monetary Fund (IMF) approved a three-month facility of 1.5 billion US-Dollars for Sri Lanka to support economic reform programme and avert a balance of payments crisis.<sup>32</sup> In the same month, the European Union lifted its ban on fishing exports from Sri Lanka that it had imposed in January 2015 to combat unregulated fishing<sup>33</sup> and the government announced that it would formally apply to re-gain the GSP+ scheme of the European Union.<sup>34</sup>

Despite promises of reform in early 2015, subsequent months have demonstrated tensions and divisions within government<sup>35</sup> and this is likely to continue. This year will

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<sup>30</sup> Upon request by the government, UN High Commissioner for Human Rights Zeid Ra'ad al-Hussein asked the UNHRC to defer the consideration of the OISL report for six months. 'Zeid requests "one time only" deferral of key report on Sri Lanka conflict', Office of the High Commissioner for Human Rights, 16 February 2015, <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15574#sthash.QF8dD23c.dpuf>> accessed 12 December 2016.

<sup>31</sup> Including the visit of Pope Francis in January 2015, visits by several heads of state, the visit of US Secretary of State Kerry on 2 May 2015 (the first such visit in 43 years), the visit by the UN Secretary General in 2016, and many others.

<sup>32</sup> 'IMF Executive Board Approves Three-Year US\$1.5 Billion Extended Arrangement under EFF for Sri Lanka, International Monetary Fund' Press Release No. 16/262, 3 June 2016, <<http://www.imf.org/external/np/sec/pr/2016/pr16262.htm>> accessed 12 December 2016.

<sup>33</sup> 'European Union completely lifts ban on import of Sri Lanka seafood' [Daily FT, 17 June 2016] <<http://www.ft.lk/article/548996/European-Union-completely-lifts-ban-on-import-of-Sri-Lanka-seafood>> accessed 12 December 2016.

<sup>34</sup> 'Sri Lanka formally applies for GSP+' [Daily news, 29 June 2016] <<http://dailynews.lk/2016/06/29/local/86027>> accessed 12 December 2016.

<sup>35</sup> For example, the government does not speak with one voice on some areas such as Transitional Justice, human rights and Constitutional reform. While Foreign Minister Samaraweera is universally seen as genuine supporter of Sri Lanka's commitments at the UNHRC, the President, the Prime Minister and a number of cabinet ministers have been more ambivalent.

be key with the UNHRC session and GSP+ application. The 34<sup>th</sup> Session of the UNHRC in March this year will see a reporting back by the High Commissioner for Human Rights. With limited progress on the commitments made so far, there is likely to be an extension of the current resolution, providing the government with more time to comply with the resolution. The GSP+ application process is presently with the EU Parliament. Both of these provide a window for greater reforms in Sri Lanka. However, an attempt to rush through with reforms in the run up to the UNHRC sessions and the GSP+ application can also have its downside, which is discussed further on in the report. On the bilateral front, the government is focused on development, poverty reduction and debt relief.<sup>36</sup> Although there is a shift in foreign policy in terms of what was evidenced pre 2015, there is much more to be done to ensure that reforms promised are delivered. In this, the international community must sustain its engagement and at the same time keep up pressure. With new governments in the USA and UK, it is to be seen what changes will be witnessed in the foreign policy agendas. This is also in a context in which many consider Sri Lanka a success story, compared to crises in other parts of the world such as Syria, Iran, Afghanistan and Yemen.

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<sup>36</sup> This includes deals progressing on the Colombo Port City and Hambantota Industrial Zone and reports indicating to more deal in 2017 in other areas. The negotiations on the Millennium Challenge Corporation (MCC) have also progressed with the likelihood of Sri Lanka being approved for the compact by 2018. There are also efforts with India to further ties including negotiating an Economic and Technology Cooperation Agreement (ETCA). The government has further announced its intention to negotiate new bilateral trade agreements with China and Singapore.

### 3. CONSTITUTIONAL REFORM

This section will first examine the key promises made regarding the constitutional reform process in light of the key policy documents that came out during the elections of 2015. It will then proceed to examine the progress made and focus on the lessons that can be extrapolated from these for the on-going reform process. Finally it will look at the challenges that lie ahead for the on-going reform process.

#### 3.1 The Elections of 2015 and their mandates

The Presidential election of January 2015 and the Parliamentary election of August 2015 resulted in the rebalancing of the powers of government between the executive, the legislature and the judiciary. The dominance of the office of the Executive President in the sphere of executive power was also significantly reduced and the office of the Prime Minister and the cabinet of Ministers came to exercise considerable executive power. This diminishing of the powers of the Executive Presidency was the result of both a change in constitutional architecture and the peculiarities of the political circumstances that were created by the common candidate Maithripala Sirisena winning the Presidential election of 2015.

President Maithripala Sirisena who represented the “common opposition front”<sup>37</sup> campaigned on the principal promise of restoring “good governance”. Despite the variance in the English and Sinhala text of the manifesto<sup>38</sup>, a key component of his election platform was enacting constitutional amendments to abolish the Executive Presidency.<sup>39</sup> The President further promised to change the existing electoral system, abolish the eighteenth amendment to the constitution enacted in 2010, re-establish independent institutions, strengthen the Committee system in Parliament and enact the Right to Information legislation. The manifesto and the accompanying 100 day programme did not contain any pledge relating to devolution of power, in fact the manifesto specifically stated that President Sirisena would not undertake any constitutional reform, which required a referendum.<sup>40</sup>

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<sup>37</sup> This report also use the term ‘broad coalition’ to describe this diverse set of individuals and groups.

<sup>38</sup> The Sinhala version of the manifesto states that he will change/ amend the Executive Presidential system, the English version uses the word “abolish”. However both versions make the promise that no changes will be made to the entrenched provisions of the Constitution. See Sinhala version of Manifesto ‘Maithripala presented his election manifesto’ [Onlanka, 19 December 2015] <<http://www.onlanka.com/wp-content/uploads/2014/12/maithripala-election-manifesto-sinhala.pdf>> accessed 30 January 2017; Dr. Kalana Senaratna, ‘The politics of negotiating competing Interests in promulgating the Nineteenth and Twentieth Amendments’ in Dr. Asanga Welikala (ed) *The Nineteenth Amendment to the Constitution: Content and Context* [Centre for Policy Alternatives 2016] available at: <<http://constitutionalreforms.org/2016/05/10/chapter-2-the-politics-of-negotiating-competing-interests-in-promulgating-the-nineteenth-and-twentieth-amendments>> accessed 30 January 2017

<sup>39</sup> Despite the wording of the manifestos President Sirisena has continuously stated that the Executive Presidency will be abolished during his term in office; ‘The Inaugural Address of President Maithripala Sirisena from the Hollowed Precincts of the Most Sacred Sri Dalada Maligawa in Kandy’ [President of Sri Lanka] <<http://www.president.gov.lk/the-inaugural-address-of-president-maithripala-sirisena-from-the-hollowed-precincts-of-the-most-sacred-sri-dalada-maligawa-in-kandy/>> accessed 30 January 2017

<sup>40</sup> ‘Maithripala Sirisena’s 100 Day Work Programme; Detailed Diary Description’ [Colombo Telegraph, 20 December 2015] <<https://www.colombotelegraph.com/index.php/maithripala-sirisenas-100-day-work-programme-detailed-diary-description/>> accessed 30 January 2017; Manifesto: A compassionate Maithri. Governance

In contrast, the manifesto of the United National Front during the August 2015 Parliamentary election was more emphatic in its promise to abolish the Executive Presidency and return to a Parliamentary system of government. It further promised to provide the maximum possible devolution of power within a unitary state, bring about electoral reform, strengthen Fundamental Rights and make good government institutions the fourth pillar of Government. The promise of a new constitution, while implicit and necessary to achieve the promises of President Sirisena's manifesto, is much clearer and central in this manifesto. The need to formulate a new constitution was among the 10 points agreed to by the UNP and SLFP in the MoU to form a National Unity Government.<sup>41</sup>

## 3.2 The 19<sup>th</sup> amendment

### The Process

Immediately after the Presidential election both President Sirisena and Prime Minister Ranil Wickramasinghe faced significant challenges in the process of fulfilling the promise of constitutional reform. The government had to accommodate differing views within a politically diverse coalition and also an opposition that continued to have a significant majority in Parliament.<sup>42</sup> Although many expected the Members of Parliament (MP's) of the SLFP to gravitate towards its new leader, a variety of factors led to a majority of the SLFP Parliamentary group continuing to support former President Rajapaksa or remaining non committal in their support.<sup>43</sup> This is the context in which, the President had to rely on the SLFP and its other partners in the UPFA for the day to day functioning of the government and for his reform agenda. Invariably this impacted the speed and content of the proposed reforms.<sup>44</sup>

One of the main criticisms regarding the 19<sup>th</sup> amendment is to do with the secrecy surrounding the process of drafting and passing the amendment.<sup>45</sup> The information that was available in the public domain regarding the amendment was limited until the Bill

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Stable Country <<http://groundviews.org/wp-content/uploads/2014/12/MS-2015.pdf>> accessed 30 January 2017

<sup>41</sup> The UNP and SLFP agreed to formulate a constitution to strengthen democracy and human rights, to ensure local representation in governance, to affirm a Sri Lankan identity whilst protecting the unique ethnic and religious identity and equality among all ethnicities.

<sup>42</sup> After the Presidential election of 2015 some members of the SLFP joined the government and took up Cabinet Positions, whilst other sections of the SLFP opted to sit in the Opposition. See 'Mahinda Rajapaksa loyalists seek ouster of Sri Lankan Opposition leader Nimal Siripala de Silva Read' [The Economic Times, 7 April 2015]

[http://economictimes.indiatimes.com/articleshow/46838378.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](http://economictimes.indiatimes.com/articleshow/46838378.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst) accessed on 1 February 2017.

<sup>43</sup> President Maithripala Sirisena was elected primarily on the support of the UNP, this was seen as a betrayal by the SLFP/ UPFA members who supported former President Rajapaksa during the elections, former President Rajapaksa continued to be popular among the SLFP's Sinhala Buddhist base, several members of the UPFA owed their political existence to the former President Rajapaksa.

<sup>44</sup> The main change pushed by the UPFA was with regard to the composition of the Constitutional Council, specifically the reduction in the number of non-political appointees on the Council.

<sup>45</sup> However during the process there were several leaks of legislative proposals, which was a strange phenomenon in recent constitutional amendment process in Sri Lanka. Comparatively there have been virtually no leaks with regard to the on going steering committee deliberations.

was gazetted. The changes approved by the Cabinet of Ministers to the gazetted Bill were also not made public until the Bill was before the Supreme Court.<sup>46</sup>

This lack of official and authoritative information was problematic as it prevented the government from galvanising support for the proposals and countering the opposition against it. This also allowed the Bill's opponents to spread misinformation about its content and implications.<sup>47</sup> Whilst the government may point to time constraints and other practical difficulties, such excuses hardly justify the limited information. The secretive process and the manner in which particular information was leaked to the public seem to indicate that there was no agreement on key areas including the abolition of the Executive Presidency.

## Substance

The final text of the amendment was the result of a political compromise<sup>48</sup> which despite the chaotic process<sup>49</sup> received near unanimous support within Parliament. Some important areas provided in the 19<sup>th</sup> amendment include the removal of the President's immunity for official acts<sup>50</sup>, reducing the President's power in relation to Parliament<sup>51</sup>, reintroducing term limits for the office of the President<sup>52</sup>, taking away the sole power of the President to make appointments to key independent institutions<sup>53</sup> and improving transparency in the law making process<sup>54</sup>. Furthermore whilst the President retains power over other aspects of cabinet appointments<sup>55</sup>, the President is

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<sup>46</sup> Aruni Jayakodi, 'The Process of Constitutional Reform: January to May 2015' in Dr. Asanga Welikala (ed) *The Nineteenth Amendment to the Constitution: Content and Context* [Centre for Policy Alternatives 2016] available at: <<http://constitutionalreforms.org/2016/05/10/chapter-1-the-process-of-constitutional-reform-january-to-may-2015>> accessed 30 January 2017; Kelum Bandara, '19A Riddled with Confusions, Complications and Contradictions' [Daily mirror, 3 April 2015] <<http://www.dailymirror.lk/68407/19a-riddled-with-confusions-complications-and-contradictions>> accessed 30 January 2017

<sup>47</sup> Camelia Nathaniel, '19-A: Threat To National Security- Sarath Weerasekera' [The Sunday Leader, 3 May 2015] <<http://www.thesundayleader.lk/2015/05/03/19-a-threat-to-national-security-sarath-weerasekera/>> accessed 30 January 2017

<sup>48</sup> A total of 174 amendments had been submitted for consideration during the committee stage of the Bill (63 amendments by the Government and 111 by the Opposition). Some key areas failed such as the attempt to subject all decisions of the Executive President to the advice of the Prime Minister due to the lack of political support from within the coalition. Centre for Policy Alternatives, 'A Brief Guide to the Nineteenth Amendment to the Constitution', May 2015 <<http://www.cpalanka.org/a-brief-guide-to-the-nineteenth-amendment-to-the-constitution/>> accessed 30 January 2017.

