Selected Bibliography


Justice, Reconciliation & Constitution Making:
Ensuring that the future constitution works for Sri Lankan Women

Kishali Pinto-Jayawardena
The views expressed here are those of the fellow and not necessarily the views of WISCOMP.
**Justice, Reconciliation & Constitution Making:**
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The Scholar of Peace fellowships awarded by WISCOMP for academic research, media projects and special projects are designed to encourage original and innovative work by academics, policy makers, defense and foreign policy practitioners, NGO workers, and others. The series WISCOMP Discussion Papers in conjunction with WISCOMP Perspectives brings the work of some of these scholars to a wider readership.

The sixth in the series *Justice, Reconciliation and Constitution Making: Ensuring that the Future Constitution works for Sri Lankan Women*, is the outcome of an academic project awarded to Kishali Pinto-Jayawardena to research how women’s demands for gender equity could be included in the new constitutional and political institutions that are being devised in contemporary Sri Lanka. Sri Lanka which has been in the throes of a violent civil war for the last twenty years is currently grappling with the difficult issues of justice and reconciliation - goals which seem may seem apparently contradictory. Since the civil war has affected men and women differently – as all wars invariably do – it is perhaps important to reflect upon how these two sets of concerns resonate especially for women survivors of the conflict. This exploratory study investigates methods of engendering present and future constitutional arrangements to make sure that the constitution of Sri Lanka becomes meaningful in theory and practice for women.

The constitutional bill of 2000 is perhaps the most substantive reform document in contemporary Sri Lanka – a country that is currently in a state of transition to a post conflict situation. Yet as the author points out the bill is “astoundingly gender insensitive”. Women in the north east of Sri Lanka have, for instance, been particularly vulnerable during the years of the armed conflict. Far from being given special treatment as a result of their extraordinary life experiences, there has been no reference to them at all in the Constitutional Bill. Also of significance is the fact that equality has been defined in terms of equality of opportunity for ‘all communities’ – there is no mention of gender equality.
Kishali examines the Bill of 2000 in the context of past constitutional developments since 1948. She traces, the manner in which gender concerns have been bypassed whenever the constitution has been amended or a new one installed. The devolution of powers to the provinces has generated an emotive debate in Sri Lanka as it has a special resonance for the management and resolution of the Tamil-Sinhala ethnic conflict. As this paper clearly demonstrates however, there is however little evidence to suggest that attempts at devolution have brought women into the decision-making loop.

Kishali’s study indicates that there is very little space in the Bill for mainstreaming gender concerns. She defines the priorities of change needed to make sure that the future constitutional structures in Sri Lanka provide an enabling framework for mainstreaming gender into policy processes. While the constitutional provisions are not sufficient in themselves to generate change it is a much needed first step. A gender sensitive legal framework in conjunction with political activism will provide the synergy to bring about the desired transformation on the ground.

Introduction

This paper asserts that – in order to be successful – the basic constitutional structures of Sri Lanka will have to be radically revised, not only to link peace and democracy but also to ensure that each aspect of the constitutional reform debate is effectively gender-sensitive. In this respect, reform involves a re-structuring of basic constitutional structures as well as a specific re-working of the electoral systems currently in place in the country. Since February 2003, negotiations between the Liberation Tigers of Tamil Eelam (LTTE) and the United National Front (UNF) Government have spotlighted constitutional reform as a priority. Despite the current friction between the People’s Alliance Presidency and the United National Front Government, constitutional reform continues to be on the agenda*.

Constitutional reform has been in focus for over seven years, ever since a Draft Constitution was proposed by the People’s Alliance Government in 1995. Devolution of power and regional autonomy is now accepted as essential for accommodating ethnic tensions and multiple identities, as well as for promoting transparency, accountability and efficiency. However, the manner in which the proposed constitutional reforms can be structured to benefit women – who comprise 50 per cent of the country’s population – remains an issue as yet unexplored. Women’s voices have barely been heard; at the most they have found some space in the ‘peace debate’ or in context of the specific issue of women’s representation in political bodies through mechanisms such as quotas.

Recently, a gender sub-committee with representatives of the Government and the LTTE has been appointed as part of the peace negotiations. However, to date, none of the initiatives have adequately addressed the wider question of how women’s rights can be protected both at the Centre and in the proposed Regions once new constitutional arrangements are put into place. As a consequence, despite the

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Past Despair: Issues Concerning Women in Constitution-Making Since Independence

Constitutional and Political Developments after Independence

The period from Independence to the enactment of the Second Republican Constitution – 1948 to 1978 – was witness to numerous contradictions with regard to the issues of empowerment in the constitutional and democratic system. The Second Republican Constitution of 1978 established an Executive Presidential system of governance in Sri Lanka, the first of its kind in South Asia. The Constitution also introduced an electoral system based on Proportional Representation. These two aspects of the Constitution served to frame the issues of political representation of women in the country in the context of the ‘constitutional struggles’ that took place from the 1980s onwards.

Proportional Representation (or PR as it is referred to), replaced the old First-Past-the-Post (FPTP) system. Among the various reasons for this change was a need to do away with the wild electoral swings that Sri Lanka had experienced in the past. These disruptive swings were most noticeable in the years prior to 1978, when in every general election one or the other of the two major parties in Sri Lanka obtained an absolute majority in Parliament, with consequent ill effects on democratic rule. Thus, in 1970, the Sri Lanka Freedom Party (SLFP) secured a two-thirds majority in Parliament despite the fact that it had won less than 50 per cent of the popular vote. Seven years later, the other major political party, the United National Party (UNP) swept into power with 83.3 per cent of parliamentary seats even though it had won only 50.9 per cent of the actual vote. In contrast, this time the SLFP managed to obtain only eight (or 4.8 per cent) of parliamentary seats, clearly incongruous with the 29.7 per cent of the vote that it obtained.

In both instances, namely in 1970 and 1977, the governments in power used their huge majorities to make systemic changes that were constitutional reform process, women remain unheard, under-represented and dis-empowered.

This is hardly a new phenomenon. The unconcern has been in evidence throughout the last decade during which the governments of both the People’s Alliance and the United National Front – the two majority parties in Sri Lanka – have devoted time and effort to the re-making of Sri Lanka’s constitutional structures. For example, the Draft Constitution of 2000 lacks a feminist perspective in its framework as well as in its substantive content. The language of the draft does not even fulfil the basic requirement of using gender-neutral language. Successive constitutional developments, which this study will address, have also failed to address these issues.

For feminists in Sri Lanka, two questions have assumed centre-stage:

- How will women’s demands for gender equity be included in the new constitutional and political institutions that are being devised?
- In the post-conflict era, how will justice and reconciliation imperatives for women survivors – some of which might prove to be incompatible with other reforms – be ensured?

While addressing these issues, this study will explore methods of engendering present and proposed structures and processes of accountability both at the Centre and in the proposed Regions as set out in the (prevalent) 1978 Constitution. In will also assess the proposed Draft Constitution in terms of the suggested equitable representation and actual effectiveness.
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detrimental to governance and particularly harmful to the rights of minorities.

When the First Republican Constitution of 1972,¹ replaced the old Soulbury Constitution, it failed to offer anything for the protection (even if inadequate) that the latter had provided for minorities under its Section 29(2). This section had been decided by the Privy Council (at that time, the country’s highest court of appeal) to address:

\[
\text{[E]ntrenched religious and racial matters that shall not be the subject of legislation. They represent the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which inter se, they accepted the Constitution; and these are therefore unalterable under the Constitution.}^2
\]

The Soulbury Constitution had an additional check on majoritarianism, namely a second Chamber that consisted of appointed members into which minority access was easier than through the electoral route. Moreover, under the Soulbury Constitution, Parliament had attempted to maintain some balance in the representation of minorities.

