

**RECOMMENDATIONS
FOR
LAW REFORM**

CENTRE FOR POLICY ALTERNATIVES

MAY 2015



The Centre for Policy Alternatives (CPA) has compiled the present document containing recommendations for legal reform in response to the call by the Law Commission of Sri Lanka through the Bar Association of Sri Lanka requesting submissions. CPA welcomes this call for public submissions and engages in the process, cognizant of its importance in the context of ongoing reform based on principles of transparency, inclusivity and participation.

CPA has over the years conducted research and advocacy on a range of issues and has been involved in conversations on legal reform and in challenges to arbitrary and unjust Bills. This document contains recommendations based on CPA's work, which are listed according to specific issues and legislation. More information on the particular areas highlighted and CPA's work can be found at www.cpalanka.org.

Law-Making Process and Related Issues

Issues related to the Law-Making Process

Address gaps within the law -making process in Sri Lanka. In particular, ensure that there is greater transparency in the law-making process and that the public is able to challenge Bills.

- Time frame- The law making process should allow for more deliberative time between the 1st and 2nd reading of a Bill in Parliament.
- Access- Bills must be made more accessible to the public.

Provincial Councils Act No 42 of 1987

- ❖ These recommendations are suggested on the assumption that Provincial Councils will remain as per the 13 Amendment and not be superseded in the constitutional reform promised for after the next General Election.
- ❖ Amend the Provincial Council Act to balance the power between the Governor and the Chief Minister in relation to the daily administration of the Provincial Council (PC).¹ This could be achieved by giving the Governor more of an over-sight role rather than tasking him with day-to-day administrative functions, and by making the exercise of the Governor's powers expressly subject to the advice of the Chief Minister and the Board of Ministers. Review and amend Governor's powers with regard to;
 - Conduct of business of the PC including those of a symbolic nature²
 - Provincial finance under Part III of the Provincial Councils Act³
 - Provincial public service and Provincial Public Service Commission under Part IV of the Provincial Councils Act⁴

(See Devolution in the Eastern Province: Implementation of the Thirteenth Amendment and Public Perceptions, 2008-2010, pp. 63-65; 72-74)

¹ Centre for Policy Alternatives, "Devolution in the Eastern Province: Implementation of the Thirteenth Amendment and Public Perceptions, 2008-2010", August 2010, (<http://www.cpalanka.org/devolution-in-the-eastern-province-implementation-of-the-thirteenth-amendment-and-public-perceptions-2008-2010/>)

² Provincial Councils Act, No. 42 of 1987, Sections 11, 15(1), 15(2), 16(1)

³ Provincial Councils Act, Sections 19(5), 20(3), 23(2), 24(1), 24(3), 25(1), 26(3), 28(1), 30

⁴ Provincial Councils Act, Sections 32, 33

Removal of Judges of the Superior Courts

- ❖ In light of the purported impeachment of the 43rd Chief Justice of Sri Lanka in 2013, there is an urgent need for legislation which provides for the procedure for the removal of Judges of the Supreme Court and Court of Appeal. The existing provisions of Standing Order 78A are inadequate as *inter alia*;
- There is a clear conflict of interest when the members submitting the impeachment motion containing the allegations of misbehaviour and the members of the Parliamentary Select Committee which investigate the charges contained therein are from the same political party. This is because, unlike in countries like the United States of America where Senators can vote on their individual convictions, in Sri Lanka Members of Parliament cannot or do not vote contrary to their party line.
 - The Standing Order does not specify the procedure that should be adopted during the investigation of the alleged misconduct.
 - The Standing Order does not describe the burden of proof necessary to establish “proved misbehaviour”; on the contrary, Standing Order 78A(5) seems to suggest that the burden is on the judge to disprove the allegations.

Recommendation

- ❖ In this regard CPA recommends legislation based on Article 151(4) of the 2000 draft constitution.⁵ Furthermore as has been stated by the Supreme Court⁶ such Act of Parliament must also provide for matters concerning the mode of proof, burden of proof and standard of proof relating to the charges in an impeachment motion, and for the right of the Judge to appear and be heard in person or by representative.