<sup>49</sup> Through the chaotic process of the Committee stage, the changes being made to the Bill were unclear. It was only almost three weeks after the passage of the 19<sup>th</sup> amendment (after the speaker certified the final amendment) that the public had access to the final version that was passed by Parliament. Aruni Jayakodi, 'The Process of Constitutional Reform: January to May 2015' in Dr. Asanga Welikala (ed) *The Nineteenth Amendment to the Constitution: Content and Context* [Centre for Policy Alternatives 2016] available at: <<http://constitutionalreforms.org/2016/05/10/chapter-1-the-process-of-constitutional-reform-january-to-may-2015>> accessed 30 January 2017

<sup>50</sup> The President's official acts were specifically made subject to the Fundamental Rights jurisdiction. Section 7 of the 19<sup>th</sup> amendment to the Constitution of Sri Lanka.

<sup>51</sup> Section 17 of the 19<sup>th</sup> amendment which amended Article 70(1) of the Constitution

<sup>52</sup> Section 4 of the 19<sup>th</sup> amendment which amended Article 31(2) of the Constitution

<sup>53</sup> Section 7 of the 19<sup>th</sup> amendment which amended Article 35 of the Constitution

<sup>54</sup> Article 41.B. (1) of the Constitution of Sri Lanka.

<sup>55</sup> The President- the head of the Cabinet- appoints the Prime Minister. The President determines the number of Cabinet Ministries, the assignment of subjects to Ministers, and retains the power to change



required to act on the advice of the Prime Minister in identifying specific MPs for appointment as Cabinet and other Ministers.

Despite major challenges<sup>56</sup>, the government was able to get the same Parliament that voted for the 18<sup>th</sup> amendment to vote for this amendment, which effectively repealed it. As a result of the changes made the powers of the office of the Executive President are the most limited under the present constitution. Despite all holders of the office since 1994 promising to abolish the Executive Presidency, the 19<sup>th</sup> amendment is the closest Sri Lanka has come to realising this promise.

However, during the time period it has been in operation, the results of the 19<sup>th</sup> amendment have been mixed. Several concerns have been raised about the Constitutional Council particularly in relation to its composition<sup>57</sup>. Although no serious concerns about the character and independence of the specific appointments made through the Constitutional Council process has been raised,<sup>58</sup> significant delays were evident with the appointment process and questions posed about the lack of transparency in its decision making process.<sup>59</sup> The functioning of independent institutions has also seen mixed results, with some commissions being assertive and challenging the decisions of the executive<sup>60</sup> whilst others being largely ineffective.<sup>61</sup> Furthermore, several independent commissions have been hampered by the delay in enacting enabling legislation.<sup>62</sup>

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the assignment of subjects and functions for such Ministries. However the President can appoint an MP as a Minister only on the advice of the Prime Minister and can only dismiss such a Minister on the advice of the Prime Minister. Furthermore the President does not have the power to dismiss the Prime Minister. See Articles 44-46 of the Constitution.

<sup>56</sup> See section 3.1 above

<sup>57</sup> Both the domination of political actors (7 political actors vs the 3 non political appointees) and the inclusion of members of the Executive on the Constitutional Council.

<sup>58</sup> Except in the case of the appointment of the Inspector General of Police Pujith Jayasundara. See Dharisha Bastians, 'Police Chief under fire over 'phone gate' Scandal' [Daily FT, 3 December 2016] <<http://www.ft.lk/article/583814/Police-Chief-under-fire-over--phone-gate--scandal>> accessed 30 January 2017.

<sup>59</sup> Dr. Nihal Jayawickrama, 'The Constitutional Council Fiasco' [The Island, 6 February 2016] <[http://www.island.lk/index.php?page\\_cat=article-details&page=article-details&code\\_title=139922](http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=139922)> accessed 30 January 2017.

<sup>60</sup> The Human Rights Commission of Sri Lanka has been particularly assertive in carrying out its functions. See Hunter S Thompson, 'Restriction of access to legal assistance' [Ceylon Today, 1 October 2016] <<http://www.ceylontoday.lk/print20160701CT20161030.php?id=6476>> accessed 30 January 2017; Human Rights Commission of Sri Lanka, 'Report of the Human Rights Commission to the Committee Against torture', October 2016 available at <<http://hrsl.lk/english/wp-content/uploads/2016/11/Report-to-CAT-Committee-.pdf>> accessed 30 January 2017; 'Sri Lanka Human Rights Commission investigates police action at student protest' [ColomboPage, 5 November 2015] <[http://www.colombopage.com/archive\\_15B/Nov05\\_1446738286CH.php](http://www.colombopage.com/archive_15B/Nov05_1446738286CH.php)> accessed 30 January 2017

<sup>61</sup> Several persons interviewed by CPA stated that the Public Service Commission was ineffective, CPA interview December 2016.

<sup>62</sup> No legislation has been brought to establish the National Audit Commission. See Ashanthi Warunasuriya and Amavasya Sirisena, 'New National Audit bill: Boon or Bane?' [The Sunday Leader, 17 July 2016] <<http://www.thesundayleader.lk/2016/07/17/new-national-audit-bill-boon-or-bane/>> accessed 30 January 2017.

### 3.3 The current reform process

Similar to the 19<sup>th</sup> amendment, the government chose the approach of building consensus among the different political parties within Parliament to enact a new constitution. There is no doubt that broad support from among different political parties within Parliament was necessary since no single political party had the requisite majority to adopt a new constitution. Considering Sri Lanka's history of constitutional change based on narrow political interest of the governing party this approach is a positive development.

The government's constitutional reform agenda was endorsed by voters at two separate elections, with the ruling government having the support of at least 160 members of Parliament.<sup>63</sup> However, by only focusing on this political process with little or no information available to the public at large on the reform process<sup>64</sup>, the government squandered a valuable opportunity to build broad public support around its reform agenda or at the very least prevent the spread of misinformation on the constitutional reform process. This missed opportunity was especially problematic in light of the contentious nature of the envisaged reform and because the draft constitution would have to be accepted by the people at a referendum at the end of the Parliamentary process.

Within six months of the Parliamentary election the government appointed the Public Representations Committee on Constitutional Reform (PRC) and presented a resolution to Parliament to establish a Constitutional Assembly to formulate a new constitution.<sup>65</sup> The political negotiations among the parties representing Parliament on Constitutional reform issues did not proceed at the expected pace and the government missed its own timelines.<sup>66</sup> Subsequent to the submission of the PRC report, the six sub committees

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<sup>63</sup> 'Budget 2016- Third Reading Division' [Parliament of Sri Lanka, 19 December 2015] <<https://www.parliament.lk/en/budget-2016/third-reading-division>> accessed 30 January 2017; 'Budget 2017- Third Reading Division' [Parliament of Sri Lanka, 10 December 2016] <<http://www.parliament.lk/en/budget-2017/third-reading-division>> accessed 30 January 2017; 'Budget 2017 3<sup>rd</sup> Reading Vote' [Manthri.lk] <<http://www.manthri.lk/en/blog/posts/budget-2017-3rd-reading-vote>> accessed 30 January 2017.

<sup>64</sup> Centre for Policy Alternatives, 'Topline Report- Opinion Poll on Constitutional Reform', October 2016 available at <<http://www.cpalanka.org/opinion-poll-on-constitutional-reform-topline-report/>> accessed 30 January 2017

<sup>65</sup> K. Venkadaramanan, 'In the Throes of Political Reform' [The Hindu, 6 January 2016] <<http://www.thehindu.com/opinion/op-ed/In-the-throes-of-political-reform/article13984280.ece>> accessed 30 January 2017; 'Sri Lanka Kick-Starts Process to adopt a new statute' [The Hindu, 9 January 2016] <<http://www.thehindu.com/news/international/Sri-Lanka-kick-starts-process-to-adopt-new-statute/article13990310.ece>> accessed 30 January 2017. The PRC comprised of professionals and academics and were tasked with gathering representations from citizens from across the country on proposals for a new constitution. "According to our records, over 2500 persons/organizations have appeared before us and made oral and written representations. Further, over 800 representations were received via e-mail, 150 by way of fax messages, 60 by telephone messages and 700 representations by post or handed over at the office." Public Representations Committee on Constitutional Reform, 'Public Representations Committee on Constitutional Reform', May 2016 <[http://english.constitutionalassembly.lk/images/pdf/PRC\\_1.pdf](http://english.constitutionalassembly.lk/images/pdf/PRC_1.pdf)> accessed 30 January 2017.

<sup>66</sup> Meera Srinivasan, 'Rajapaksha slams draft proposals for Constitution' [The Hindu, 5 December 2016] <<http://www.thehindu.com/news/international/Ranil-aims-to-present-draft-Constitution-by-year-end/article14380964.ece>> accessed 30 January 2017; the delay of almost two months to pass the framework resolution and set up a Constitutional Assembly.

appointed by the Steering Committee of the Constitutional Assembly (the Steering Committee) started formulating proposals to be submitted to the Steering Committee. At the time of writing, the Steering Committee has met close to 50 times since its inception.<sup>67</sup>

### **3.4 Key areas in the current reform process**

#### **a) Devolution of Power and the Executive Presidency**

The nature of the State and to what extent power is devolved to Provincial Councils are the most contentious and politically charged issues in the entire reform process. Reports indicate many within the UNP and the SLFP being committed to the preservation of the 'unitary state' whilst the TNA opposes the label of the 'unitary state'. Beyond the formal description of the state, there is also no agreement yet on the substantive provisions relating to the devolution of power.<sup>68</sup> The other main promise on constitutional reform was the abolition of the Executive Presidency. More recently it became public that the SLFP opposes the abolition and argues for retaining the Executive Presidency in its present form.<sup>69</sup> Even among the political parties that support abolition there is little or no agreement as to what should replace it.<sup>70</sup>

The constitutional reform process at present seems to hinge on these dual issues relating to abolishing the Executive Presidency and devolution of power. This is because the issue of devolution of power has historically been a contentious issue and because at least some sections of the SLFP wanting to trade concessions on devolution to retain the Executive Presidency in its present form.<sup>71</sup> Whilst there was a clear disagreement between the TNA on one hand and the UNP and SLFP on the other as regards the extent of devolution of power there was broad support for the abolishing the Executive Presidency. However, all political configurations other than the Joint Opposition did not

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<sup>67</sup> 'Third sitting of the Constitutional Assembly' [The Constitutional Assembly of Sri Lanka, 19 November 2016] <<http://english.constitutionalassembly.lk/media/press-releases/106-steering-committee-discuss-electoral-reforms-devolution-executive>> accessed 30 January 2017.

<sup>68</sup> Although until December 2016, the indications were that there was an evolving consensus within the Steering Committee. See 'Unitary Character and Devolution: Decision up to Parliament: Kiriella' [Daily mirror, 18 January 2017] <<http://www.dailymirror.lk/122381/Unitary-character-and-devolution-decision-up-to-parliament-kiriella>> accessed 30 January 2017; Kelum Bandara, 'Proposed Constitution somewhat Similar to APRC: Says Sumanthiran' [Daily mirror, 17 January 2017] <<http://www.dailymirror.lk/article/Proposed-Constitution-somewhat-Similar-to-APRC-Proposals-Says-Sumanthiran-122280.html>> accessed 30 January 2017.