When the constitution changed in 1972, the new constitutional structures continued the Westminster style of government as under the Soulbury system. However, particular features of the new 1972 Constitution proved to be highly inimical to the democratic system and ultimately to the incorporation of minority and disadvantaged interests within the democratic process. Among the relevant changes were the elevation of Parliament as the supreme assembly over and above other checks and balances such as the authority of the judiciary; the vesting of public service in the hands of politicians; and a deliberate down-grading of the importance given to Fundamental Rights provisions in the Constitution. The 1972 Constitution was aptly described as ‘a centralised democracy in which the dominant element is the political executive, which has few institutional checks on its use of political power’³. It set the trend for an even greater withdrawal than earlier of women from the democratic process in the years after 1978. The chief reason for this withdrawal lay in the burgeoning ethnic and civil violence, which from the 1980s onwards impacted in an extremely destructive manner on systems of democratic governance in general. The new electoral systems brought in by the 1978 Constitution contributed substantially to this phenomenon.⁴

The 1978 Constitution put into place the system of Proportional Representation (PR) – a complex system of voting for a political party, and thereafter selecting from a maximum of three given preferences from a list of candidates nominated by the party, accompanied by cut-off points and bonus seats. Each party was also given a list of individuals to be appointed from a National List, with the number of appointees being determined by the extent of electoral success. Thus the elections that took place under this new system, the first one being in 1989, radically changed the rules of electoral engagement. Whereas, earlier, candidates had contested in a small constituency, PR meant elections in a huge district with financial strength becoming a major problem. Added to this was the fact that PR, as it was practised in Sri Lanka, involved contesting for preference votes even within one’s own party. The resulting upsurge in intra-party violence as well as between parties made it even more difficult for women to enter the political process.

\[\text{Meanwhile, the explosion of ethnic conflict in Sri Lanka subsequent to 1983 ‘normalised’ emergency law in the country. Under the Public Security Ordinance (PSO) and the Prevention of Terrorism Act (PTA), special security laws replaced the ordinary legal regime for more than two decades. The second civil youth insurrection in the South in the 1980s by a pro-Marxist rebel group campaigning among the disaffected and unemployed youth in the country – the first insurrection had taken place in the 1970s and was quickly suppressed – almost brought Sri Lanka to its knees, and made terror and counter-terror a part of everyday life. After the insurrection had subsided, leaving in its wake an enormous loss of life, politics became highly brutalised, thus making elections even more fraught with danger for women candidates.}\]

¹ ‘Autochthonous’ or ‘home-grown’ as it was referred to proudly at that time.
² The Bribery Commissioner Vs Ranasinghe, 1964 (66) NLR, 73, p. 78.
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4 See Kishali Pinto-Jayawardena & Chulani Kodikara in Yasmin Thambiah (eds), Women and Governance in South Asia: Re-Imagining the State, ICES, Colombo, 2002, p. 421.
As the political process came to be seen as irredeemably corrupt and violent, the years after the introduction of PR in Sri Lanka saw an even greater down-surge in the numbers of women in Parliament. Despite the historical presence of powerful women at the helm of governance, the numbers of women in successive cabinets remained extremely low. The situation was particularly negative in regard to the inclusion of women from minority groups. Even traditionally, the political presence of women from the minority Tamil and Muslim communities was quite dismal: for example, only one woman from the Tamil community – Naysum Saravanamuttu – managed to successfully contest a seat in the State Council (in 1933), and was re-elected (in 1936). The legislatures of 1980 and 1989 again saw only one Tamil woman politician each, both coming into Parliament after the death of the male political members in their respective families. Rasa Manohari Pulendran was appointed as the first woman Tamil State Minister of Education in 1994.

In regard to the representation of Muslim women, the recent years have seen some change, with the nomination of a Muslim woman from the National List of a radical minority leftist party to Parliament in 2000. This woman, Anjan Umma, is one of the few women without a political family legacy to enter the political process in Sri Lanka. Representation of Muslim women in the national legislature was further supplemented when the wife of the former leader of the Sri Lanka Muslim Congress, MHM Ashraff was elected to the same Parliament upon the death of her husband in a plane crash. As the Minister for Rural Housing, and Reconstruction and Rehabilitation of the Eastern Province, Mrs Ferial Ashraff became the first woman Muslim Minister in Sri Lanka. However, these examples remain significant exceptions to a general pattern of low representation of Muslim women, even poorer that the representation of women politicians from the Tamil community. In contrast, the emergence of women from elite political families who have come into power as a result of some calamity befalling male members of their families has grown more pronounced.

Socio-Economic Indicators in a Political Context

Though Sri Lankan women have exercised their vote in large numbers – as evidenced by the fact that female voter participation in all elections has surpassed 80 per cent, thus almost equaling the male voter participation rate – yet the percentage of women in the actual political process has consistently decreased. This discrepancy has intensified in later years, even though the literacy rate among women has climbed upwards, reaching 86 per cent (as compared to a male literacy rate of 93.2 per cent). Currently, women have about a 4 per cent representation in Parliament.

In the past, two markers of special interest in the process towards the education and upliftment of Sri Lankan women was the introduction of adult franchise in 1931 and of free education in 1943. Both these developments had a remarkable effect on the literacy rates of women, as evidenced from the fact that, in 1971, the female literacy rate was 70.9 as compared to the male literacy rate of 85.6. These percentages were astonishingly high when compared with other countries in the Asian subcontinent at that time. From the 1930s onwards, Sri Lankan women distinguished themselves by their participation in the country’s governance and in the democratic processes. Thus, in granting the demand for franchise for women on the same basis as men a mere three years after women in England won the right to vote, the Donoughmore Commission pronounced that:

1 Department of Census and Statistics, ‘Woman and Men in Sri Lanka’, 1994. Other human development indicators continue to be high:
• the average life span of women is 74.6 years (that of men at 70 years);
• fertility rates have dropped by 50 per cent over the past three decades with high educational levels of women cited as a reason for the change;
• during the past two decades, women have entered the labour force in Sri Lanka at a faster rate than men despite the fact that the labour force participation of women (31.4 per cent) is estimated to be only half of that of male participation;
• the average age of marriage of Sri Lankan women is currently estimated at 25.5 years.

6 Comparative literacy rates in the subcontinent at the time were as follows: India had 46.8 per cent literacy among males and 18.9 among females; Pakistan had 23.5 per cent literacy among males and 5.8 among females; and in Bangladesh the literacy rates for males was 31.4 per cent and for females 8.7 per cent. From UNESCO, Statistics in Developing Countries in Asia, UNESCO Office of Statistics, Paris, p. 349.
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[W]e have been impressed by the high infantile mortality in the island, the need for better housing and for the development of child welfare, midwifery and antenatal services, all providing solutions of which women’s interest and help would be of special value....the demand for the vote was put before us by a large and representative deputation of Ceylonese ladies.\(^7\)

A Failed Promise?

The decades after 1948 did not quite manifest the promise of the early 1940s – that despite the cosmetic commitment to empowerment exemplified by the State, Sri Lanka would turn out to be an outstanding example of an engendered constitutional democracy in South.\(^8\) Future development ensured that Sri Lankan women could not use the 1978 Constitution to their advantage. Unlike in the case of equivalent provisions in the Indian Constitution for example, Sri Lankan women were unable to make good use of the equality provision in the 1978 Constitution. While laws were passed in some instances, theoretically redressing eighteenth-century penal laws that were prejudiced against women – for example, the 1995 amendments to the Penal Code which prohibited marital rape between ‘judicially separated’ spouses, brought into effect a penal prohibition against sexual harassment and tightened sentences in the case of rape – yet there was no noticeable difference in actual practices of rape and sexual harassment in the country. Neither was there any increased seriousness in the perception of crimes against women. On the contrary, the limitation of judicial separation to the prohibition against marital rape, for example, in practice made the 1995 amendment a mockery, as judicial separation was a remedy rarely availed of by Sri Lankan women.

Meanwhile, there was continued jettisoning of gender progressive bills, such as the Equal Opportunity Bill and, very recently (January 2002), of the proposed liberalisation of the Abortions Bill. A draft Domestic Violence Act remains on the backburner.

A short lived Gender Caucus in Parliament demonstrated the apparent impossibility of bringing about a common parliamentary consensus on legislation affecting Sri Lankan women in a highly fractured and damaged political culture. The working of the 1978 Constitution, set as it was against the backdrop of a steep deterioration of political life in the country, was inimical to the interests of Sri Lankan women. This regressive situation was not redressed by attempts in the late 1980s to bring about a measure of devolution to the provinces.


\(^8\) Sri Lanka ratified the International Convention against the Elimination of All Forms of Discrimination against Women (CEDAW) in October 1981. Ten years later, a Women’s Charter substantively based on the provisions of CEDAW was put into place. State institutions dedicated to the concerns of women multiplied, including the establishment of a Ministry for Women’s Affairs which supervises a Women’s Bureau (established in 1978) and the National Committee on Women.
We have been impressed by the high infantile mortality in the island, the need for better housing and for the development of child welfare, midwifery and antenatal services, all providing solutions of which women’s interest and help would be of special value….the demand for the vote was put before us by a large and representative deputation of Ceylonese ladies.\(^7\)

**A Failed Promise?**

The decades after 1948 did not quite manifest the promise of the early 1940s – that despite the cosmetic commitment to empowerment exemplified by the State, Sri Lanka would turn out to be an outstanding example of an engendered constitutional democracy in South.\(^8\) Future development ensured that Sri Lankan women could not use the 1978 Constitution to their advantage. Unlike in the case of equivalent provisions in the Indian Constitution for example, Sri Lankan women were unable to make good use of the equality provision in the 1978 Constitution. While laws were passed in some instances, theoretically redressing eighteenth-century penal laws that were prejudiced against women – for example, the 1995 amendments to the Penal Code which prohibited marital rape between ‘judicially separated’ spouses, brought into effect a penal prohibition against sexual harassment and tightened sentences in the case of rape – yet there was no noticeable difference in actual practices of rape and sexual harassment in the country. Neither was there any increased seriousness in the perception of crimes against women. On the contrary, the limitation of judicial separation to the prohibition against marital rape, for example, in practice made the 1995 amendment a mockery, as judicial separation was a remedy rarely availed of by Sri Lankan women.