⁵ See http://www.priu.gov.lk/Cons/2000ConstitutionBill/Constitution_Chapter18.pdf

⁶ See SC Ref. 3 of 2012 to SC Ref. 9 of 2012

Land Issues

- ❖ The Land Development Ordinance No 19 of 1935 (LDO) should be amended to recognize gender equality in terms of succession. In this regard the table subjoined to rule 1 of the 3rd schedule of the LDO should be amended to remove the hierarchy, which favours males as against females.

- ❖ The Prescription Ordinance No22 of 1871 should be amended to recognize the situations caused by the war in terms of accessing and occupying one's own land. In this regard the time period a person continued in displacement should be discounted when calculating the period of prescription in terms of the ordinance (i.e. 10 years in terms of Section 3). Furthermore the end of displacement should not be narrowly defined to mean the end of armed hostilities, the definition should allow the judge to take into consideration relevant facts which could prevent the displaced person from returning to their land.

(The Prescription (special provisions) bill was presented to Parliament in August 2014 and January 2015 however it has not been passed by Parliament. The draft proposed by the law commission in 2009 does not consider aspects relating to end of displacement mentioned above)

- ❖ Amend the Land Acquisition Act No. 5 of 1950 to provide clear definition to the term “public purpose”. Furthermore, amend sections 38 and 38A of the Act in order to provide clarity regarding what is meant by “ground of any urgency”. In addition, introduce reforms in relation to Section 63 relevant to compensation.

(See “Legal and Policy Implications of Recent Land Acquisitions, Evictions and Related Issues in Sri Lanka”, pp 23 – 26)

- ❖ Legal reform should be introduced to recognize the concept of joint ownership for State Land with reform brought in with the LDO and State Land Ordinance.

- ❖ Remove the broad powers provided in the Urban Development Projects (Special Provisions) Act No2 of 1980 that provides for the acquisition of private lands on an urgent basis (Section 2)

(See “Legal and Policy Implications of Recent Land Acquisitions, Evictions and Related Issues in Sri Lanka”, p.28)

- ❖ Review the need for the creation of special zones/areas under different laws including the Urban Development Authority Act No 41 of 1978 (Section 3), the Board of Investment Act No 04 of 1978 (Section 22A) and Tourism Development Authority Act No14 of 1968 which can curtail/prevent access of and control by the legal owners. Any powers to create special zones/areas should adhere to a transparent and inclusive process through which the public is informed of the reasons for the need to create a specific zone/area with provision to challenge such acts.

(See “Legal and Policy Implications of Recent Land Acquisitions, Evictions and Related Issues in Sri Lanka”, p.47)

- ❖ Repeal the Requisition of Land Act No 33 of 1950 which allows the President to establish a competent authority to take over any land during a time of emergency. A reformed Land Acquisition Act can provide for legal acquisition of private land in adherence to a due process and any other additional laws to acquire should at the minimum have checks and balances.

(See “Legal and Policy Implications of Recent Land Acquisitions, Evictions and Related Issues in Sri Lanka”, p.35-36)

Abductions, Enforced or Involuntary Disappearances

Introduce legislation, in line with the International Convention for the Protection of All Persons from Enforced Disappearance to *inter alia* specifically criminalize enforced or involuntary disappearances. (Relevant here is the provision below on amendments to the Penal Code)

Penal Code

- ❖ The Penal Code does not recognize involuntary or enforced disappearance as a criminal offence. Usually the prosecution has to rely on the ordinary criminal offences such as abduction, abetment, conspiracy and wrongful confinement in order to file indictments. Therefore, it is important for the Penal Code to recognize and define enforced disappearance as a criminal offence along with introducing strong penalties.

❖ **Penal Code, Section 365**

"Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be punished with fine and where the offence is committed by a person over eighteen years of age in respect of any person under sixteen years of age shall be punished with rigorous imprisonment for a term not less than ten years and not exceeding twenty years and with fine and shall also be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for injuries caused to such person."