<sup>69</sup> 'SLFP wants executive presidency retained and Sirisena to contest' [the Sunday Times, 8 January 2017] <<http://www.sundaytimes.lk/170108/news/slfp-wants-executive-presidency-retained-and-sirisena-to-contest-223367.html>> accessed 30 January 2017

<sup>70</sup> Options vary from directly elected Prime Minister, having a vote of investiture to a pure Westminster system. See Centre for Policy Alternatives, 'Reshaping the Executive: Choosing the Prime Minister in a Parliamentary System', June 2016 <<http://constitutionalreforms.org/wp-content/uploads/2016/06/CPA-Working-Paper-2.pdf>> accessed 30 January 2017.

<sup>71</sup> Chamikara Weerasinghe, 'SLFP backs Executive Presidency, broader power to PCs' [Daily news, 30 May 2016] <<http://www.dailynews.lk/?q=2016/05/30/political/83151>> accessed 30 January 2017; Asela Kuruluwansa, 'SLFP candidate for presidential poll: President must abide by party decision: SB' [Daily news, 13 January 2017] <<http://dailynews.lk/2017/01/13/local/104601/slfp-candidate-presidential-poll-president-must-abide-party-decision-sb>> accessed 30 January 2017; 'SLFP wants Executive Presidency- Deputy Speaker' [News Radio, 15 January 2017] <<https://www.newsradio.lk/retain-post-executive-presidency-deputy-speaker/>> accessed 30 January 2017

lay down any non-negotiable pre conditions going into the negotiations at the Steering Committee.<sup>72</sup> The Steering Committee process thus represents a unique opportunity to develop a consensus among a broad cross section of political parties representing Parliament. The report of the Steering Committee which was due to be presented to the Constitutional Assembly in December 2016 could have provided clarity on the political agreements reached on these issues but is yet to be publicly shared with no information available at the time of writing as to when and if it will be made public.<sup>73</sup> With recent public statements by senior members of the SLFP on the Executive Presidency and the devolution of power<sup>74</sup>, there is a growing perception of diminishing prospects for political consensus in this regard.

The proposition to retain the Executive Presidency in its present form is troubling. As discussed previously, the 19<sup>th</sup> amendment complicates the distribution of executive power between the President and the Prime Minister.<sup>75</sup> Therefore in a situation where the Prime Minister and President do not have a working relationship, this arrangement could become unworkable.<sup>76</sup> The power settlement in the 19<sup>th</sup> amendment was a political compromise, which would become unworkable over a period of time, and thus, it is curious as to why these senior members of the SLFP would want to prolong this system.

## **b) Electoral Reform**

Despite some setbacks, there is broad consensus among the UNP, SLFP, TNA and Joint Opposition about amendments to the electoral system. Parties seem to broadly agree that the Mixed Member Proportional (MMP) system with two ballots should replace the existing electoral system. However the Sri Lanka Muslim Congress (SLMC) and the Tamil Progressive Alliance (TPA) have raised concerns about the impact of the proposed system on representation of minority communities.<sup>77</sup> The Janatha Vimukthi Peramuna (JVP), which potentially stands to benefit the most from a shift to MMP,

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<sup>72</sup> Shamindra Ferdinando, 'Constitution making process: JO spells out non-negotiable conditions, urges govt. to reveal UNP- SLFP proposals' [The Island, 21 December 2016]

<[http://www.island.lk/index.php?page\\_cat=article-details&page=article-details&code\\_title=157575](http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=157575)> accessed 30 January 2017

<sup>73</sup> From December the submission of the report was postponed to January 2017, until being postponed indefinitely at the behest of the SLFP for further internal consultations.

<sup>74</sup> 'UNP, SLFP poles apart on Constitutional reforms' [the Sunday Times, 22 January 2017]

<<http://www.sundaytimes.lk/170122/columns/unp-sfp-poles-apart-on-constitutional-reforms-225740.html>> accessed 30 January 2017; 'SLFP favours proposals not requiring referendum: Dilan' [Daily mirror, 13 January 2017] <<http://www.dailymirror.lk/article/SLFP-favours-proposals-not-requiring-referendum-Dilan-122110.html>> accessed 30 January 2017; 'No Elections in 2020: Says Rajitha' [Daily FT, 12 January 2017] <<http://www.ft.lk/article/590986/ft>> accessed 30 January 2017.

<sup>75</sup> *Supra* note 55.

<sup>76</sup> Furthermore, beyond the incumbent, the President can no longer retain any ministerial responsibilities. See section 9 of the 19<sup>th</sup> amendment and section 50(a) and 51 of the 19<sup>th</sup> amendment

<sup>77</sup> The concerns of the SLMC and the TPA are mainly due to issues of geographical representation for their candidates and the long-term political implications of not being able to nurture geographical constituencies. 'SLMC opposed to new electoral system' [Daily mirror, 2 January 2017]

<<http://www.dailymirror.lk/article/SLMC-opposed-to-new-electoral-system-121497.html>> accessed 30 January 2017.

however has not taken up a public position on the proposals.<sup>78</sup> Despite the broad consensus on electoral reform, it has to be noted that in terms of the larger reform agenda electoral reform-by itself- is a necessary but inadequate measure to improve transparency and accountability of elected representatives. The government has committed to introducing campaign finance reform legislation and amendments to election law to strengthen intra party democracy, but it remains to be seen if such measures will get political support.<sup>79</sup>

### **c) A new Fundamental Rights Chapter**

Another area in which reform was promised is the strengthening of the Fundamental Rights chapter. In this regard the report of the subcommittee on Fundamental Rights has made progress with the recognition of several new rights<sup>80</sup> and changing the scope of restrictions. Whilst the subcommittee's report is only a proposal to be considered by the Constitutional Assembly it appears to be a progressive and robust chapter on rights. This subcommittee report has generated significant public debate particularly on including justiciable economic and social rights<sup>81</sup> and subjecting customary laws to review by courts for compliance with Fundamental Rights standards<sup>82</sup>. Additionally both the sub committee on fundamental rights and on the independence of the judiciary recommend the fundamental rights jurisdiction be given to lower courts (than the Supreme Court). This should make it easier for citizens to access courts for remedies in

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<sup>78</sup> At present because of the 5% cutoff point at the district level a significant number of votes cast for the JVP do not get counted towards the allocation of seats (i.e. in places they do not reach the cutoff point). However a MMP system with a dual ballot, operating at the Provincial or National level will minimize this. Furthermore the dual ballot in addition to securing their existing votes will increase the JVP's chance of attracting votes from the two main political parties.

<sup>79</sup> Zahrah Imtiaz, 'Pecuniary interest in polls campaigns: call to cap spending' [Daily news, 16 September 2016] <<http://dailynews.lk/2016/09/16/features/93314>> accessed 30 January 2017.

<sup>80</sup> Includes the right to life, dignity, privacy, the right not to be subject to enforced disappearance, Right to enjoy and promote culture and use of language, Freedom to engage in any lawful livelihood, trade, occupation, profession, business or enterprise, the right to health, the right to education. See Report of the Sub-Committee of the Constitutional Assembly, available at <<http://english.constitutionalassembly.lk/images/pdf/01-Fundamental-Rights-ste.pdf>> accessed 30 January 2017

<sup>81</sup> Dr. Asanga Welikala, 'The Case Against Constitutionalizing Justiciable Socioeconomic Rights in Sri Lanka', CPA Working Papers on Constitutional Reform No. 12, January 2017 available at <<http://constitutionalreforms.org/wp-content/uploads/2016/06/Working-Paper-12-1.pdf>> accessed 30 January 2017; Daniel Antonio Garcia- Huerta, 'A Constitution for Human Rights: Between Abstract Principles and Social Transformation', CPA Working Papers on Constitutional Reform No. 11, January 2017 available at <<http://constitutionalreforms.org/wp-content/uploads/2016/06/Working-Paper-11-1.pdf>> accessed 30 January 2017; Mario Gomez, Conor Hartnett and Dinesha Samararatne, 'Constitutionalizing Economic and Social Rights in Sri Lanka', CPA Working Papers on Constitutional Reform No. 7, September 2016 available at <<http://constitutionalreforms.org/wp-content/uploads/2016/06/Working-Paper-7.pdf>> accessed 30 January 2017; 'Economic and Social Rights in the New Constitution: A New Justification' [Daily FT, 23 November 2016] <<http://www.ft.lk/article/581680/ft>> accessed 30 January 2017.

<sup>82</sup> Ameer Faaiz, 'Muslim Personal Laws Reform: On or Not?' [Groundviews, 29 October 2016] <<http://groundviews.org/2016/10/29/muslim-personal-laws-reforms-on-or-not/>> accessed 30 January 2017; Rathindra Kuruwita, 'Addressing women's issue will strengthen Muslim Community' [Ceylon Today, 14 November 2016] <<http://www.ceylontoday.lk/print20161101CT20161231.php?id=9241>> accessed 30 January 2017

cases of violations of fundamental rights. It remains to be seen how these debates and proposals are addressed when progressing with the reforms.

#### **d) The Constitutional Court**

The Constitutional Court was not an explicit promise by the government in terms of its constitutional reform agenda. It has been argued that such a Court is immensely significant in developing the new constitution, particularly with respect to the bill of rights and ensuring the supremacy of the constitution.<sup>83</sup> The subcommittee on the independence of the judiciary<sup>84</sup> has taken on board the submissions by several organisations and groups<sup>85</sup> and has recommended the establishment of a Constitutional Court to deal with important constitutional law issues and to be the apex body with regard to the interpretation of the constitution. The sub committee has further recommend the Constitutional Court exercise exclusive jurisdiction with regard to constitutional interpretation and that the court be comprised of legal academics in addition to legal practitioners and judges.<sup>86</sup>

### **3.5 Challenges to the Reform process**

A constitutional amendment or a new constitution abolishing the Executive Presidency and providing for meaningful devolution of power would require approval by the people at a referendum.<sup>87</sup> The main setback so far is that the government has done very little to broaden the discourse on these issues; it has not put forward its vision on these issues and failed to deepen the understanding among citizens. In addition, other areas such as the deteriorating economic situation, the onset of the worst drought in recent years, increase in the cost of living,<sup>88</sup> continued allegations of corruption against the

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<sup>83</sup> Centre for Policy Alternatives, 'Written Submissions to the Subcommittee of the Constitutional Assembly on the Judiciary', July 2016 available at <<http://www.cpalanka.org/written-submissions-by-the-centre-for-policy-alternatives-to-the-subcommittee-of-the-constitutional-assembly-on-the-judiciary/>> accessed 31 January 2017.

<sup>84</sup> The Steering Committee of the Constitutional Assembly, 'Report of the sub-committee on judiciary' available at <<http://english.constitutionalassembly.lk/images/pdf/02-Judiciary-ste1.pdf>> accessed 31 January 2017.

<sup>85</sup> *Supra* note 84.

<sup>86</sup> The subcommittee report whilst recommends the establishment of the Court but has not justified its recommendation adequately. This is particularly because of the several arguments that were placed before the subcommittee against establishing such a Court and because of Sri Lanka's past experience with the institution. See Dr. Nihal Jayawickrama, 'Establishing a Constitutional Court: The Impediments Ahead', CPA Working Paper on Constitutional Reform No. 13, January 2017 available at <<http://constitutionalreforms.org/wp-content/uploads/2016/06/Working-Paper-13-1.pdf>> accessed 31 January 2017.

<sup>87</sup> This is because moving beyond the devolution framework already in the Constitution and the Provincial Councils Act will require a referendum based on the interpretation of Article 2 of the Constitution in the majority decision of *In Re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill (1987) 2 Sri L.R. 312*, (a full Bench decision of the Supreme Court) and converting the Presidency into a titular Presidency would also require a referendum in terms of the decisions of the Supreme Court in *In Re the Nineteenth Amendment to the Constitution (2002)* and *In Re the Nineteenth Amendment to the Constitution (2015)*.