Meanwhile, there was continued jettisoning of gender progressive bills, such as the Equal Opportunity Bill and, very recently (January 2002), of the proposed liberalisation of the Abortions Bill. A draft Domestic Violence Act remains on the backburner.

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Devolution of Power: 
Confronting gendered realities

Changing Structures of Devolution

The devolution/decentralisation debate in Sri Lanka has been historically centred around management and resolution of the Sinhala-Tamil ethnic conflict. However, as examined in this study, each attempt to resolve the conflict through measures of devolution, (considered to be appropriate for that particular moment in history), has been politically expedient and consequently destructive rather than empowering the minorities or the marginalised in Sri Lanka. One key analysis has been that post-colonial political systems, (centered around the Western models of democratic politics), have, in fact, accentuated conflict, destroyed democratic institutions and created intractable ethnic conflict.9

These tensions assumed a particular nature at the local level. In the early days after Independence, local government had a special significance in the political structures, often serving as a testing ground for local level politicians aspiring to enter national politics. Once in the National Assembly, these politicians remained faithful, for the most part, to their rural responsibilities, within the framework of the Ward System which compelled close loyalties between representatives and their constituents.

The introduction of the Proportional Representation system whittled down these loyalties, diminishing the ties between Members of Parliaments (MPs) and their constituents, and replacing it with a much more free-ranging responsibility towards a district as a whole. These changes, as far as national level representation was concerned, were not accompanied by any parallel strengthening of local government structures which might have compensated for this shift in nature of political representation.


The local government structures existing in Sri Lanka by 1977 were creations of immediate pre- or post-Independence enactments. Four types of local authorities existed:

- Municipal Councils (under Ordinance No. 16 of 1947);
- Urban Councils (under Ordinance No. 61 of 1939);
- Town Councils (under Ordinance No. 3 of 1946); and
- Village Councils (under ordinance No. 9 of 1924).

However, in 1977, along with a comprehensive change in the electoral system from the Ward System to Proportional Representation, far-reaching changes were also made to local government through the Local Authorities (Special Provisions) Law No. 24 of 1977. This law reinforced the existing political ethic that it was the party that was important and not the individual. Ward representation had already been abolished. Other provisions that were introduced removed the right to election of mayoral posts by majority votes of the elected representatives as well as the requirement of holding a by-election when the office of a representative fell vacant. This radically changed the manner in which local authorities functioned, diminishing the space for the entry of the disadvantaged, including minority candidates and women, and boosting the notion of the political party as the single most important entity.

Meanwhile, as the internal conflict between the Government and forces fighting for a separate state in the North increased in intensity, efforts were made ostensibly to placate the separatists who had been demanding greater autonomy in their areas. Accordingly, the UNP, the party in power from 1977 to 1994, made greater changes to local government structures. In an attempt to further decentralise the implementation of development activities, the old Town Councils and Village Councils were abolished and replaced by a system of district administration. These District Development Councils (DDCs), established in 1981, consisted of MPs in the district and elected members, headed by a District Minister. These DDCs were the first regional units established in Sri Lanka since the country gained Independence in 1948. However, due to the excessive politicisation of these Councils and significant malpractice in the process of their election, the DDCs soon became a failed experiment in decentralisation. It was after their failure that the Pradeshiya Sabhas (PS) were instituted as another tier of local government through Act No. 15 of 1987.
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At that point, the administrative system in Sri Lanka consisted of two basic units, the central government and the local government system. A cabinet-level Ministry of Local Government at the Centre supervised a network of Municipal Councils (MC), Urban Councils (UC) and Pradeshiya Sabhas (PS), all set up under separate acts of Parliament. While the MCs and UCs operated in urban areas, the PSs functioned in rural areas. The members to these were elected by periodic elections, also through the Proportional Representation system. While the MCs and UCs operated in urban areas, the PSs functioned in rural areas. The members to these were elected by periodic elections, also through the Proportional Representation system. All these bodies had particular subjects and functions assigned to them by law, which were, however, subject to specific limitations that effectively worked against them evolving as true development-centred bodies. While they remained responsible for some regulatory and administrative functions, for provision of physical infrastructure and for promotion of public health, no independent power was given to them as far as development activities were concerned. As an analyst has commented tellingly:

In other words deconcentration [sic] was preferred to devolution and this was largely because the former enabled continued control of patronage by the politician at the centre. With the growth of government departments from about forty in 1928 to ninety two in 1948, many of them dispensing services, centralising tendencies grew. Importantly, these local government bodies had little financial autonomy, with funds being provided through the central ministry. Even though periodic reports from pre-Independence days had identified lack of resources as the primary problem crippling local government in Sri Lanka, no significant efforts were made to remedy this. Instead, the situation was further aggravated by constitutional changes in 1987. These were meant, ostensibly, to provide a corrective to minority grievances but proved to actually worsen the situation, wrecking in the process whatever structures of decentralisation which had survived the expedient political manoeuvring of the past. As usual, the first to be affected as a result of these changes were the women.

Provincial Councils

In 1987, the 13th Amendment to the Constitution was passed by Parliament, followed by the enacting of the Provincial Councils Act No. 42 of 1987 and the Provincial Councils (Consequential Provisions) Act No. 12 of 1989. These statutory and constitutional changes, touted as forms of devolution of power, were in fact, highly paradoxical in nature. It has been convincingly argued that the 13th Amendment established structures that actually bordered on ‘quasi-federal’. The Ninth Schedule to the 13th Amendment made an ‘explicit constitutional demarcation of the spheres of authority of the centre and the constituent units’ or Provincial Councils. Further, the 13th Amendment made express provision that, in the case of all matters set out in the Provincial Councils List, no bill presented to Parliament could become law unless approved by all Provincial Councils or by a special majority in Parliament, with or without a referendum as the case might be. The same stipulations applied in the case of any constitutional amendment affecting the power of Provincial Councils.

In its structure, the Provincial Councils consisted of a Governor and a Board of Ministers with the former being appointed by the President, and latter being elected by the people of that province. The Governor possessed overwhelming powers in respect of the Council over which he or she presided, ranging from legislative to executive and financial. He or she held office at the pleasure of the President, advising the removal of the Governor, but this address could be initiated only on three specified grounds: intentional violation of the provisions of the Constitution, misconduct or corruption, and bribery or moral turpitude. While the Board of Ministers was empowered to aid and advise the Governor in the exercise of his or her functions, the Governor was awarded a


15 Ibid.
16 13th Amendment, Article 154G(3).
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The 13\textsuperscript{th} Amendment personified a classic case of ‘giving with one hand and taking away with the other’. While it contained three lists, detailing the subjects retained by the Centre (the Reserved List), subjects handed over to the provinces (the Provincial List) and subjects common to both (the Concurrent List), the central government in practice treated both the Reserved List and the Concurrent List as its exclusive domain. Through the Reserved List, the Centre retained overriding power to determine national policy on subjects that were technically under the Provincial List. Many of the clauses of the 13\textsuperscript{th} Amendment meant to foster and encourage devolved structures with regard to education, police and land were only partially implemented or not at all, thus frustrating the purpose for which the Constitution was amended. Thus, even though the system of Provincial Councils was put into place with unrealistic expectations, their actual working over the past decade and a half has been far worse than what even a hopeless pessimist could have envisaged. Instead of workable devolved structures coming into being, the 13\textsuperscript{th} Amendment has only resulted in the creation of unwieldy provincial political structures and provincial political dynasties which have done little to help the lot of the people in the provinces; instead these political dynasties have concentrated on bettering themselves, politically and financially.

Given the painfully sensitive political climate in which the 13\textsuperscript{th} Amendment was passed, and the haste in which it was introduced,\textsuperscript{20} empowering women was the least of the concerns of those who framed it. Thus, the consequences of the 13\textsuperscript{th} Amendment remain specially disastrous in relation to women. The Amendment itself did not contain any clauses aimed at helping women access the new political bodies, either through a reserved seat or a specific quota for nominations. The Councils set up did not contain any sub-structures focusing on gender concerns, nor were there any financial allocations for this purpose. Instead, as the provincial power structures grew more dominant, national level elitism percolated dramatically into the provinces. Increasingly, only a few women from selected regional families with political power and influence accessed these Councils. This is borne out by details of female representation in Provincial Councils (even though the numbers of women nominated to contest these elections increased marginally from 0.5 per cent in 1993 to 5.38 per cent in 1999 (due largely to a surge in the overall numbers of candidates in general). The PR electoral system, with all its inherent weightage in favour of the powerful and the influential, continued to work to the disadvantage of the few women candidates who braved the hustings.