CPA recommends that the above provision be removed or at the least amended to conform with international standards and to ensure that the right to privacy and liberty are respected, specifically to the extent of decriminalising sexual acts between consenting adults in private. An amendment should also address the ambiguity in the present language, which allows for use of the provision in an arbitrary manner.

❖ **Penal Code, Section 365A**

"Any person who, in public or private, commits, or is a party to the commission of, or procures or attempts procure the commission by any person of, any act of gross indecency with another person, shall be guilty of an offence, and shall be punished with imprisonment of either description, for a term which may extend to two years or with fine or with both and where the offence is committed by a person over eighteen years of age in respect of any person under sixteen years of age shall be punished with rigorous imprisonment for a term not less than ten years and not exceeding twenty years and with fine and shall also be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person."

CPA recommends the removal and at the very least, amendment of the present provision in line with concerns raised in relation to Section 365.

(See "HIV/AIDS and the Legal and Policy Framework in Sri Lanka", p.23-25)

Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979

Key defects in legislation.

- ❖ Facilitates arbitrary arrests and detention.
- ❖ Suspects held in custody have no statutory right either to inform a family member or to promptly access a lawyer.
- ❖ Allows for confessions/ statements made by detainees to be used against them in a Court of law without safeguards to ensure such statements were made voluntarily.
- ❖ The Supreme Court of Sri Lanka has recognized that parts of the PTA are inconsistent with the provisions of the Sri Lankan Constitution including the Chapter on Fundamental Rights.⁷

Recommendation

- ❖ CPA recommends that the PTA in its present form be repealed, and legislation consistent with international anti-terrorism standards reflected in relevant United Nations instruments and comparative constitutional practices.

In the absence of such repeal and as a short term measure to off-set the undesirable impact of the PTA, CPA recommends the following amendments;

- ❖ Sections 6 and 9 of the Act provides for arrest and detention for a wide range of offences either at the discretion of the Minister or the Police. The PTA should be amended so that such discretion should only be granted to Courts.
- ❖ According to Section 19, Magistrates have no discretionary power to order the release of suspects on bail. The Act should be amended to facilitate this.
- ❖ Introduce provisions that require for:
 - Arrestees to be given the right to inform a family member of the arrest;
 - Arrestees to be informed of the reason for arrest (Presidential Directives on Protecting Fundamental Rights of Persons Arrested and/or detained issued in July 2006 are not binding).

⁷ See *Weerawansa v Attorney General* (2000) 1 SLR 387 at pp.394 - 395

- ❖ The PTA must provide arrestees with access to legal counsel before recording of a statement of a suspect- Sections 11 and 26 of the Prevention of Terrorism Act of 1979 (the Code of Criminal Procedure continues to lack provisions for the right to a lawyer during interrogation, to confidential communication with the lawyer and to an interpreter).
- ❖ Section 16 allows statements made by an arrestee to higher-ranking police officers to be admissible in a court of law, subject to the test as to whether the statement had been made under any form of coercion, inducement or promise. However Section 16(2) provides that the burden of proving that the confession/statement is NOT voluntary is on the accused who asserts that fact. The entire provision runs counter to the basic principles of criminal law and should be repealed.

Human Rights Commission of Sri Lanka Act No 21 of 1996

The Act does not provide the Commission with the power to enforce its decisions.

Recommendation

- ❖ Amend the powers vested in the Commission under Section 11 of the Act to make its decisions enforceable.

Registration of Death Act No 19 of 2010

This Act enables family members of the disappeared to apply for a death certificate, if she/he has not been heard from for over a year (Section 2).

Compensation is only granted to families who have been issued with a death certificate. Therefore, if the families were to proceed with the above process, it would translate as accepting the death of their loved one.

Recommendation

- ❖ This provision must be repealed so that it does not require the disappeared to be declared dead but instead that they obtain the certificate on the basis that the person is

disappeared. Thus, enabling the families to obtain compensation/ benefits without declaring the person is dead.