<sup>88</sup> World Food Programme, 'Sri Lanka- Initial Rapid Assessment on Drought 2016, January 2017' available at <[https://www.wfp.org/Sri\\_Lanka\\_Drought\\_Assessment](https://www.wfp.org/Sri_Lanka_Drought_Assessment)> accessed 31 January 2017; 'Drought Could Cost Sri Lanka Billions: Report' [Asian Mirror, 26 January 2017] <<https://www.asianmirror.lk/news/item/22086-drought-could-cost-sri-lanka-billions-report>> accessed 31 January 2017.

government<sup>89</sup>, the lack of progress on any major corruption cases against the previous regime, compound the perception of inefficiency, inertia and lack of political will within the present government. These circumstances make the government's ability to win a referendum increasingly difficult.<sup>90</sup>

Sri Lanka will see a series of elections during 2017 and 2020. With the report of the delimitation commission recently handed over to the Minister Local Government and Provincial Councils and being gazetted by the end of January<sup>91</sup>, Local Authority elections could be conducted in a matter of months.<sup>92</sup> In such a context, questions remain as to when the Local Authority elections will be held with the prospect of provincial and national elections likely to be held as well during this period. Provincial Council elections in September 2017, 2018 and 2019,<sup>93</sup> with the Presidential election tipped for 2019<sup>94</sup> and Parliamentary elections in 2020.

A school of thought holds that the referendum should be ideally concluded before the commencement of the local authority elections. This is largely due to practical and political reasons such as the ability of political parties to mobilise their grass root level party machinery to campaign for the new constitution and turn out the vote during a period when there is a focus on elections. Furthermore, local government elections increase the prospect of friction and rivalry between grassroots cadre, with larger issues including the prospect of a new constitution taking a secondary role. Another factor that must be considered regarding the timing of the referendum and elections is the growing disenchantment and disillusionment with the postponement of local government elections and whether this can be turned around. All these factors and possibly others will impact on whether a referendum held during the 2017 – 2019 election cycle will receive the complete support of party loyalists and supporters. This support is absolutely necessary if the government hopes to win a referendum.

Considering the rate of current progress, it seems unlikely that the government will be able to produce a draft constitution to submit to the people for a referendum in the first half of 2017. It is also unlikely that demonstrable progress in key areas to win the confidence of the public and provide credibility to the government will be achieved to

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<sup>89</sup> 'Corruption Perception Index 2015: Transparency International' [Transparency International] <<https://www.transparency.org/cpi2015/>> accessed 30 January 2017.

<sup>90</sup> This must also be considered in the context where history has proven it easy to convince a majority of the country that any proposal aimed at assuaging minorities would lead to a separation of the country. See Ketheshwaran Loganathan, *Sri Lanka: Lost Opportunities: Past Attempts at Resolving Ethnic Conflict* [CEPRA, Faculty of Law, University of Colombo 1996].

<sup>91</sup> Sandun A Jayasekara, 'Delimitation Report Handed over to Minister' [Press reader, 18 January 2017] <<https://www.pressreader.com/sri-lanka/daily-mirror-sri-lanka/20170118/282239485326771>> accessed 30 January 2017.

<sup>92</sup> However the elections commission has suggested that realistically Local Authority elections cannot be held until the end of May. 'Local government elections cannot be held before May- Election Commissioner' [ColomboPage, 17 January 2017] <[http://www.colombopage.com/archive\\_17A/Jan17\\_1484591635CH.php](http://www.colombopage.com/archive_17A/Jan17_1484591635CH.php)> accessed 30 January 2017.

<sup>93</sup> 'Provincial Council Election Results' [Election Commission of Sri Lanka] <<http://www.slelections.gov.lk/web/index.php/en/past-provincial-council-election-results>> accessed 30 January 2017.

<sup>94</sup> As per Article 31 (3) of the Constitution, the poll to elect a President should be conducted at least one month prior to the expiration of his term (i.e. 8 December 2019 the latest).

ensure success at a referendum. Failure at a referendum could be disastrous to the government and will not only derail the reform process but will also raise questions about the legitimacy of the government thereafter.

The alternatives being proposed to a new constitution are minor changes to the present constitution, which would not require a referendum. It is unlikely that any significant changes impacting the promises made by the government can be achieved at this stage without triggering a referendum. Mere symbolic changes are unlikely to convince the public that the government has achieved its goal of constitutional reform. It has to be emphasised that this government came into power on the promise of major reforms and the inability to deliver on those promises could leave the government vulnerable at future elections.

Furthermore, the absence of any meaningful progress on devolution of power is also likely to delegitimise elements within the TNA that support the constitutional reform process.



## 4. ANTI CORRUPTION AND RELATED ISSUES

Establishing “good governance” was the government’s main campaign promise in both elections in 2015. The previous section discussed the changes promised to the Constitution to improve transparency and independence within government. The present section will look at broader issues relevant to anti-corruption.

### 4.1 Main challenges

On the governance front, the main challenges facing the government are the lack of progress on investigations into allegations of corruptions and the number of allegations of large- scale corruption against it.<sup>95</sup> It is generally agreed that despite disagreements on issues pertaining to constitutional reform and Transitional Justice, the coalition that supported the victory of the President in January 2015, supported the proposals to create a more transparent and accountable government. Therefore the setback on this front has a much more significant impact on public perception of the government. In turn this has further complicated reform efforts relating to constitutional reform and Transitional Justice. The government should have been aware of this potential impact, the fact that they permitted these setbacks is indicative of either mismanagement or the existence of a design to use this as an excuse for the slow progress on constitutional reform and Transitional Justice.

#### a) Investigations into allegations of corruption

Whilst the rhetoric of large -scale corruption of the previous government continues, the lack of significant progress on investigations raises serious questions about the credibility of the government.<sup>96</sup> The investigations are no doubt complicated and time consuming.<sup>97</sup> However the government has failed to communicate this and the progress

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<sup>95</sup> Sam Samarasinghe and Dushyantha Mendis, ‘The Bond issue controversy- an analysis’ [Daily FT, 25 March 2015] <<http://www.ft.lk/2015/03/25/the-bond-issue-controversy-an-analysis/>> accessed 31 January 2017; ‘Good Governance activist writes to Monetary Board demanding Bond info’ [Mirror Business, 20 April 2016] <<http://www.dailymirror.lk/108375/Good-governance-activist-writes-to-Monetary-Board-demanding-bond-info>> accessed 31 January 2017; Dharisha Bastians ‘Sumanthiran Vs Swaminathan on 65,000 houses in NE’ [Daily FT, 7 December 2016] <<http://www.ft.lk/article/584534/ft>> accessed 31 January; Namini Wijedasa, ‘Conditional approval for 10, 000 prefab houses in North’ [the Sunday Times, 18 December 2016] <<http://www.sundaytimes.lk/161218/news/conditional-approval-for-10000-prefab-houses-in-north-221172.html>> accessed 31 January; Namini Wijedasa, ‘Tycoon gets sweetheart deal for mega tyre city in Horana’ [the Sunday Times, 15 January 2017] <<http://www.sundaytimes.lk/170115/news/tycoon-gets-sweetheart-deal-for-mega-tyre-city-in-horana-225018.html>> accessed 31 January 2017.

<sup>96</sup> There is also growing criticism of individuals being questioned with some arrested on comparatively minor offences. “No investigation on Large Scale Corruption’: Senaratne Slams Own Government’ [Asian Mirror, 5 October 2016] <<http://www.asianmirror.lk/top-news/item/19587-no-investigations-on-large-scale-corruption-senaratne-slams-own-government>> accessed 31 January 2017; Ranil Wijayapala, ‘Fraud and Corruption: Investigations moving at snail’s pace’ [Sunday Observer, 15 March 2015] <<http://archives.sundayobserver.lk/2015/03/15/sec03.asp>> accessed 31 January 2017.

<sup>97</sup> The inability to share information between different investigative agencies, the complex nature of the offences, the lack of skilled investigators and the transnational nature of these offences all contribute to the delay in investigations, CPA interview December 2016; see also Rasika Jayakodi, ‘Cabinet defers paper on anti-corruption delays’ [Sunday Observer, 22 May 2016] <<http://archives.sundayobserver.lk/2016/05/22/fea01.asp>> accessed 31 January 2017; Nelum Gamage, ‘Feature: The Offence of Corruption in the Bribery Act’ [Daily news, 12 December 2016] <<http://dailynews.lk/2016/12/12/law-order/101650>> accessed 31 January 2017.

made in strengthening investigative agencies<sup>98</sup> and has also failed to introduce several key reforms intended to help combat corruption.<sup>99</sup>

The situation is further exacerbated by a string of allegations of corruption and nepotism against Members of the present government. Almost all such allegations have yet to be comprehensively investigated<sup>100</sup> with perception rife of some in government actively trying to cover up these incidents.<sup>101</sup> This has contributed significantly to the growing perception that the present government is as or more corrupt than its predecessor.<sup>102</sup>

## **b) Right to Information act**

One of the key successes of the government over this period has been the passage of the Right to Information (RTI) act.<sup>103</sup> Despite the significant delay in appointing the commissioners to the RTI commission, all provisions of the act will be brought into operation by the 3<sup>rd</sup> of February.<sup>104</sup> The passage of the act was significant as it was a

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<sup>98</sup> 'Sri Lanka calls on the international help to find former first family's alleged foreign fortune' [The Telegraph, 23 January 2017] <<http://www.telegraph.co.uk/news/worldnews/asia/srilanka/11806234/Sri-Lanka-calls-on-international-help-to-find-former-first-familys-alleged-foreign-fortune.html>> accessed 30 January 2017; 'Prime Minister update Parliament on Investigation delay' [News.lk, 9 June 2016] <<http://www.news.lk/news/sri-lanka/item/13597-prime-minister-update-parliament-on-investigation-delay>> accessed 31 January 2017.

<sup>99</sup> Ranil wants to create UK-type serious Frauds Division' [Ada Derana, 5 June 2015] <<http://www.adaderana.lk/news/31135/ranil-wants-to-create-uk-type-serious-frauds-division>> accessed 30 January 2017 and 'Decisions taken by the cabinet of ministers at its meeting held on 28.06.2016' [News.lk, 29 June 2016] <<http://www.news.lk/cabinet-decusions/item/13820-decisions-taken-by-the-cabinet-of-ministers-at-its-meeting-held-on-28-06-2016>> <<http://www.news.lk/cabinet-decusions/item/13820-decisions-taken-by-the-cabinet-of-ministers-at-its-meeting-held-on-28-06-2016>> accessed 30 January 2017; Ranil Wijayapala, 'Special Tribunal to investigate Corruption: Redrafted Bill Soon in Parliament' [The Sunday observer, 29 January 2017] <<http://sundayobserver.lk/2017/01/29/news/special-tribunal-investigate-corruption-redrafted-bill-soon-parliament>> accessed 31 January 2017.

<sup>100</sup> 'Updated: Australian firms linked to bribe scandals in Sri Lanka' [Daily FT, 25 August 2016] <<http://www.ft.lk/article/563708/Australian-firms-linked-to-bribe-scandals-in-Sri-Lanka--Sirisena-implicated>> accessed 31 January 2017; 'President appoints commission to investigate bond issue' [Colombo Gazette, 27 January 2017] <<http://colombogazette.com/2017/01/27/president-appoints-commission-to-investigate-bond-issue/>> accessed 31 January 2017.

<sup>101</sup> Chandra Jayaratne, 'An Open Letter To UNP Members of COPE' [Colombo Telegraph, 10 July 2016] <<https://www.colombotelegraph.com/index.php/an-open-letter-to-unp-members-of-cope/>> accessed 31 January 2017; 'Corruption: The Inconvenient Truth' [Daily FT, 12 May 2016] <<http://www.ft.lk/article/541415/Corruption--The-inconvenient-truth>> accessed 31 January 2017; Ifham Nizam, 'Protecting the Mandate To Fight Corruption' [The Sunday Leader, 16 October 2016] <<http://www.thesundayleader.lk/2016/10/16/protecting-the-mandate-to-fight-corruption/>> accessed 31 January 2017.

<sup>102</sup> 'Sri Lanka ranked 95 in 2016 Corruption Perception Index' [Colombo Gazette, 25 January 2017] <<http://colombogazette.com/2017/01/25/sri-lanka-ranked-95-in-2016-corruption-perception-index/>> accessed 30 January 2017.