As has been aptly pointed out by an one activist who campaigned from an independent group:

This system makes anyone who wants to work for the people through the political process, a victim of one or the other of the major parties. After I lost, I realised how impossible it was to contest as an independent group or candidate and win. I obtained 11,500 votes which is a good enough number, which might have entitled me to a seat in the old ward system. However, I lost out due to the proportional representation allocations in the Nuwara Eliya District.\textsuperscript{21}

Table 1
Women in Provincial Councils

<table>
<thead>
<tr>
<th>Provinces</th>
<th>Total 1993</th>
<th>Women</th>
<th>%</th>
<th>Total 1999</th>
<th>Women</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>WESTERN</td>
<td>104</td>
<td>7</td>
<td>6.7</td>
<td>104</td>
<td>2</td>
<td>1.9</td>
</tr>
<tr>
<td>NORTH CENTRAL</td>
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<td>4</td>
<td>11.1</td>
<td>34</td>
<td>1</td>
<td>2.9</td>
</tr>
<tr>
<td>NORTH WESTERN</td>
<td>52</td>
<td>3</td>
<td>5.8</td>
<td>51</td>
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<td>5.8</td>
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<td>UVA</td>
<td>34</td>
<td>0</td>
<td>0.0</td>
<td>32</td>
<td>1</td>
<td>3.1</td>
</tr>
<tr>
<td>CENTRAL</td>
<td>58</td>
<td>1</td>
<td>1.7</td>
<td>58</td>
<td>3</td>
<td>5.1</td>
</tr>
<tr>
<td>SOUTHERN</td>
<td>55</td>
<td>2</td>
<td>3.6</td>
<td>55</td>
<td>1</td>
<td>1.8</td>
</tr>
<tr>
<td>SABARAGAMUWA</td>
<td>44</td>
<td>1</td>
<td>2.3</td>
<td>43</td>
<td>1</td>
<td>2.3</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>383</strong></td>
<td><strong>18</strong></td>
<td><strong>4.7</strong></td>
<td><strong>377</strong></td>
<td><strong>12</strong></td>
<td><strong>3.3</strong></td>
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\textsuperscript{19} Ibid., Article 154(F) 2.
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\begin{table}[h]
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\hline
Provinces & \multicolumn{2}{c|}{1993} & \multicolumn{2}{c|}{1999} \\
\hline
 & Total & Women & \% & Total & Women & \% \\
\hline
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NORTH WESTERN & 52 & 3 & 5.8 & 51 & 3 & 5.8 \\
UVA & 34 & 0 & 0.0 & 32 & 1 & 3.1 \\
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\end{table}

Despairing stories abound. For example, in the seven Provincial Councils functioning in the year 2000, only one woman held a ministerial post as opposed to 34 men. This pattern of subordination was highlighted dramatically when two women councillors who won in the Uva and North Central Provinces in 1999 actually stepped down from their positions to allow their husbands, both prominent party men, to take their place and be appointed Chief Ministers. This development was all the more bizarre as these two men had, in fact, had seats in Parliament at the time that the elections were held. After their wives won the elections, the men resigned from their parliamentary seats and entered the Provincial Councils under a problematic provision (Section 65) of the Provincial Councils Elections Act No. 2 of 1988 which, on the face of it, allows the Party Secretary to appoint individuals from outside the nomination list when a vacancy arises through resignation.22

From the minorities, Wellamma Sellasamy remains the only Tamil woman to be elected to a Provincial Council to date after winning the election to the Western Provincial Council in the 1993 Council election. She, however, failed to get re-elected in 1999. Anjan Umma, contesting from a radical leftist party, the Peoples Liberation Front (JVP) became the first Muslim woman to be elected to a Provincial Council in 1999. She was nominated to Parliament by the JVP in 2000.

**Local Government**

The 13th Amendment also affected the representation of women at local level extremely negatively. While the authority – with regard to structure, form, constitution and national policy – was retained by the Centre, all other powers and functions relating to local government were devolved to the Provincial Councils. This included the power of the administration of local authorities, including the power of dissolution, subject to quasi-judicial inquiries into the grounds of dissolution and legal remedies in respect thereof.23

The 13th Amendment contained a superficial clause permitting Provincial Councils to confer additional powers on local authorities (but not reducing any of their powers).24 However, no other provision was made for strengthening local government structures. Instead, the 13th Amendment further weakened local government by stipulating that financial support and guidance of local government bodies should be channelled through the Provincial Councils. As a result of these changes, any space that local bodies had had in the past to facilitate an effective decentralisation of power, backed up by some measure of financial autonomy, was further diminished.

The current position is that development work is carried out through agencies of the central government and by special officers of the Provincial Councils. The weakened local government structures are left in control of “…residual matters providing comfort and convenience to the community in regard to public health, scavenging, public utility services and thoroughfares”.25 This reduction in the importance of local government bodies has had an extremely negative impact on the morale of the members of these bodies. A member of a Pradeshiya Sabha from the North Western Province in Sri Lanka has summed up the situation thus:

> Even though we function in local government, this is very limited[;] we do not have enough powers to bring about any substantive changes in our areas. All the decisions we take are undercut by powerful politicians who are in the provinces, sometimes simply because they do not like our face or our political affiliations. We become very vulnerable.26

As the political structure of government changed in a way that accommodated only the powerful, rich and influential, female representation in local government decreased, and became minimal. Earlier, the systems of local government had been the easiest method

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22 These nominations were challenged in two public interest petitions filed in the appellate courts as being contrary to the spirit of the electoral process and the principles of representative democracy. The Court ruled that the nominations from outside the nominations list were unlawful and offended the principles of the Provincial Councils Act No 2 of 1988.(per judgement of Justice Mark Fernando in Centre for Policy Alternatives and Another v. Commissioner of Elections and Others, SCM 27/5/2003).

23 Ninth Schedule in the Provincial Council List, Clause 4:2.

24 Ibid., Clause 4:3.


26 As stated by Kumari Ekanayake, Member, Mawathagama Pradeshiya Sabha, North Western Province: Personal Interview.
Despairing stories abound. For example, in the seven Provincial Councils functioning in the year 2000, only one woman held a ministerial post as opposed to 34 men. This pattern of subordination was highlighted dramatically when two women councillors who won in the Uva and North Central Provinces in 1999 actually stepped down from their positions to allow their husbands, both prominent party men, to take their place and be appointed Chief Ministers. This development was all the more bizarre as these two men had, in fact, had seats in Parliament at the time that the elections were held. After their wives won the elections, the men resigned from their parliamentary seats and entered the Provincial Councils under a problematic provision (Section 65) of the Provincial Councils Elections Act No. 2 of 1988 which, on the face of it, allows the Party Secretary to appoint individuals from outside the nomination list when a vacancy arises through resignation.22

From the minorities, Wellamma Sellasamy remains the only Tamil woman to be elected to a Provincial Council to date after winning the election to the Western Provincial Council in the 1993 Council election. She, however, failed to get re-elected in 1999. Anjan Umma, contesting from a radical leftist party, the Peoples Liberation Front (JVP) became the first Muslim woman to be elected to a Provincial Council in 1999. She was nominated to Parliament by the JVP in 2000.

Local Government

The 13th Amendment also affected the representation of women at local level extremely negatively. While the authority – with regard to structure, form, constitution and national policy – was retained by the Centre, all other powers and functions relating to local government were devolved to the Provincial Councils. This included the power of supervision of the administration of local authorities, including the power of dissolution, subject to quasi-judicial inquiries into the grounds of dissolution and legal remedies in respect thereof.23

The 13th Amendment contained a superficial clause permitting Provincial Councils to confer additional powers on local authorities (but not reducing any of their powers).24 However, no other provision was made for strengthening local government structures. Instead, the 13th Amendment further weakened local government by stipulating that financial support and guidance of local government bodies should be channelled through the Provincial Councils. As a result of these changes, any space that local bodies had had in the past to facilitate an effective decentralisation of power, backed up by some measure of financial autonomy, was further diminished.