International Covenant on Civil and Political Rights Act No 56 of 2007

This Act contains only four main substantive rights-conferring provisions in Sections 2, 4, 5 and 6 (viz., the right to be recognized as a person before the law; entitlements of alleged offenders to legal assistance, safeguard against self-incrimination; certain rights of the child; and right of access to State benefits, respectively).

There are a number of rights contained in the International Covenant on Civil and Political Rights (ICCPR), which are not recognized by Sri Lankan law. These include the right to life; freedom from negative discrimination on the basis of national or social origin; freedom from forced or compulsory labor; the security and liberty of persons deprived of liberty; the right to compensation for unlawful arrest or detention; right to require free consent to medical or scientific experimentation; right to leave the country; rights of minorities, including in respect of religion, language and culture; and the right to privacy.

Recommendation

- ❖ The terminology used in Sections 2, 4, 5 and 6 are substantially and significantly different from the corresponding provisions of the ICCPR, and should therefore be amended to be brought in line with international standards.
- ❖ The National Action Plan for the Promotion and Protection of Human Rights (NHRAP), has recognized some of these shortcomings, and has proposed a Constitutional amendment to ensure the Right to Privacy and legislation to ensure the Right to Life. However, as with several other activities in the NHRAP, these have not been implemented and none of the rights recognized under the ICCPR have been incorporated into domestic law.

Commission of Inquiry Act No 8 of 1981

The Commission of Inquiry (COI) Act does not provide for a credible mechanism to investigate and inquire into cases of serious human rights violations due to the power the Executive

continues to wield over such a mechanism including with appointments, finances and follow up. The Act makes no provision for consultation with relevant stakeholders in the appointment of its members or on deciding on its mandate, powers or duration of a COI. Such a consultative process ensures inclusiveness and the participation of all actors, thereby providing for a certain ownership. Furthermore, it facilitates public trust and confidence in both the process and the mechanism, including the independence of the experts appointed.

The Act does not confer a positive obligation on the President to ensure reports of the COI are made public. Though there is provision for hearings of the COI to be open to the public, the absence of any mention of making reports and findings of the COI public is also a cause for concern.

Recommendation

- ❖ The powers currently vested in the President to:
 - Appoint a COI, consisting of one or more members (Section 2);
 - Appoint the chairman of the COI (Section 2(2)(b));
 - Provide TOR for COI (Section 2(2)(c)); Make the COI or parts of it public (Section 2(2)(d));
 - Appoint new members at his/her discretion (Section 3);
 - Expand time period of COI and the due date of final report (Section 4);
 - Alter or revoke the warrant (Section 5); Appoint a Secretary to COI (Section 19); Provide additional powers to the COI (Section 8),

should be amended to reflect independence of a COI. Furthermore, the Act should be amended to ensure that there is a positive obligation on the President to ensure reports of the COI are made public.

(“A Commentary on the Presidential Commission to Investigate Missing Persons during the periods of June 1990 - May 2009 in the Northern and Eastern provinces”, pp. 2-3)

Rights of Women

- ❖ Formulate necessary amendments to the Penal Code that allows for the medical termination of pregnancies in the case of incest, rape or major congenital abnormalities.
- ❖ Introduce relevant statutory provisions to ensure women representation in elected bodies at local, provincial and national levels.
- ❖ Reform the Vagrants Ordinance that leads to the harassment and detention of women. (See “HIV/AIDS and the Legal and Policy Framework in Sri Lanka”, p.20-21)
- ❖ Introduce legal reform to provide for joint ownership of land and for non discrimination on the basis of gender regarding succession under the LDO (See above section on land)

Local Government

- ❖ Add a new sub-section as “By-law formulation and Review Committee” under the purview of the Commissioner of Local Government [CLG] of each province under Section 267 of Municipal Ordinance, Section 153 of Urban Council Ordinance and Section 122 of Pradeshiya Sabha Act 15/1987. At present there is no such committee to analyze and review draft by-laws forwarded by Local Authorities for approval by the CLG. This results in delays in the approval process, in some occasions taking up to one year for the approval to be obtained.