<sup>103</sup> Right to Information Act, No. 12 of 2016.

<sup>104</sup> 'Sri Lanka: Extraordinary Gazette notification announces Right to Information Act to be enforced from February 3<sup>rd</sup>' [ColomboPage, 22 January 2017] <[http://www.colombopage.com/archive\\_17A/Jan22\\_1485073570CH.php](http://www.colombopage.com/archive_17A/Jan22_1485073570CH.php)> accessed 31 January 2017.

culmination of an effort by civil society organisations for over twenty years.<sup>105</sup> The act itself is textually very strong and has been welcomed as a much-needed tool for private citizens and civil society organisations to ensure greater accountability in government. However, as with many other progressive legislation, the extent to which the legislation will be implemented remains to be seen.<sup>106</sup> The main concerns regarding the RTI act stem from the restriction placed on disclosing information relating to economic development and the applicability of the legislation to the Non-Government sector.<sup>107</sup> Although the government has conducted more awareness raising campaigns in this area compared to others, a lot more needs to be done to fully operationalize RTI in Sri Lanka.

### **c) Other legislation**

Despite the progress on the RTI act, other legislation promised by this government, which was supposed to increase transparency of government processes, have not been enacted.<sup>108</sup> Whilst some proposed legislation have been delayed due to concerns raised by public servants<sup>109</sup>, delays pertaining to other proposed legislation are yet to be explained.

Several proposed legislation particularly relating to development activities have sought to centralise power within the purview of one or two individuals and reduce existing checks and balances.<sup>110</sup> The government's position seems to be that there is a need to simplify process and ensure quick decision making in order to increase local competitiveness.<sup>111</sup> However, past experiences have seen such types of reform only

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<sup>105</sup> Nalaka Gunawardena, 'Pioneers of the Right to Information Struggle in Sri Lanka' (Sinhala) [Ravaya, 3 July 2016] <<http://www.vikalpa.org/?p=27152>> accessed 31 January 2017; 'RTI Time Line' (Sinhala) [Vikalpa, 16 May 2016] <<http://bit.ly/2kpWrp7>> accessed 31 January 2017.

<sup>106</sup> Sam Bresnick, 'RTI, lifting the curtain of secrecy' [Daily news, 3 October 2016] <<http://dailynews.lk/2016-10-03-193000/features/94810>> accessed 31 January 2017; Gehan Gunatilleke, 'The Right to Information as a Fundamental Right' in Dr. Asanga Welikala (ed) The Nineteenth Amendment to the Constitution: Content and Context [Centre for Policy Alternatives 2016] available at: <<http://constitutionalreforms.org/2016/05/10/chapter-8-the-right-to-information-as-a-fundamental-right/>> accessed 30 January 2017.

<sup>107</sup> There remains ambiguity to what extent the act will apply to Non-Governmental organisations and companies in which the government owns shares. Furthermore the belated inclusion of Non-Governmental organization within legislation that was otherwise structured to be applicable to the government sector places a particularly onerous burden on them.

<sup>108</sup> These include the National Audit Bill, amendments to the Bribery Act, Assets and Liabilities Declaration act and the Official Secrets Act No 32 of 1955

<sup>109</sup> Lacille De Silva, 'The National Audit Bill: Should they hold it up?' [Daily FT, 25 July 2016] <<http://www.ft.lk/article/557042/The-National-Audit-Bill--Should-they-hold-it-up>> accessed 31 January 2017.

<sup>110</sup> See Centre for Policy Alternatives, 'The Western Region Megapolis Master Plan and The Megapolis Authority', April 2016 available at <<http://www.cpalanka.org/the-western-region-megapolis-master-plan-and-the-megapolis-authority/>> accessed 31 January 2017; Chandra Jayaratne, 'The Development (Special Provisions) Bill and the Coalition Government' [Daily FT, 28 July 2016] <<http://www.ft.lk/article/557628/The-Development--Special-Provisions--Bill-and-the-Coalition-Government>> accessed 31 January 2017; 'Bill to facilitate overall National Policy formulation' [the Sunday Times, 4 December 2016] <<http://www.sundaytimes.lk/161204/news/bill-to-facilitate-overall-national-policy-formulation-219107.html>> accessed 31 January 2017.

<sup>111</sup> Kelum Bandara, 'Development (Special Provisions) Bill: We want economic development and rapid decision making' [Daily mirror, 3 January 2017] <<http://www.dailymirror.lk/article/Development-Special-Provisions-Bill-We-want-economic-development-and-rapid-decision-making--121572.html>> accessed 30 January 2017; 'Will the Development (Special Provisions) Bill Paves Way for a Super

leading to arbitrary decision-making and incentivising corruption, with no tangible improvements in economic prospects.<sup>112</sup> Thus, the government's position seems to be a rehash of past excuses. In light of its electoral mandate and rhetoric of good governance, the government is in a particularly difficult position to justifying such endeavours.

## 4.2 Existing checks and balances

The past two years have seen the implementation of a comparatively depoliticised oversight over political institutions.<sup>113</sup> The tension between political actors and bureaucrats especially on matters of policy was to be expected. However the government has demonstrated a significant degree of resistance on issues concerning transparency with regard to these institutions.<sup>114</sup> When in conflict with oversight bodies, the Government has resorted to the usual justification of the need for a free hand and flexibility when dealing with matters of economic policy. This echoes the rhetoric of the previous government and undermines the narrative on which the President and the UNP campaigned during the elections of 2015. It remains to be seen whether the government is able to forge a mature relationship with these oversight bodies. The government's legitimacy and that of independent institutions can be risked if the government continues to confront these institutions.<sup>115</sup>

Particularly problematic has been the government's attitude towards the media. Whilst the environment for dissent on general and media freedom saw an improvement in the

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Minister' [News 1<sup>st</sup>, 21 December 2016] <<http://newsfirst.lk/english/2016/12/157557/157557>> accessed 31 January 2017.

<sup>112</sup> This has been Sri Lanka's experience with centralising power in the Executive Presidency. See for overview of broad issues; Executive Presidency at the root of the problem' [the Sunday Times, 23 October 2016] <<http://www.sundaytimes.lk/161023/editorial/executive-presidency-at-the-root-of-problem-213378.html>> accessed 31 January 2017; The Divineguma development department was another recent example of centralisation of power ostensibly to aide poverty alleviation but which has been plagued by accusations of corruption. "Divineguma' Funds Siphoned Off to Bail Out Cash Strapped Newspaper Companies' [Asian Mirror, 11 May 2015] <<http://www.asianmirror.lk/keyhole/item/8719-divi-neguma-funds-siphoned-off-to-bail-out-cash-strapped-newspaper-companies>> accessed 31 January 2017; Centre for Policy Alternatives, 'Note on the Divineguma Bill', February 2013 <<http://www.cpalanka.org/note-on-the-divineguma-bill/>> accessed 31 January 2017.

<sup>113</sup> See above section 3.2 the 19<sup>th</sup> amendment, however there have been questions raised as to whether institutions by themselves are adequate to deal with issues of governance. 'Dismissing Magic formulas in restoring judicial integrity' [the Sunday Times, 6 December 2015] <<http://www.sundaytimes.lk/151206/columns/dismissing-magic-formulas-in-restoring-judicial-integrity-174176.html>> accessed 31 January 2017; 'Replacing sycophancy with a culture of criticism' [the Sunday Times, 17 January 2016] <<http://www.sundaytimes.lk/160117/columns/replacing-sycophancy-with-a-culture-of-criticism-178948.html>> accessed 31 January 2017.

<sup>114</sup> 'Ravi slams Auditor General, accuses him of crossing the line' [Colombo Gazette, 25 January 2017] <<http://colombogazette.com/2017/01/25/ravi-slams-auditor-general-accuses-him-of-crossing-the-line/>> accessed 30 January 2017; 'Steamrolling of Central Bank by Minister of Finance: An unsavoury Development' [Daily FT, 23 January 2017] <<http://www.ft.lk/article/593041/Steamrolling-of-Central-Bank-by-Minister-of-Finance--An-unsavoury-development>> accessed 30 January 2017; Tharushan Fernando, 'CBSL Governor vs. Finance Minister: State Minister of Finance defends Governor's honesty' [News 1<sup>st</sup>, 6 January 2017] <<http://newsfirst.lk/english/2017/01/cbsl-governor-vs-finance-ministerstate-minister-of-finance-defends-governors-honesty/158985>> accessed 30 January 2017; 'Sri Lanka Central Bank Governor is a good soul: Finance Minister' [economynext, 12 January 2017] <[http://www.economynext.com/Sri\\_Lanka\\_Central\\_Bank\\_Governor\\_is\\_a\\_good\\_soul\\_Finance\\_Minister-3-7073-1.html](http://www.economynext.com/Sri_Lanka_Central_Bank_Governor_is_a_good_soul_Finance_Minister-3-7073-1.html)> accessed 30 January 2017.

<sup>115</sup> *Ibid.*

past two years<sup>116</sup>, segments of the government have been prone to ridicule and be hostile towards media reporting.<sup>117</sup> Whilst the government can claim to be subject to unfair reporting in some instances and want to curb hate speech propagated by some media organisations, it seems to be unable to use the vast apparatus of the state media to engage the debate and clarify issues, and at the same time take a mature stance with the fourth pillar of democracy.

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<sup>116</sup> 'Sri Lanka's ratings improve in World Press Freedom Index' [Daily FT, 22 April 2016]

<<http://www.ft.lk/article/537602/ft>> accessed 30 January 2017.

<sup>117</sup> 'Attack on Media: Dangerous trend by Govt.: JVP' [Daily mirror, 28 November 2016]

<[http://www.dailymirror.lk/119871/Attack-on-media-Dangerous-trend-by-Govt->](http://www.dailymirror.lk/119871/Attack-on-media-Dangerous-trend-by-Govt-) accessed 30 January 2017; Ashwin Hemmathagama, 'Ranil rips up the press' [Daily FT, 29 January 2016]

<[http://www.ft.lk/article/521931/Ranil-rips-up-the-press->](http://www.ft.lk/article/521931/Ranil-rips-up-the-press-) accessed 30 January 2017; 'CaFFE, CHR concerned over attacks on Media' [Ceylon Today, 01 November 2016]

<<http://www.ceylontoday.lk/print20161101CT20161231.php?id=9720>> accessed 30 January 2017;

'President slams NGOs, the Media, Traitorous Forces' [mirror CITIZEN, 28 October 2016]

<<http://mirrorcitizen.dailymirror.lk/2016/10/28/president-slams-ngos-the-media-traitorous-forces/>> accessed 30 January 2017.

## 5. TRANSITIONAL JUSTICE

The government's key commitments in relation to Transitional Justice crystallised in the 30<sup>th</sup> UNHRC session in Geneva in September 2015, where in contrast to previous instances, the GOSL co-sponsored the consensus resolution.<sup>118</sup> The following paragraphs will look into the commitments made by the government in relation to Transitional Justice, the progress made so far, the challenges and trends that can be identified especially in relation to where there has been a lack of progress, and projections for the coming year.

### 5.1 Establishment of Transitional Justice Mechanisms and Other Commitments

The commitments of the government in relation to Transitional Justice mechanisms at the UNHRC via the consensus resolution, and the Foreign Minister's speech,<sup>119</sup> envisaged the setting up of:<sup>120</sup>

- i. a Commission for Truth, Justice, Reconciliation and Non-recurrence
- ii. an Office of Missing Persons
- iii. an Office for Reparations
- iv. a Judicial Mechanism with a Special Counsel

Several statements by key actors in government indicate the proposed timelines.<sup>121</sup> With more than a year since the passage of the 2015 Resolution, though the timelines

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<sup>118</sup> Resolution HRC/30/L.29. These key commitments comprised the establishment of transitional justice mechanisms, land returns, demilitarization, repeal of the Prevention of Terrorism Act (PTA) and the bringing in of a new legislation in line with international standards and more space for human rights defenders to act freely sans surveillance.

<sup>119</sup> 'Statement by Mangala Samaraweera at the 30<sup>th</sup> Session of the UNHRC, Geneva' [News.lk, 15 September 2015] <<http://www.news.lk/features/item/9742-statement-by-mangala-samaraweera-at-the-30th-session-of-the-unhrc-geneva>> accessed 30 January 2017.