The current position is that development work is carried out through agencies of the central government and by special officers of the Provincial Councils. The weakened local government structures are left in control of “…residual matters providing comfort and convenience to the community in regard to public health, scavenging, public utility services and thoroughfares”.25 This reduction in the importance of local government bodies has had an extremely negative impact on the morale of the members of these bodies. A member of a Pradeshiya Sabha from the North Western Province in Sri Lanka has summed up the situation thus:

Even though we function in local government, this is very limited[;] we do not have enough powers to bring about any substantive changes in our areas. All the decisions we take are undercut by powerful politicians who are in the provinces, sometimes simply because they do not like our face or our political affiliations. We become very vulnerable.26

As the political structure of government changed in a way that accommodated only the powerful, rich and influential, female representation in local government decreased, and became minimal. Earlier, the systems of local government had been the easiest method

22 These nominations were challenged in two public interest petitions filed in the appellate courts as being contrary to the spirit of the electoral process and the principles of representative democracy. The Court ruled that the nominations from outside the nominations list were unlawful and offended the principles of the Provincial Councils Act No 2 of 1988.(per judgement of Justice Mark Fernando in Centre for Policy Alternatives and Another v. Commissioner of Elections and Others, SCM 27/5/2003).

23 Ninth Schedule in the Provincial Council List, Clause 4:2.

24 Ibid., Clause 4:3.


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for community conscious activist women, who did not have elite power ties, to access the political process. However, these avenues became severely restricted.

We now find it much harder to enter politics on our own merit. The main power structures are at provincial or at central level (sic). These are all dominated by a few powerful families... though every government talks of decentralisation or devolution, what actually happens is more centralisation and those who are marginalised, like women candidates find it more and more harder (sic) to enter politics. Are we surprised that the percentages are so low?27

Minority women representation in local government deteriorated even further as the conflict in the North-East worsened. Local government elections were not even held in many parts of the North-East. When elections finally took place in 1997 in some parts of the Northern Province after almost 16 years, Sarojini Yogeswaran was elected to the Jaffna Municipal Council, claiming the mayorship in an extraordinary feat of determination overcoming adversity. However, her assassination by the LTTE a few months later – commonly believed to be because of her strongly independent stand against the excesses of the militant movement – blunted what might have been a renewing of hope for the women of the North.

From the Muslim community, Ayisha Rauf became the first Muslim woman to contest an election in Sri Lanka from the Colombo Central multi-member constituency in 1947. Though her first attempt was unsuccessful, her second attempt in 1949 won her a seat in the Colombo Municipal Council. She reached the near zenith of glory in the local government system when in 1952, she became the Deputy Mayor but was forced into premature retirement in 1961 when she was compelled to choose between her career in teaching and local government service. Recent years have not seen any other Muslim woman emulating her example at local government level. The personal laws and customs of the Muslim community, which are enforced rigidly in the country, make it even harder for women to think of entering the political process and coping with the problems of personal/sexual harassment and the character assassination that this commonly entails.28

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<td>Pradeshiya Sabhas</td>
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Support for Youth Representation: The Contrast with Women’s Representation

The manner in which women’s under-representation, particularly at local government level, was treated with scant concern by successive governments is in stark contrast with the campaign to incorporate sufficient numbers of youth in the political processes, which has been pushed very vigorously both politically and legally. Impelled by the destructive youth insurrection in the South in the 1980s, in which hundreds of individuals died at the hands of the insurrectionists as well as through measures of counter-terror initiated by the State, a Commission was set up in 1990, after the insurrection had been quelled, to examine the grievances of the youth. Its recommendations included the opening up of the mainstream political processes to the youth in a structured manner.

Consequently, a youth quota was introduced in 1990 through (Amendment) Act No. 25 of 1990 to the Local Authorities Elections, providing that 40 per cent all candidates in nomination lists at the local government level had to be youth candidates, that is persons between 18 and 35 years of age.

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The reasoning of the Youth Commission, in this sense, is interesting:

[The commission is convinced that at this particular period of our history, the generation gap has so widened that youth are in fact a distinct category who require separate representation. Although they may share different political ideologies, they are substantially united in the belief that the system does not give them the opportunity to represent and act upon their views.]

No such interest has been evinced in relation to women as a ‘distinct category needing separate representation’. The increasingly minute percentages of women being represented in all political bodies has not generated critical opinion at policy levels despite leadership positions being held by women themselves.

The Constitutional Bill of 2000: Considerations of gender?

General Outline of the Bill

The Constitutional Bill of 2000 (hereafter, Constitutional Bill) was based on a text of Devolution Proposals submitted by the People’s Alliance when that party formed the Government in 1995. The proposals were put in concrete form for the first time in 1997. A near constitutional crisis occurred in mid-2000 when the Bill was hurriedly gazetted as urgent, and referred overnight by President Kumaratunge to the Supreme Court, prior to being presented in Parliament. Citizen’s groups, members of the clergy and the Opposition protested, stating that though some provisions of the Bill had been put before the people, the country remained unaware of the Constitutional Bill in its entirety, as formulated in the final draft (hereafter, Draft). When the Draft, in fact, became public, the fact that its Transitional Provisions contained clauses permitting President Kumaratunge to assume the powers of a ceremonial head of state as well as that of a cabinet-style Prime Minister for the remainder of her presidential term (i.e., for a period of six years from December 1999 onwards) led to a storm of protests. Though legal challenges to the Constitutional Bill failed in the Supreme Court, extreme public agitation resulted in the government withdrawing it from Parliament.

Three years later, however, the Bill remains the most substantive reform document in existence. While it attempts to redress many historical problems that have frustrated devolution in the past, its provisions remain problematic in general. The Bill is astoundingly gender insensitive.

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The reforms envisaged in the Constitutional Bill can broadly be summarised thus:

- Provisions directed at democratising the institutions of state, that is, proposals to abolish the Executive Presidency, and return to the Cabinet style of government, as well as establish a Constitutional Council with the purpose of making key public appointments.
- Provisions attempting to strengthen Fundamental Rights and the institutional safeguards protecting these rights.
- Provisions aiming to increase the mechanisms for power-sharing between the Centre and the Regions, and also within the Regions themselves, through devolution of power to regional governments. These proposals also include formats for an executive committee system, and for a multi-party cabinets within these governments.
- Provisions relating to an Interim Council for the North-East.

The UNF has not, to date, clarified its position as to whether it will adopt the constitutional document drafted by its predecessor, even in part. The peace negotiations between the UNF Government and the LTTE have hitherto focused on immediate humanitarian issues rather than constitutional questions. However, given that the Draft Constitution embodies reform of overall structures of governance – including a radically restructured chapter on Fundamental Rights – it is reasonable to believe that the document will not be jettisoned wholesale. Therein lies the necessity for the Draft to be further fine-tuned to ensure that gender concerns are incorporated in it.

Structural Features Outlined in the Draft

In Article 1, the Draft Constitution declares the Republic of Sri Lanka to be a free, sovereign and independent state, consisting of the institutions of the Centre and of the Regions. The replacement of the prevalent provisions in the Sri Lankan Constitution of 1978 enshrining a unitary state (in Articles 2 and 76) is an essential concession to fundamental demands made by minority communities. So too is the deletion of Article 18 in the 1978 Constitution, stipulating that the official language of Sri Lanka would be Sinhala – instead the Draft Constitution states in Article 32 that the official languages will be Sinhala and Tamil. Along with English, these have also been specified as the national languages of the country.

The Draft Constitution envisages Regional Councils with a devolution of powers in the areas of finance, law and order, land, education, the administration of justice and the public service. The powers designated for the Centre and the Regional Councils have been determined according to two lists, the Regional List and the Reserved List. The abolition of the Concurrent List is meant to ensure that the problem of overlapping jurisdictions currently besetting the functioning of the Provincial Councils – and in which the discretion of the Centre prevails – will not arise in the new regional structures contemplated. More extensive revenue raising powers are also envisaged for the Councils.

The Constitutional Bill also contains a new chapter on Fundamental Rights, including the right to life, the right to property subject to particular exceptions according to law and the right to privacy. Its anti-discrimination clause, in Article 11(2)(a), differs from the prevalent clause in the 1978 Constitution – (Article 12(2)). While the clause in the 1978 Constitution forbids discrimination on the grounds of gender, married status, maternity, parental status as well as sex, yet – unlike several other constitutions, for example Article 9(4) of the South African Constitution – it does not impose a duty on the State to prevent or prohibit unfair discrimination.

The Constitutional Bill includes a host of socio-economic rights as well as special rights of children. Whereas earlier, only a victim or a lawyer could approach court on a violation of a Fundamental Right, the new chapter in Article 30 gives this right to groups or classes of persons acting bona fide. While these provisions are an improvement on what exists, the equality clause can still be critiqued as restrictive in its formulation.