Election Law

- ❖ **Amend laws governing Presidential, Parliamentary, Provincial Council and Local Government elections to ensure employees of the private sector are granted leave in order to vote:** CPA has in monitoring elections observed problems faced by private sector employees to obtain time to cast their vote on election day. Currently the Department of Elections or The Ministry of Labour are not in a position to take actions against the employers in cases of non-adherence to guidelines issued by the Department of Elections regarding leave. Therefore, it is vital to introduce specific provisions in the relevant laws, which guarantees an identified time period for private sector employees to be able to cast their vote. Another provision should also be included in these laws introducing an enforcement mechanism and action against employers who contravene this and in doing so undermine the fundamental right of franchise.

- ❖ Amend laws governing Presidential, Parliamentary and Provincial Council elections to ensure the establishment of special polling stations for public officials of essential services: Certain public officials who are designated for essential services are not in a position to take leave to vote. Hence, it is important to establish special polling stations in areas where there are public officials designated for essential services such as the Sri Lanka Port, the Katunayake airport, teaching hospitals across Sri Lanka, Ceylon Petroleum Corporation, Southern and Katunayake highways to name a few. This step, with the necessary safeguards from the relevant authorities to maintain the integrity of elections, will uphold the right to franchise of public officials.

- ❖ **Assistance to persons with disabilities:** Steps should be taken to bring in legal provisions within all election laws to facilitate persons with disabilities to cast their vote. These could include providing greater access to people with special needs and the provision of services for blind voters such as polling cards in braille.

- ❖ **Migrant Workers:** Introduce legal provisions to recognize the franchise of migrant workers. This includes introducing a system for migrant workers to register at the Sri Lankan embassy/consul where they reside and a system, which allows them to cast their vote at the time of elections.

References- CPA Documents:

CPA, Submission on List of Issues to be taken up by the Human Rights Committee (CCPR): http://www.ccprcentre.org/doc/2014/02/INT_CCPR_ICO_LKA_16072_E.pdf

CPA, Submission re. Sri Lanka's response to the list of issues adopted by the Human Rights Committee (CCPR): <http://www.ccprcentre.org/doc/2014/09/CPA-submission-regarding-Sri-Lankas-Response-to-the-List-of-Issues-Adopted.pdf>

Asanga Welikala, "Devolution in the Eastern Province: Implementation of the Thirteenth Amendment and Public Perceptions, 2008-2010", August 2010, <http://www.cpalanka.org/devolution-in-the-eastern-province-implementation-of-the-thirteenth-amendment-and-public-perceptions-2008-2010/>

Bhavani Fonseka, Luwie Ganeshathasan & Mirak Raheem Short-Term Benchmarks for Peace and Reconciliation in Post-War Sri Lanka, May 2012, <http://www.cpalanka.org/short-term-benchmarks-for-peace-and-reconciliation-in-post-war-sri-lanka/>

CPA, HIV/AIDS and the Legal and Policy Framework in Sri Lanka, August 2013, <http://www.cpalanka.org/a-critique-hiv-aids-and-the-legal-and-policy-framework-in-sri-lanka/>

CPA, "A Commentary on the Presidential Commission to Investigate Missing Persons during the periods of June 1990 - May 2009 in the Northern and Eastern provinces", March 2014, <http://www.cpalanka.org/a-commentary-on-the-presidential-commission-to-investigate-missing-persons/>

Bhavani Fonseka, Legal and Policy Implications of Recent Land Acquisitions, Evictions and Related Issues in Sri Lanka, November 2014, <http://www.cpalanka.org/legal-and-policy-implications-of-recent-land-acquisitions-evictions-and-related-issues-in-sri-lanka/>

CPA, The Presidential Commission to Investigate into Complaints Regarding Missing Persons: Trends, Practices and Implications, December 2014, <http://www.cpalanka.org/the-presidential-commission-to-investigate-into-complaints-regarding-missing-persons-trends-practices-and-implications/>