<sup>120</sup> The government committed to 'undertake a comprehensive approach to dealing with the past, incorporating the full range of judicial and non-judicial measures...to establish a commission for truth, justice, reconciliation and non-recurrence, an office of missing persons and an office for reparations..'. Further, the government also proposed 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, as applicable; affirms that a credible justice process should include independent judicial and prosecutorial institutions led by individuals known for their integrity and impartiality...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>121</sup> The Foreign Minister stated that the mechanisms would be put in place within 12 to 18 months of the resolution being passed. The Secretary General of the Secretariat for Coordinating Reconciliation Mechanisms (SCRM) stated that the OMP Commissioners are likely to be appointed by the end of 2016 to commence work at the beginning of 2017. In August 2016, the Sri Lankan parliament enacted the OMP Act, amidst much controversy. Laws criminalising disappearances were promised to be established by the 1st quarter of 2017, and likely before the OMP is fully operational. The Office of Reparations was promised to be established and functioning by the end of the 1st quarter of 2017. Further, it was stated that a Truth Commission will be established and functioning by the end of the 3rd quarter of 2017 and that the Special Courts will be put in place thereafter.

have not been adhered to, there has been some progress but much is yet to be implemented.

Some areas of progress include progress with consultations and legislative reforms in specific areas. For example, the government took the important step of carrying out a nationwide consultation process, taking cognisance of the need to listen to the views of the public. The Consultation Task Force on Reconciliation Mechanisms (CTF) was appointed in January 2016.<sup>122</sup> It undertook nationwide consultations, culminating in a final report released in January 2017. In August 2016, Parliament also enacted into legislation the Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act and the Registration of Deaths (Temporary Provisions)(Amendment) Act<sup>123</sup>, though neither have been operationalized at the time of writing this report.

### **Challenges and trends**

Despite the ambitious proposals made in 2015, the government has been extremely slow in the implementation of transitional justice promises. These are briefly discussed below.

#### **a) Prioritisation of Constitutional Reforms over Transitional Justice**

One of the main challenges to progress on Transitional Justice is the common sentiment in government circles that Transitional Justice need not be prioritised. Many in government have pushed for the prioritisation of constitutional reforms instead on the basis that such reforms entails a long term solution of the ethnic question as well as strengthen basic human rights. Some believe too that transitional justice would adversely impact the prospects for constitutional reform as opponents of both distort the former as the process through which war heroes would be turned into war criminals. In this respect the accountability mechanism is of particular salience.

The inability to deliver on the commitments made in 2015 including the delay in the establishment of the OMP, further feed into the perception of transitional justice not receiving the same status as constitutional reform. The apparent prioritisation will likely have ramification during the election cycles, especially in the North and East, where there is growing dismay with limited progress with transitional justice.

#### **b) Lack of political will**

Despite the legislation on the OMP being enacted in August 2016, there has as yet been no move to gazette the legislation, delaying further the establishment of the OMP and the appointment of commissioners. Similarly, no legislation has yet been introduced for the establishment of the other three mechanisms and there continues to be delays in the implementation of the other commitments such as criminalising disappearances, security sector reforms, further land releases. The delays can be attributed to many factors.

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<sup>122</sup> The CTF was buttressed by the appointment of the Zonal Task Force (ZTF), through which it was able to reach the public at a Provincial and district levels.

<sup>123</sup> This provides for Certificates of Absence to be issued to the families of the missing, instead of death certificates.

Firstly, Transitional Justice did not significantly feature in the January 2015 nor August 2015 general elections,<sup>124</sup> thus the lack of political will can stem from the fact that Transitional Justice was not part of the mandate for which the people voted. However, the commitments made at the UNHRC in September 2015 (post both elections in 2015) tie the government to a process of Transitional Justice.

Secondly, many interviewed by CPA indicated that the internal politics and power struggles within government have resulted in a lack of political will in strengthening Transitional Justice mechanisms. As the honeymoon period of the National Unity Government wanes, the government expends its time and energy on consolidating its power, fending off attacks from the Joint Opposition and maintaining unity within its ranks. Thus, there are not many champions of Transitional Justice in government, with many identifying the Foreign Minister as the lone voice in favour of Transitional Justice.

Thirdly, the pushback from nationalist elements within and outside government is another factor. This is clearly demonstrated with the debates around the participation of foreign judges alluded above.<sup>125</sup>

### **c) Absence of a strategy**

Another challenge is the lack of a clear vision or strategy.<sup>126</sup> The plethora of ministries and secretariats appointed to look into matters concerning reconciliation and Transitional Justice is an example of this.<sup>127</sup> Moreover, there seems to be no clear roadmap as to the sequencing of mechanisms and linkages amongst them.<sup>128</sup> The confusing situation that has ensued stirs up disillusionment amongst the public and renders the government an easy target for criticism.

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<sup>124</sup> Some parties referred to aspects of transitional justice in the manifestos for the general election. For example, the election manifesto of the Tamil National Alliance referred to the need for truth, justice, reparations and guarantee of non-recurrence in order to bring about true reconciliation. The manifesto of the United National Party stated their commitment to respond to the reports of the UNHRC and ensure true reconciliation.

<sup>125</sup> Though the government committed to an accountability mechanism that would see the participation of foreign judges and experts, the President and Prime Minister, have repeatedly made statements to the effect that 'war heroes' will not be punished and that foreign judges will not be permitted. Subsequent to the release of the CTF report, many government ministers revisited this issue and informed media that foreign judges will not be allowed. Certain government voices were even heard to reject the CTF report altogether. Thus, the trend has been for the government to rush to pacify nationalist voices than to take a firm stance in line with its existing commitments. See- Centre for Policy Alternatives, Hybrid vs. Domestic: Myths, Realities and Options for Transitional Justice in Sri Lanka, January 2016

<sup>126</sup> Statement by Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights, on the situation on Sri Lanka and Myanmar available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20218&LangID=E> accessed 31 January 2017.

<sup>127</sup> The Secretariat for Coordinating Reconciliation Mechanisms, the Office for National Unity and Reconciliation, the Minister and State Minister for National Integration and Reconciliation as well as the Foreign Minister who has been championing Transitional Justice causes.

<sup>128</sup> Bhavani Fonseka, 'Human Rights Day, Transitional Justice and the Reform Agenda in Sri Lanka: What Next?' [Groundviews, 10 December 2016] <http://groundviews.org/2016/12/10/human-rights-day-transitional-justice-and-the-reform-agenda-in-sri-lanka-what-next/> accessed 30 January 2017.



#### **d) Lack of outreach and communication**

The lack of political will, has also led to deficiencies in communication on the part of the government. The main criticism regarding the OMP was the lack of consultation by the government with key stakeholders, especially with victims, as well as the insufficient communication to explain what it entails.<sup>129</sup>

Lack of communication can give rise to many problematic consequences.<sup>130</sup> Firstly, the lack of transparency that this creates, causes distrust amongst the victim groups and other stakeholders in civil society. There would also be no sense of ownership, as the mechanisms or solutions put forward will be those decided behind closed doors by a select few with minimum public participation, compounding the perception of an elitist driven process with no resonance with the actual victims.

On the other hand, the lack of communication also results in the government not keeping the public informed about the good work that is being done such as the release of some lands and the enabling of people displaced for decades to return to their homes.

Secondly, the weak communication results in the factions opposing the government, such as the Joint Opposition, setting the agenda and projecting the dominant narrative the current situation. With inadequate and inept communication, the government has ceded agenda-setting and the dominant narrative to the opposition

Thirdly, contradictory statements have been made by different actors in government, as seen with the accountability mechanism. This reflects the lack of cohesion within government and feeds into perceptions of contradictions and incompetence.

#### **e) Waning international pressure**

Added to the lack of political will and lack of a clear vision, is the easing of international pressure. The international community has been lenient with this government and adopted a far more relaxed stance than in the past.<sup>131</sup> This situation is most likely to continue in the future, especially considering the regime changes in several countries.

### **5.2 Repealing the Prevention of Terrorism Act and Related Issues**

The government committed to repeal the PTA, and introduce new legislation that will be in line with international standards in the 2015 Resolution. Despite the passage of time, the PTA continues to be in operation today with continued arrests being made

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<sup>129</sup> The legislation being passed before the interim report of the CTF on the OMP was released, was cited as an example of the reluctance of the government to consult key interest groups.

<sup>130</sup> 'Cheers in Colombo, apathy in Jaffna' [the Sunday Times, 28 August 2016] <<http://www.sundaytimes.lk/160828/columns/cheers-in-colombo-apaty-in-jaffna-206454.html>> accessed 30 January 2017; Human Rights Watch, 'Sri Lanka: Consultations Lacking on Missing Person's Office' [Human Rights Watch, 27 May 2016] <<https://www.hrw.org/news/2016/05/27/sri-lanka-consultations-lacking-missing-persons-office>> accessed 30 January 2017.

<sup>131</sup> The Sri Lankan government was allowed to report to the UNHRC in September 2015 instead of in March of the same year. This was considered a win for the government. Following the September session and the consensus resolution, the international community has not applied as much pressure as it used to in the previous years.

within its framework.<sup>132</sup> The Counter Terrorism Act (CTA) which was proposed to succeed the PTA, has been critiqued as being more draconian and a further infringement of basic human rights guarantees than in the PTA.<sup>133</sup> Moreover, the CTA came in the wake of certain other questionable amendments being proposed regarding the regulation of hate speech<sup>134</sup> and the proposed amendment to the Criminal Procedure Code.<sup>135</sup> Furthermore, media reports indicate opposition to the inclusion in the National Human Rights Action Plan of the requirement of a two-third majority to introduce a State of Emergency,<sup>136</sup> raising concerns as to the priorities of this government and the preference (or lack thereof) for keeping draconian laws in place.

These worrying trends seem to indicate a weakening of the government's stance on human rights. The political will to repeal/amend the PTA and other laws not in line with international human rights standards is lacking, despite commitments made to the contrary. These actions are also indicative of the government's desire to please and placate the nationalist voices.

### **5.3 Demilitarisation, Security Sector Reforms (SSR) and Return of Private Lands**

The government committed to the release of lands, demilitarisation of the North and SSR.<sup>137</sup> The President's 100day plan also stated that 'a democratic civil administration will be put in place in the North and South'. While a certain amount of land has been restored to their rightful owners, there is more to be returned, and the military presence in the North continues.<sup>138</sup> The military continues to be involved in civilian administration in the North, such as managing shops and pre-schools<sup>139</sup> which has resulted in the locals being absorbed into the military structure, as they are employed in these institutions.<sup>140</sup> The continued military presence in the North, despite commitments made to the contrary, has resulted in the victor mentality being sustained. This is to be contrasted with other steps taken by the government to soften the victor

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<sup>132</sup> Human Rights Watch, 'Sri Lanka: Enforce Commission Directives on Terror Detainees' [Human Rights Watch, 13 June 2016] <<https://www.hrw.org/news/2016/06/13/sri-lanka-enforce-commission-directives-terror-detainees>> accessed 30 January 2017.

<sup>133</sup> Easwaran Rutnam, 'Alarm Bells Ring Over Proposed Counter Terrorism Act' [The Sunday Leader, 13 November 2016] <<http://www.thesundayleader.lk/2016/11/13/alarm-bells-ring-over-proposed-counter-terrorism-act/>> accessed 30 January 2017; 'New Counter- Terror Law triggers old fears in Sri Lanka: The Hindu' [Daily news, 27 October 2016] <<http://dailynews.lk/2016/10/27/local/97288>> accessed 30 January 2017.

<sup>134</sup> This amendment carried similar provisions to those in the PTA which were used by the previous government to intimidate those who opposed them.

<sup>135</sup> This amendment sought to prevent counsel from accessing their clients prior to a statement being recorded by the police.

<sup>136</sup> GSP Plus: Govt. rushing through rights plan' [the Sunday Times, 15 January 2017] <<http://www.sundaytimes.lk/170115/news/gsp-plus-govt-rushing-through-rights-plan-225020.html>> accessed 16 January 2017.