With regard to power structures at the Centre, the Constitutional Bill envisages the abolition of the Executive Presidency, replacing this with a ceremonial head of state to be assisted by two Vice Presidents from two different communities. In a return to the Westminster system,
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_Though these provisions are meant to serve as a radical transformation of the prevalent conflict ridden power structures, yet they continue to be undermined by other clauses_, such as the one that allows the President, acting upon the advice of the Prime Minister, to intervene whenever the latter is ‘of the opinion’ that a state of emergency has arisen in a particular Region. Thereafter, by Proclamation, extensive security powers are vested in the Centre, allowing the Centre to override the conferment of powers in the Regional List to that particular Regional Council.\(^{34}\) Though retention of power in the Centre is necessary in times of grave danger to the State, the manner in which this power has been framed in the Constitutional Bill has given rise to fears of possible abuse once the Bill becomes law.

**Absence of Considerations of Gender in the Bill**

Feminists, meanwhile, have reacted in a lukewarm manner to the Constitutional Bill primarily because of the startling _absence of any gender specific clauses or mechanisms_, both with regard to the political and governance processes and devolved structures. There is no provision for gender empowerment at the policy levels. Instead, while national policy on women’s affairs has been included in the Reserved List,\(^{35}\) the Regional Councils have been given a peculiarly termed mandate to ‘implement programmes for the advancement of women’.\(^{36}\) Worse, while the 1997 proposals had, in a minimum concession to the demands of the women’s movement in Sri Lanka, contained a 25 per cent reservation for women in nominations for elections at the local government level,\(^{37}\) the 2000 Constitutional Bill has omitted this stipulation.

When pressed for reasons for this omission, the Government defence was that the minority parties had protested against the inclusion of this clause apparently because of difficulties that they would face in getting women to contest. No sustained or reasonable debate took place on this matter thereafter. The Constitutional Bill was essentially a document that fell far short of the most minimum demands made by women in Sri Lanka for over several decades.

**Constitutional Reform since the Draft Constitution**

Thereafter, further constitutional reform has mirrored this same unconcern with gender justice. Shortly before the (Chandrika) Kumaratunge-led People’s Alliance Coalition Government was defeated in the December 2001 General Elections, a particularly crucial amendment to the existing Constitution (the 17th Amendment) was passed in Parliament, primarily as a result of pressure by leftist parties on which the Coalition Government was depending for support. This amendment focused on the appointment of a Constitutional Council, structured as a non-political body vested with the power to make appointments to key offices, including the appointment of members of four Independent Commissions – on the police, the judiciary, elections and the public service. These reforms were looked upon as essential for the reformation of Sri Lanka’s political, electoral, administrative and judicial culture, subverted by decades of conflict and institutionalised politicisation. In attempting to instil a new morality into Sri Lanka’s governance process, the 17th Amendment to the Constitution provided for the process of appointments both to the Constitutional Council itself and the subsequent Independent Commissions to be governed by specific criteria.

The Council comprises 10 persons, including the Prime Minister, the Speaker, the Leader of the Opposition – by virtue of their office – as well as one Presidential appointee, five persons nominated both by the Prime Minister and the Leader of the Opposition and one person nominated by all the political parties and independent groups not constituting the Government or the Opposition. In the appointment of the five persons by the consensual decision of the Prime Minister and the Leader of the Opposition, the 17th Amendment requires that three of them should represent the respective minority communities in

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In mid-2002, appointments to the Constitutional Council were finalised and the Council is now functioning without a single woman member in its ranks. The process of appointments to the Independent Commissions is now underway and reflects a gender composition that is positive and welcome. However, this, by itself, will not suffice to redress the grave problems that women face in respect to governance and political processes in Sri Lanka.

Meanwhile, following the commencement of peace negotiations between the LTTE and the UNF Government, a sub-committee focusing on gender concerns in the process has been appointed, consisting of women activists and academics from the South and LTTE members as representatives from the North. Regardless, the need to inject a strong gender perspective into whatever reform structures are agreed upon, in the context of the volatile political climate, remains.

Justice for Women in the North-East?

Securing justice for women in the North-East, affected by the decades of conflict has been completely bypassed by the framers of the Constitutional Bill. This is exemplified by the fact that women come in as a category that is constitutionally recognised only in the general clause dealing with equality in the chapter on Fundamental Rights. Among the proposals forwarded to deal with the conflict-ridden North-East, there is no recognition for women as a category deserving special treatment in law because of their extreme vulnerability in the conflict.

Even though the Constitutional Bill of 2000 provides in its Chapter XXVIII for an Interim Council for the North-East, there is no specific reference to women, either in the composition of such a Council or in the composition of bodies for the North-East such as the Public Service Commission and the Police Commission.

Disturbingly, women do not even find space in context of the Equality Commission envisaged by the Bill. The Bill contemplates an Equality Commission – comprising three members appointed by the President from the three major communities in the North-East – as specified in Clause 252. However, the function of this Commission is not phrased in gender-specific terms; instead, the Commission’s mandate is to promote equality of opportunity for all communities in matters such as employment and access to public services and – very esoterically – to promote parity of esteem among all communities in such regions. The Equality Commission has been given the power to inquire into complaints relating to such matters made against public bodies. There is not even a token mention of gender discrimination or promotion of gender equity as an aim of the Commission.

Similarly, the Interim Council has been given the power to rehabilitate and resettle persons who have been displaced, to enable such persons to recover possession of property or secure compensation (in Clause

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38 Article 41A(3).
39 Article 41A(4).
All appointed members of the Council have to be persons of eminence and integrity who have distinguished themselves in public life and who are not members of any political party. However, no mention was made in the Amendment of ensuring fair gender representation in the appointments to the Council. Similarly, the 17th Amendment did not make any provision for appointments to the Independent Commissions following a policy of gender balance, even though it had a mandatory stipulation that such recommendations should reflect the presence of different ethnic groups.

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Meanwhile, following the commencement of peace negotiations between the LTTE and the UNF Government, a sub-committee focusing on gender concerns in the process has been appointed, consisting of women activists and academics from the South and LTTE members as representatives from the North. Regardless, the need to inject a strong gender perspective into whatever reform structures are agreed upon, in the context of the volatile political climate, remains.

In the meantime, following the commencement of the peace process and the Constitution Bill, a sub-committee focusing on gender concerns in the process has been appointed, consisting of women activists and academics from the South and LTTE members as representatives from the North. Regardless, the need to inject a strong gender perspective into whatever reform structures are agreed upon, in the context of the volatile political climate, remains.

The North-East: Ensuring the rights of life, liberty and security for women affected by war

Justice for Women in the North-East?

Securing justice for women in the North-East, affected by the decades of conflict has been completely bypassed by the framers of the Constitutional Bill. This is exemplified by the fact that women come in as a category that is constitutionally recognised only in the general clause dealing with equality in the chapter on Fundamental Rights.

Among the proposals forwarded to deal with the conflict-ridden North-East, there is no recognition for women as a category deserving special treatment in law because of their extreme vulnerability in the conflict.

Even though the Constitutional Bill of 2000 provides in its Chapter XXVIII for an Interim Council for the North-East, there is no specific reference to women, either in the composition of such a Council or in the composition of bodies for the North-East such as the Public Service Commission and the Police Commission.

Disturbingly, women do not even find space in context of the Equality Commission envisaged by the Bill. The Bill contemplates an Equality Commission – comprising three members appointed by the President from the three major communities in the North-East – as specified in Clause 252. However, the function of this Commission is not phrased in gender-specific terms; instead, the Commission’s mandate is to promote equality of opportunity for all communities in matters such as employment and access to public services and – very esoterically – to promote parity of esteem among all communities in such regions. The Equality Commission has been given the power to inquire into complaints relating to such matters made against public bodies. There is not even a token mention of gender discrimination or promotion of gender equity as an aim of the Commission.

Similarly, the Interim Council has been given the power to rehabilitate and resettle persons who have been displaced, to enable such persons to recover possession of property or secure compensation (in Clause

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38 Article 41A(3).
39 Article 41A(4).
250 of the Bill). However, the Council is not mandated to address the very special problems of women in this regard.

**The Effects of War**

The need to restructure these provisions in order to incorporate specific issues related to gender justice is self-evident. The internal armed conflict in Sri Lanka between the LTTE and Government forces, which has raged in the North-East of the country for the past two decades, has resulted in war-generated migration of extremely large proportions. Internally displaced persons (IDPs) from the Tamils, Sinhalese and Muslims communities number around 800,000. An estimated one million individuals, overwhelmingly of the Tamil community, have fled the country. Most recent surveys undertaken by the office of the United Nations’ High Commissioner for Refugees (UNHCR), Colombo, show that over 75 per cent of IDPs wish to return home, subject to the principles of voluntary, safe, secure and dignified return.

*During the two decades of conflict, fundamental questions relating to status, legal identities and power relations have been experienced intensely by women of the minority Tamil community in relation to the Sri Lankan State, effectively, ‘the enemy’. These questions have arisen against the background of the extreme violence that has taken place. Women have had to cope with the illegal arrests and detention, and the disappearance and torture of the male members of the family, as well as confront legal obstacles that have impeded their right to a dignified return.*

In its *Sri Lanka Monitor*, the British Refugee Council notes that in the period between February 1996 and July 1999, more than 45 cases of rape by soldiers in the North-East were reported. Similarly, in her 2001 report to the Commission on Human Rights, the United Nations’ Special Rapporteur on Violence against Women highlighted a number of cases of rape and sexual abuse perpetrated by the Sri Lankan police, security forces and armed groups allied with the Government.

In November 2000, the United Nations’ Division for the Advancement of Women, the Office of the High Commissioner for Human Rights and the United Nations’ Development Fund for Women jointly organised an Expert Group Meeting on Gender and racial discrimination. In their report, participants at the meeting cited Sri Lanka as an example of a conflict ‘motivated by ethnically based acts of aggression in which women have been targeted and become victims of ethnically-motivated, gender-specific forms of violence’.

Even though there is now a cease-fire between the government troops and the LTTE which has lasted for over a year, many women and children continue to suffer the combined traumas of losing their husbands, being displaced, and having their mobility severely affected. The severe violence that has occurred in the past remains a constant reminder of their helplessness, and of the failure of the State to deal with the plight of Sri Lankan women affected by the war.

**The Failure of the Legal System**

The legal system has failed to deal effectively with the perpetrators of the violence. Impunity continues for members of the forces who engage in blatantly unconstitutional actions under the PTA and Emergency Regulations. Interventions by the courts have not been able to stem a change of the general pattern of impunity behind which members of the forces take refuge for their actions. Such interventions have been able to correct injustices only in very individual situations, which are more the exception than the rule.

Of particular importance is the Krishanthi Kumarasamy case – which involved the rape and murder of a 15-year-old school girl, and the subsequent murders of her mother, brother and neighbour who went in search of her, by eight soldiers and one policeman on duty at the Chemmani check point. This incident marked the coming together of...

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forces across the country, united in their condemnation of the horrendous happenings. The accused in this case were convicted in the High Court of Sri Lanka inter alia of offences under Section 357 of the Penal Code – abduction with intent that the victim may be compelled or knowing it to be likely that she will be forced or seduced into illicit sexual intercourse – as well as under Section 364 (rape) and Section 296 of the Penal Code (murder). Their appeals are currently pending. By the end of 1998, however, the momentum initially caused by the Kumarasamy verdict petered out. Other cases, similarly gruesome in nature, remain to be pursued.43

Perpetrators of human rights violations against women are meted out a measure of justice in cases brought before the Supreme Court for violation of Fundamental Rights. In August 2001, the case filed by Yogalingam Vijitha of Paruthiyadaippu, Kayts, against the Reserve Sup. Inspector of Police, Police Station Negombo, and six others,44 is a case in point – the Supreme Court ordered compensation and costs to be paid to a Tamil woman who had been arrested, detained and brutally tortured. The Court pointed out that:

As Athukorala J in Sudath Silva Vs Kodituwakku 1987 2 SLR 119 observed ‘the facts of this case has revealed disturbing features regarding third degree methods adopted by certain police officers on suspects held in police custody. Such methods can only be described as barbaric, savage and inhuman. They are most revolting and offend one’s sense of human decency and dignity particularly at the present time when every endeavor is being made to promote and protect human rights.

The Attorney General was also directed to consider taking steps under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Act No. 22 of 1994 against the respondent police officers and any others who are responsible for the acts of torture perpetrated. However, on a larger scale, the lack of seriousness with which Act No. 22 of 1994 has been utilised with regard to members of

the armed forces and police who commit serious human rights violations remains a major problem. Women do not have access to redress and reparation and very few are able to appeal to the Supreme Court.

The widespread impunity that continues to be enjoyed by perpetrators of rape and other forms of violence committed against women in Sri Lanka provides strong evidence of a systematic practice of discrimination. The consequences of this impunity are devastating for individual victims who are effectively denied access to criminal and civil remedies including reparations. Instead, at the most, perpetrators are transferred away from their stations. In most cases, witness intimidation results in the case collapsing half-way through the trial. The basic requirements of prosecution of rape cases – including medical examinations – are often subverted.

A classic example of the subversion of medical examination in a rape case is the Vijayakala Nanthakumar and Sivamani Weerakoon case. This case arose out of an incident in Uppukulam in March 2001 when the two women were allegedly raped by members of the Mannar police’s Counter-Subversive Unit (CSU).45 The initial report of the District Medical Officer to the magistrate stated that he had examined the women and that there was no evidence of rape. However, owing to public outrage and an appeal made by the Bishop of Mannar, there was a further examination. The victims then stated that they had not been subjected to any medical examination; also that they had been threatened by the police not to consent to an examination or provide any evidence to the magistrate concerning the torture. The second examination resulted in the Medical Officer finding strong evidence of rape and sexual assault.46

43 Other cases that have remained without redress include the case of Ida Camelita who was raped and murdered in Mannar and the murder and alleged rape of Koneswary in Amparai in 1999.
46 Evidentiary hurdles exist for women wishing to bring charges of rape against security forces personnel due to an un-revised Evidence Ordinance. The Evidence Ordinance effectively negates Section 364(2) of the Penal Code, providing for punishments ranging from 10 to 20 years of imprisonment for public officers or persons in a position of authority who rape women in official custody or who wrongfully restrain women. Under this Ordinance, women may be required to prove an absence of consent even in cases of custodial rape and prior sexual history may be introduced into evidence.
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In the light of the above-cited instances, there is urgent need for the institution of a legal process that is geared towards dealing with violations of the right to life and liberty of women during the conflict. There is specific need for the institution of strong structures of witness protection and also for an examination of legal obstacles which currently impede such a process.

**Issues of Displacement**

Displacement has, of course, resulted from the actions of the Government as well as those of the LTTE. In Puttalam, an area in the North-Western province of Sri Lanka, approximately 80,000 Muslims were forcibly evicted from the north by the LTTE in the 1990s and have since then been living in welfare centres (refugee camps) run by the Government. Till date, there have been limited efforts by the State to provide some relief to displaced women through bodies such as the Human Rights’ Commission, the Commissions on Disappearances and the Anti-Harassment Committee. However, these efforts have been faltering and their impact remains manifestly inadequate.\(^\text{47}\)

As far as land, housing and property rights of the IDPs are concerned, there is an urgent need to specifically provide for this in the Transitional Provisions of whichever future constitution is being contemplated. Identification and revision of all national laws relating to adequate housing and property restitution, the right to property and the peaceful enjoyment of possessions, the right to be protected against forced evictions, and the right to privacy and protection of the home, should follow. A separate process, distinct from the already overburdened court system, should be initiated within the context of an institutional and legal framework for protecting land, housing and property rights of returning IDPs and refugees and for resolving related disputes.

A recent study on land, housing and property in the context of refugee and IDP return undertaken jointly by the Human Rights’ Commission of Sri Lanka and the UNHCR office in Colombo,\(^\text{48}\) concluded that a serious overhaul of existing laws – such as Prescription Ordinance No. 2 of 1889 (as amended), as well as provisions of the Recovery of Loans by Banks Act No. 4 of 1990 and the Debt Recovery (Special Provisions) Act No. 2 of 1990 – was necessary in order to assist voluntary repatriation.

In addition, the well researched study recommends that a commission be established on land, housing and property rights in regard to IDPs and refugees. The functions of this commission would potentially include guaranteeing joint ownership rights in areas where state lands are concerned and devoting special attention and staff to issues affecting women – clearing of land, rebuilding of damaged houses and practical livelihood challenges facing the numerous households with female heads.

**Rectifying the Past**

A key analysis should therefore focus on processes of law reform at the national and provincial level with particular reference to existing constitutional provisions that are necessary to enable Sri Lankan women to forge new strategies of empowerment with regard to these issues.

Given the enormity of these issues, it is necessary that any constitutional solution should contemplate a truth and reconciliation process that may not be provided for, in detail, in the constitutional document but with regard to which basic goals could be outlined. There is no logic, for example, as to why such an outline could not have been included in the constitutional provisions relating to resettlement in the Transitional Provisions of the Constitutional Bill.

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Similar criticisms were leveled against Sri Lanka in the 79\(^{th}\) session of the Human Rights’ Committee during consideration of Sri Lanka’s Fourth and Fifth Periodic Reports under the International Covenant on Civil and Political Rights (ICCPR).

The Re-Working of the Reform Process:
Constitutional Impreratives and Initiatives for the Future

The Constitutional Context

As this study has identified in the preceding sections, Sri Lanka’s legal, political and constitutional structures are inherently subversive in so far as women are concerned.