<sup>137</sup> Human Rights Council resolution 2015- HRC/30/L.29

<sup>138</sup> Centre for Policy Alternatives, 'Occupation of Land in the Northern Province', March 2016.

<sup>139</sup> Interviews with civil society December 2016 & January 2017; Sri Lanka Brief, 'Report: Militarization Threatens Livelihood of Local Communities in Jaffna' [Sri Lanka Brief, 19 October 2016] <<http://srilankabrief.org/2016/10/report-militarization-threatens-livelihood-of-local-communities-in-jaffna/>> accessed 30 January 2017.

<sup>140</sup> Interviews with civil society December 2016 & January 2017.

mentality that was highlighted during the past regime.<sup>141</sup> Thus, while the government attempts to mellow the victor mentality, the continued military presence in the North negates these efforts and continues to create fear and apprehension among the residents of the area.

Furthermore, there is no information publicly available on progress in relation to SSR, which can be attributed to a fear of a possible pushback from the military.<sup>142</sup> This can perhaps also be linked to several reasons: to the lack of understanding of the need for SSR in a post-conflict era, the practical issue of finding alternative options for a significant number of military personnel, the enormity of SSR, if done correctly, not having the capacity or understanding to move forward and the lack of interest and unwillingness in carrying through with promised reforms.

#### 5.4 Marginalized Groups, Surveillance and the Culture of Impunity

The need to create a safe environment for human rights defenders and civil society was also one of the commitments made in the 2015 resolution<sup>143</sup> and Sri Lanka was urged to take steps to hold accountable the perpetrators of attacks against *inter alia*, human rights defenders and places of worship.<sup>144</sup>

Despite this, religious tensions and the culture of impunity which were witnessed in the pre-2015 era persist. For example, certain actors in government have made controversial statements that have the potential to harm religious harmony.<sup>145</sup> Such incidents call into question the government's commitments towards ensuring human rights and as to whether a 'change' in mind-set indeed took place in January 2015. Lack of demonstrable action in this area feeds into the perception that the government is either protecting the perpetrators of these attacks, or turning a blind eye and nurturing impunity.

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<sup>141</sup> For example, the 'Victory day' celebration that was held on May 18<sup>th</sup> by the previous regime is now being called the 'Remembrance day'. Sri Lanka Brief, 'Rajapaksha's "War Heroes Day" to Counter Sirisena's "Remembrance Day"' [Sri Lanka Brief, 18 May 2015] <<http://srilankabrief.org/2015/05/rajapaksas-war-heroes-day-to-counter-sirisenas-remembrance-day/>> accessed 30 January 2017; 'Sri Lanka to mark May 19 as Remembrance Day' [News.lk, 15 May 2015] <<http://www.news.lk/news/sri-lanka/item/7656-sri-lanka-to-mark-may-19-as-remembrance-day-no-longer-victory-day>> accessed 30 January 2017.

<sup>142</sup> Dharisha Bastians, 'New Govt Aware that Sections of the Military Remain Fiercely Loyal to Ex-Def Secy Gotabhaya Rajapaksa' [DBSJYARAJ.COM, 25 February 2015] <<http://dbsjeyaraj.com/dbsj/archives/38971>> accessed 30 January 2017.

<sup>143</sup> "Recognizing the improved environment for members of civil society and human rights defenders in Sri Lanka while expressing concern at reports of ongoing violations and abuses of human rights, and recognizing the expressed commitment of the Government of Sri Lanka to address issues, including those involving sexual and gender-based violence and torture, abductions, as well as intimidation of and threats against human rights defenders and members of civil society". See Human Rights Council resolution 2015- HRC/30/L.29.

<sup>144</sup> "Encourages the Government of Sri Lanka to investigate all alleged attacks by individuals and groups on journalists, human rights defenders, members of religious minority groups and other members of civil society, as well as places of worship, and to hold perpetrators of such attacks to account and to take steps to prevent such attacks in the future". See Human Rights Council resolution 2015- HRC/30/L.29.

<sup>145</sup> '32 SL Muslims have Joined ISIS: Wijedasa Claims' [Daily mirror, 18 November 2016] <<http://www.dailymirror.lk/article/-SL-Muslims-have-joined-ISIS-Wijedasa-claims-119366.html>> accessed 18 November 2016.

Despite attempts at reconciliation by successive governments, marginalization of specific communities continues. The 100day plan of the President referred to a National Policy Framework to be formulated under the National Unity Government to ensure social and economic reforms.<sup>146</sup> These reforms were to address, among others, the housing and educational needs of the Up-country Tamils.<sup>147</sup> The government established the Ministry of Hill Country New Villages, Infrastructure and Community Development<sup>148</sup> and introduced a new National Plan of Action on Social Development of the Plantation Community (2016-2020). Despite this, the Upcountry Tamils continue to be a forgotten and marginalized group with basic needs such as housing, documentation, education and sanitation not being met.<sup>149</sup> Furthermore, the language gap between the estate community who speak Tamil and the government officers who mostly speak Sinhala, the geographically isolated location of the plantations and the control wielded by the tea companies have exacerbated the existing problems.<sup>150</sup> In addition to this, the Upcountry Tamils have also faced the brunt of the war, as many were disappeared,<sup>151</sup> arrested under the PTA and were discriminated based on their ethnicity.<sup>152</sup> With more attention on the North and East by the government, political actors and diaspora, the woes of the Upcountry Tamils are largely ignored.

Threats, intimidation and surveillance continue<sup>153</sup> and were even witnessed during the CTF consultation process. While, the number of such incidents might be lower in comparison to those witnessed during the previous regime, it is troubling to note that such incidents have not ceased, and what has been achieved falls far short of the commitments and promises made. The argument that is put forward in favour of surveillance is that it is carried out in the interest of national security. While safeguarding national security is important, it should not lead sustaining a fear psychosis, restricting the citizens' freedoms and undermining basic human rights and democratic values.

It is important that the government takes serious account of these incidents, undertake necessary steps to ensure non-recurrence, and hold accountable those responsible for

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<sup>146</sup> 'Maithripala Sirisena's 100 Day Work Programme; Detailed Diary Description' <https://www.colombotelegraph.com/index.php/maithripala-sirisenas-100-day-work-programme-detailed-diary-description/>, accessed 31 January 2017

<sup>147</sup> The 100day plan stated that 'steps will be taken to provide land ownership and proper housing to plantation workers instead of their current confinement in line rooms. Facilities will be provided in schools for the children of plantation workers in the Badulla, Nuwara Eliya, Kandy, Matale and Kegalle Districts to have access to education in the Tamil medium upto university level including in Science.'

<sup>148</sup> This was done with the aim of transforming plantation communities into village communities with dignity and self-respect

<sup>149</sup> Zonal Task Forces on Reconciliation Mechanisms, Consolidated Report, p. 226-256

<sup>150</sup> Zonal Task Forces on Reconciliation Mechanisms, *Consolidated Report*, p. 226-256; Centre for Policy Alternatives, 'Up-Country Tamils: The forgotten 4.2 %', June 2015.

<sup>151</sup> Consultation Task Force on Reconciliation Mechanisms, *INTERIM REPORT: The Office on Missing Persons Bill and Issues Concerning the Missing, the Disappeared and the Surrendered*, p.15,16.

<sup>152</sup> Zonal Task Forces on Reconciliation Mechanisms, Consolidated Report, p. 226-256.

<sup>153</sup> Final Report of the Consultation Task Force on Reconciliation Mechanisms, p. 405-406.

threats, intimidation and attacks. Therefore, independent investigations and prosecutions should take place without undue delay.

## 5.5 Language rights and implementation

Articles 18 and 19 of the Constitution recognise that Sinhala and Tamil are the Official and National Languages of Sri Lanka, while English is the link language.<sup>154</sup> Despite this, successive governments have continued to undermine language rights. Since the change in 2015, some basic steps were taken such as the singing of the National Anthem in Sinhala and Tamil at the Independence Day celebrations in February 2016.<sup>155</sup> Despite the National Anthem being sung in Tamil, progress has not been made in implementing the Official Languages Policy (OLP) in general. The facility to access information and communicate in one's own language is a basic human right and an integral step towards reconciliation. However, implementation of the OLP is challenged by the widespread lack of understanding regarding the importance of the OLP especially in the state sector.<sup>156</sup> Many problems exacerbated this issue.<sup>157</sup> CPA has repeatedly highlighted the importance of ensuring effective implementation of the OLP.<sup>158</sup>

## 5.6 Projections

The government will have to report on its progress in relation to human rights standards, at various instances throughout the year including at the UNHRC and GSP+

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<sup>154</sup> Article 18,19 of the Constitution

<sup>155</sup> '67 Year wait ends as National Anthem sung in Tamil on Independence Day' [Daily FT, 5 February 2016] <<http://www.ft.lk/article/523351/67-year-wait-ends-as-National-Anthem-sung-in-Tamil-on-Independence-Day>> accessed 30 January 2017; Azzam Ameen, 'Sri Lanka Anthem sung in Tamil for the first time since 1949' [BBC News, 4 February 2016] <<http://www.bbc.com/news/world-asia-35495567>> accessed 30 January 2017; Dr. Ranga Kalansooriya, 'National Anthem sung in Tamil a step for Reconciliation?' [Daily mirror, 12 February 2016] <<http://www.dailymirror.lk/article/National-anthem-sung-in-Tamil-a-step-in-reconciliation--105340.html>> accessed 30 January 2017. This move was opposed by certain factions, and a Fundamental Rights petition was lodged in the Supreme Court. However, the Supreme Court dismissed the petition, deciding that singing the National Anthem in Tamil was not unconstitutional.

<sup>156</sup> Sandun Jayawardena, 'Lack of bilingual abilities blocking reconciliation: Consultation Task Force' [the Sunday Times, 15 January 2017] <<http://www.sundaytimes.lk/170115/news/lack-of-bilingual-abilities-blocking-reconciliation-consultation-task-force-224982.html>> accessed 30 January 2017; Lionel Guruge, 'Importance of Preserving Language Rights in Sri Lanka' [The Sunday Leader, 27 March 2016] <<http://www.thesundayleader.lk/2016/03/27/importance-of-preserving-language-rights-in-sri-lanka/>> accessed 30 January 2017; Centre for Policy Alternatives, 'Violation of the Official Languages Policy: The Official Languages Commission receives Eastern Police Head's Observation', 2014 <<https://www.cpalanka.org/wp-content/uploads/2014/11/3rd-Edition-Vibhasha-English.pdf>> accessed 30 January 2017.

<sup>157</sup> The absence of powers to enforce the OLP through legal measures, and the reported resignation of officials of the Official Languages Commission are some.

<sup>158</sup> CPA has lodged complaints and filed cases in this regard with the Human Rights Commission, the Official Languages Commission and the Courts. For more information- Lionel Guruge, 'Importance of Preserving Language Rights in Sri Lanka' [The Sunday Leader, 27 March 2016] <<http://www.thesundayleader.lk/2016/03/27/importance-of-preserving-language-rights-in-sri-lanka/>> accessed 30 January 2017; Centre for Policy Alternatives, 'Violation of the Official Languages Policy: The Official Languages Commission receives Eastern Police Head's Observation', November 2014 <<https://www.cpalanka.org/wp-content/uploads/2014/11/3rd-Edition-Vibhasha-English.pdf>> accessed 30 January 2017.

process.<sup>159</sup> Thus, throughout the year 2017, the government will be kept in check with regards to the progress and/or lack thereof made in the human rights sphere. However, this system of checks can be undermined due to two reasons, discussed below.

### **Pushing through hasty reforms**

Firstly, this could set in motion a worrying trend, where the government endeavours to rush through certain commitments and take hasty measures to meet international deadlines and placate international opinion, as it has done in the past.<sup>160</sup> The government already is in the process of hastily seeking the approval of Ministers for the National Human Rights Action Plan for 2017 to 2021, which has caused consternation, as the government has agreed to make certain questionable compromises.<sup>161</sup> Furthermore, a situation might arise where rushed commitments made by the government, cannot be implemented as the window for reforms narrows. This too, has been witnessed in the past year.<sup>162</sup>

### **Limited impact on domestic measures**

Secondly, the impact these reviews have on the Sri Lankan mind-set and structural reforms can be minimal. This prognosis though dire, was witnessed in 2016. The Sri Lankan delegation to the United Nations Committee Against Torture (UNCAT), attempted to gloss over prevalent human rights violations and instances of torture and as a result was subjected to intense questioning by the UNCAT officials.<sup>163</sup> Furthermore, the composition of the delegation also came under fire, as it included an official against whom allegations of torture has been previously levelled during the OHCHR investigations in Sri Lanka.<sup>164</sup> Thus, the government has showed insensitivity and lack

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<sup>159</sup> Firstly, the 34<sup>th</sup> UNHRC sessions comes up in March 2017, where progress made by Sri Lanka since the September 2015 consensus resolution will be scrutinised. Furthermore, repealing the PTA and ensuring various other human rights guarantees are key for Sri Lanka to regain the GSP+ tariff preferences this year. Thus, even if the government lacks political will to adhere to international human rights standards due to their inherent value, the government might be constrained to uplift human rights standards to gain economic advantage. Thirdly, Sri Lanka's next Universal Periodical Review (UPR) comes up in November 2017 and once again, Sri Lanka's human rights standards will come under scrutiny by the international community and Sri Lankan groups.

<sup>160</sup> The OMP Act was hastily enacted into legislation prior to the July 2017 UNHRC session, and drew much criticism as it was passed with minimum consultation with stakeholder groups.

<sup>161</sup> According to media reports, in order to rush through the NHRAP, the requirement for a two-third majority to introduce a State of Emergency, as well as the submissions to decriminalise homosexuality, which were proposed to the NHRAP, have been shot down. 'Several Ministers Raise Issues About Some Provisions in Proposed 300 Page National Human Rights Action Plan' [DBSJEYARAJ.COM, 14 January 2017] <<http://dbsjeyaraj.com/dbsj/archives/50811>> accessed 30 January 2017.

<sup>162</sup> Despite the government hastily enacting the OMP Act, the legislation has yet not been gazetted, the commissioners have not yet been set up and the OMP is not yet implemented. Bhavani Fonseka, 'Transitional Justice in Sri Lanka: Lessons So Far and the Long Road Ahead' [Groundviews, 11 January 2017] <<http://groundviews.org/2017/01/11/transitional-justice-in-sri-lanka-lessons-so-far-and-the-long-road-ahead/>> accessed 30 January 2017.

<sup>163</sup> 'Sri Lanka grilled at UN Committee Against Torture' [Daily FT, 16 November 2016] <<http://www.ft.lk/article/580333/Sri-Lanka-grilled-at-UN-Committee-Against-Torture>> accessed 30 January 2017.

<sup>164</sup> Easwaran Rutnam, 'Decision to Include Mendis in Delegation To UN Backfires' [The Sunday Leader, 11 December 2016] <<http://www.thesundayleader.lk/2016/12/11/decision-to-include-mendis-in-delegation-to-un-backfires/>> accessed 30 January 2017.

of political will to address stark violations of human rights, even when brought before the international community. The concern is that this trend of indifference on the part of the government might continue this year too, possibly impacting the forthcoming March UNHRC session and UPR process.

## 6. CONCLUSION

The reform project is facing severe strain with immediate remedial steps needed if the National Unity Government is to stay the course.

**Importance of the Coalition:** For many who were active in bringing the change in 2015, the political realities remain. A change from the past and a new political culture is needed and for this, the leadership of President Sirisena and Prime Minister Wickramasinghe is crucial to ensure much needed structural reforms are initiated. It is also the only option at present for many who do not want to go back to an era of authoritarian rule, rampant corruption and nepotism and where critics, minorities and political opponents were constantly under siege. The two leaders need each other and must work together to fulfil the mandate given in 2015. In this regard, the President must look beyond the immediate concerns of his party, focus on the commitments made in 2014/2015 and give strong leadership to the reform project. The Prime Minister, critiqued for his elitist way of decision making, must respect diverse views and positions beyond those pushed by a few and institute consensus building and transparency in governing.

Crucial to the reform project would be the ability of the UNP-SLFP to continue the National Unity Government beyond election cycles. With disagreements between the two parties increasing, it remains to be seen what impact the adversarial politics between these two parties during local and provincial elections will have on the National Unity Government. One possible counter force to this at present is the political will of the President and Prime Minister to see through the reform process. This is supported by the provisions of the 19<sup>th</sup> amendment which prevents Parliament being dissolved by the executive for four and a half years, thus providing some stability.<sup>165</sup>

The success of the present reform process is also dependent on the government demonstrating tangible progress with pledges and breaking from past practices. Improving its own record on corruption and pledges to improving accountability<sup>166</sup> are critical. Other measures highlighted in this report are also important such as political leadership, clarity, vision and improved communication. The government must commence a dialogue with different stakeholders including the broad coalition that helped bring it to power, better communicate plans and initiatives and have a roadmap with feasible time frames and deliverables that resonate with what was pledged. Inability and/or unwillingness to commence this will indeed be fatal for the coalition and reform project.

**Political Alliances:** Another area that must be considered is parliamentary support for the reform project. The Joint Opposition from the outset has obstructed realisation of the present reform agenda.<sup>167</sup> However, outside the Joint Opposition, there is scope for

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<sup>165</sup> Section 17 of the 19<sup>th</sup> amendment which amended Article 70(1) of the Constitution.

<sup>166</sup> By politicians and officials being held accountable for allegations of corruption and nepotism

<sup>167</sup> The JO seems to view the reform agenda as a possible rallying call for nationalist forces that could help the JO regain power. In many ways the JO is making the same political calculation the UNP and SLFP has made in the past when the other party has engaged in significant reform. As such the message of the JO both within and outside parliament has been that a new constitution is meant to appease foreign interests and Tamil nationalists and is hence not necessary.



broad agreement to be forged on key issues concerning the Constitution. The Parliamentary group comprising of the UNP, SLFP, TNA, JVP, SLMC & TPA provide the required majority to pass a constitution in Parliament as well as other legislation necessary for reforms.<sup>168</sup> Provided the government improves its image on corruption, this group also represents segments of society, which could potentially provide the required support at a referendum. Whilst an agreement among these parties seemed to be the most likely trajectory of the reform process until very recently, the statements by the SLFP over the past two weeks have complicated the possibility of a consensus and will be an area that needs to be studied in the coming weeks and months.

**Coherent Policy Options:** Preserving the National Unity Government is on its own not sufficient to ensure the protection of the reform agenda. The UNP-SLFP has to be able to govern with a coherent policy plan and ensure tangible economic benefits to the public at large. At present there does not seem to be a mechanism within government to formulate coherent policy. This is most evident by the spate of policy reversals and changes by the government on economic issues.<sup>169</sup> The response by the government needs to develop existing mechanisms for decision-making and communication within government. It was hoped that the government understood this when it proposed co-ordination mechanisms within the executive<sup>170</sup> and talked about improving the committee system of Parliament and involving all government MP's in decision making.<sup>171</sup> However the government's response seems to be to move power away from cabinet and the oversight committees and to centralise power in individuals.<sup>172</sup>

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<sup>168</sup> 'Budget 2016- Third Reading Division' [Parliament of Sri Lanka, 19 December 2015] <<https://www.parliament.lk/en/budget-2016/third-reading-division>> accessed 31 January 2017; 'Budget 2017- Third Reading Division' [Parliament of Sri Lanka, 10 December 2016] <<http://www.parliament.lk/en/budget-2017/third-reading-division>> accessed 31 January 2017; 'Budget 2017 3<sup>rd</sup> reading vote' [Manthri.lk] <<http://www.manthri.lk/en/blog/posts/budget-2017-3rd-reading-vote>> accessed 31 January 2017; 'UPFA: Government Vs Joint Opposition' [Manthri.lk] <<http://www.manthri.lk/en/blog/posts/upfa-government-vs-joint-opposition>> accessed 31 January 2017.

<sup>169</sup> As an example the issues that arose with the governments VAT scheme and the numerous revisions made to the 2016 Budget. 'Govt's policy inconsistency irks Ceylon Chamber' [Daily FT, 10 May 2016] <<http://www.ft.lk/article/541095/Govt-s-policy-inconsistency-irks-Ceylon-Chamber>> accessed 30 January 2017; 'Ceylon Chamber's Mixed View on Budget' [the Sunday times, 20 November 2016] <<http://www.sundaytimes.lk/161120/business-times/ceylon-chambers-mixed-view-on-the-budget-217136.html>> accessed 30 January 2017; see also Razeen Sally, 'The Sri Lankan economy after regime change' [Daily FT, 12 August 2016] <<http://www.ft.lk/article/560914/ft>> accessed 31 January 2017.

<sup>170</sup> See The National Executive Council which was an ad hoc body set up during the first 100 days to coordinate the implementation of the 100 day programme. 'National Executive Council holds first meeting to implement Sri Lankan President's 100- day plan' [ColomboPage, 15 January 2015] <[http://www.colombopage.com/archive\\_15A/jan15\\_1421345198CH.php](http://www.colombopage.com/archive_15A/jan15_1421345198CH.php)> accessed 30 January 2017.

<sup>171</sup> 'Ranil Wickremasinghe speaks of strengthening parliamentary committees', [Asian Mirror, 4 September 2015] <<http://www.asianmirror.lk/news/item/11373-ranil-wickremasinghe-speaks-of-strengthening-parliamentary-committees>> accessed 30 January 2017.

<sup>172</sup> The Cabinet Committee on Economic management is the predominate institution making decisions on development projects and Development (Special Provisions) Bill. See 'Cabinet Committee on Economic Management to get more power' [News.lk, 5 March 2016] <<http://www.news.lk/news/sri-lanka/item/12471-cabinet-committee-on-economic-management-to-get-more-power>> accessed 31 January 2016. The role of Cabinet in making policy decisions is also brought into question, as senior cabinet ministers have on several occasions publicly contradicted each other. See Rathindra Kuruwita, 'Ranil didn't know' [Ceylon Today, 26 January 2017]

The government needs to urgently formulate a comprehensive and coherent policy for political communication, and invest resources in its effective implementation if it is to see through reforms and be able to govern. This is particularly important in relation to the situation regarding the economy. Sri Lankan citizens have proven their capacity to understand hardship, as long as the government can communicate that it is doing the best in the specific circumstances and provide a clear policy direction to improve the situation.<sup>173</sup> The government needs to adopt a mature manner in which to deal with unfavourable reporting by particular media organisations including admitting to its own mistakes and correcting the record where necessary.

**Transparency and Inclusivity:** It also needs to be more transparent with its decision-making processes. It has engaged in several rounds of consultations on the constitutional reform process and Transitional Justice, however it is unclear how those consultations inform the final decision making processes. Whilst the political authority does have the prerogative to make the final policy decisions, when arriving at decisions they should engage with the representations made by citizens. The secrecy and elitist nature of formulating policy has created distrust within sections in government, its loyalists and the public, and impacted the credibility of this government. Legislation and policies meant to benefit the public should be done in an inclusive and transparent manner and not result in further alienation and mistrust.

**Leadership:** Both the President and Prime Minister exhibited political will and provided leadership to navigate the difficult terrain when enacting the 19<sup>th</sup> amendment and establishing the Constitutional Assembly. The fact that they continue to make statements supporting the constitutional reform process is welcome but much more is needed to ensure its success. Leadership also must be given towards issues that galvanized the common opposition such as addressing corruption and good governance. Similarly, the President and Prime Minister must give leadership to accountability issues related to the war and steps taken to reckon with the past.

The government must now reenergise the reform project, openly championing it with the people and ensure that partisan interests from within and outside do not jeopardise it. January 2015 presented an unprecedented opportunity for democratic governance on a number of fronts; to squander it, even by delay and default, will hasten the return to populist authoritarianism.

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<<http://www.ceylontoday.lk/print20170101CT20170331.php?id=13908>> accessed 31 January 2017 and See further 'Formalising economic management through Development Bill: Another communication failure by the unity Government?' [Daily FT, 2 January 2017]  
<<http://www.ft.lk/article/588569/Formalising-economic-management-through-Development-Bill:-Another-communication-failure-by-the-Unity-Government>> accessed 31 January 2017.

<sup>173</sup> And also the government improves its own image on corruption.