To reiterate three critical examples of this:

- **As far as constitutional guarantees go, though the Sri Lankan Constitution theoretically includes an equality clause, its effectiveness is severely diminished by the fact that the process of approaching the Supreme Court on the basis of this clause is extremely restrictive.** An application must be filed within one month of the aggrieved person becoming aware of the alleged violation. The Constitution does not permit judicial review of executive or administrative action unlike, for example, the Indian Constitution. Neither does it permit public interest litigation ... have operated particularly against women using the constitutionally guaranteed rights to their advantage.

- **Even though a variety of bodies with the mandate of looking into women’s issue, do exist, yet none of these are provided for by law, and thus lack the consequent safeguards that would ensure their proper working despite changes in government.** On the contrary, the existing bodies come under the Ministry of Women’s Affairs thereby lending a political dimension to the whole issue. There are innumerable examples of how lethargic ministers, or those motivated by party considerations, have not only rendered such bodies ineffective but also, due to their highly divisive policies, antagonised activists.

- **Despite powerful women being at the helm of national and provincial politics in Sri Lanka, women continue to be discriminated against at every stage in the political process.** This is true both at the point of entry and thereafter, especially in context of the absolute authority wielded by the party whip in the prevalent electoral system, which emphasises the party over the conscience of the individual. The space that a woman politician has to articulate different concerns is limited to the point of non-existence.

Defining Priorities for Change

It is not very difficult to identify particular priorities in the context of issues relating to women and their welfare and security. As far as general political structures are concerned, ensuring the representation and participation of women in the electoral process is foremost on the agenda. The issue of women’s representation continues to be articulated through mechanisms like the quota. The argument continues to be relatively uncomplicated. Systematic gender discrimination at the point of entry into the political process has to be addressed through special interventions in order to bring about the required critical mass of women. Given the dismal state of political representation (which, effectively appears to be the worst as compared to its South Asian neighbours), the logic inherent in this argument is not difficult to comprehend.

Particular initiatives impacting on electoral reform were evidenced in June 2002 when a private member motion for reform of Sri Lanka’s electoral laws presented in Parliament (seconded by a government minister) represented that:

*This Parliament resolves that a new combined electoral system be introduced with priority being given to the first past the post system while ensuring proportional representation on an island wide basis for political parties and groups.*

A six-point discussion agenda was detailed by the Government, including among its discussion points the issue of whether a new electoral system should apply across the board to all electoral levels and what should be the proportion of directly elected members to those elected on a proportional basis. Questions relating to by-elections,
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reintroduction of multi-member constituencies and the cut-off point were also on the agenda. This agenda traced its points of discussions to previous draft laws which had proposed a replacement of the prevalent electoral system of proportional representation with a mixed system, resulting in a Parliament of 298 members – of which 168 members were to be elected through the First-Past-the-Post system, 100 were to be elected through district-wise proportional representation, and 30 through the national list.

Regrettably though not surprisingly, this electoral reform agenda did not condescend to mention the under representation of women in the Sri Lankan political process, far less specify this as a point of discussion. Despite sustained lobbying by women’s bodies, which put forward specific recommendations in this regard, there is no basis to believe that the findings of the committee would be sensitive to the issue.

The consensus of opinion among women’s groups inclines towards a quota in reserved seats rather than on the nomination lists. Thus, the aim is to secure an amendment of parliamentary laws, as well as of the Local Authorities Elections Ordinance No. 53 of 1946 (as amended) and Provincial Councils Elections Act of 1988, (as amended), in order to allow for specific provision to be made for the reservation of at least 30 per cent of seats in Provincial Councils and Local Government bodies for women. This however, is not enough. Re-formulating constitutional structures should involve considerably more than encouraging numerical representation, important as this is. Instead, it should necessarily involve emphasis on the nature and quality of representation as well as focus on the relationship between women voters and women politicians. For this inter-linking to take place, it is important that existing policy bodies on women are de-politicised, that the Constitution and subordinate laws give direction regarding the advancement of gender claims in policy debates, and that regional and local government structures are de-linked from national-level politics.

Potential Initiatives: Change at the National, Provincial and Local levels and in the North-East

There exists a body of suggestions about possible initiatives at the national, provincial and local levels that can redress the lacunae in the constitutional, legal and political status of women in Sri Lanka.

At the national level, redress can involve a re-formulation of the constitutional clause on gender equality in a manner that goes beyond the clause in the Constitutional Bill of 2000. A useful example in this regard is the formulation of the equality clause in the South African Constitution, which, as activists have pointed out, has provided a legitimising framework by establishing gender equality as a core principle and value of South African democracy. This provision has had a far-reaching formal impact, in that both political parties and the Independent Electoral Commission (IEC) have to ensure that women’s participation is not prejudiced in any way by the nature of electoral campaigns or by the procedural aspects of the elections. The presence of gender activists among IEC commissioners has facilitated attention to gender issues in the work of the Commission.

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At the national level, redress can involve a re-formulation of the constitutional clause on gender equality in a manner that goes beyond the clause in the Constitutional Bill of 2000. A useful example in this regard is the formulation of the equality clause in the South African Constitution, which, as activists have pointed out, has provided a legitimising framework by establishing gender equality as a core principle and value of South African democracy. This provision has had a far-reaching formal impact, in that both political parties and the Independent Electoral Commission (IEC) have to ensure that women’s participation is not prejudiced in any way by the nature of electoral campaigns or by the procedural aspects of the elections. The presence of gender activists among IEC commissioners has facilitated attention to gender issues in the work of the Commission.

This however, is not enough. Re-formulating constitutional structures should involve considerably more than encouraging numerical representation, important as this is. Instead, it should necessarily involve emphasis on the nature and quality of representation as well as focus on the relationship between women voters and women politicians. For this inter-linking to take place, it is important that existing policy bodies on women are de-politicised, that the Constitution and subordinate laws give direction regarding the advancement of gender claims in policy debates, and that regional and local government structures are de-linked from national-level politics.

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reintroduction of multi-member constituencies and the cut-off point were also on the agenda. This agenda traced its points of discussions to previous draft laws which had proposed a replacement of the prevalent electoral system of proportional representation with a mixed system, resulting in a Parliament of 298 members – of which 168 members were to be elected through the First-Past-the-Post system, 100 were to be elected through district-wise proportional representation, and 30 through the national list.

Regrettably though not surprisingly, this electoral reform agenda did not condescend to mention the under representation of women in the Sri Lankan political process, far less specify this as a point of discussion. Despite sustained lobbying by women’s bodies, which put forward specific recommendations in this regard, there is no basis to believe that the findings of the committee would be sensitive to the issue.

The consensus of opinion among women’s groups inclines towards a quota in reserved seats rather than on the nomination lists. Thus, the aim is to secure an amendment of parliamentary laws, as well as of the Local Authorities Elections Ordinance No. 53 of 1946 (as amended) and Provincial Councils Elections Act of 1988, (as amended), in order to allow for specific provision to be made for the reservation of at least 30 per cent of seats in Provincial Councils and Local Government bodies for women.

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42 See Study on Land, Housing and Property, p. 46 (see note 48). It is recommended that the Commission should appoint a women’s affairs focal point and provide emergency assistance and compensation to women on a fully equitable basis.

43 Amendment of parliamentary laws falls within the purview of the Constitution, which means that any amendment of these laws needs a 2/3rd majority in parliament. However elections to Provincial Councils and Local Government are provided for by ordinary law and not by way of a constitutional provision. Therefore a constitutional amendment is not required to repeal or reform the system of election to Provincial Councils and Local Authorities. An important factor in this respect would be overall revision of election laws in order to bring about a safer environment for women to work in within the political process. Thus, at a minimal level, we would need the tightening of laws regarding electoral misconduct and the abuse of state resources and also a revision of election laws in order to give the Elections Commission/Commissioner more powers. A ceiling should be imposed on campaign spending and candidates required to make the requisite declaration to that effect, with punishment for violation of these laws and specific legal restrictions imposed on the nomination by parties of violators of election laws.

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51 in addition, the abolition of the one month time limit for filing Fundamental Rights petitions and permitting substantial judicial review is very necessary.

Initiatives should also involve the creation and development of institutional capacity that is independent from the government and from political parties. An Office for the Status of Women or a Commission on Gender Equality should be established by the government. These should not have the limitations restricting political bodies, which are dictated to by the needs of ministers with differing political agendas; rather these should comprise a body of experts appointed through an independent process by the Constitution Council and with security of tenure. The Office/Commission should, importantly, be endowed with all powers, as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.

Vitally, within Parliament, it should spearhead formation of advocacy groups working across party boundaries, including for example, a Parliamentary Committee on the Status of Women.

The 17th Amendment needs to be subjected to further amendment to ensure that gender is specifically incorporated as a factor in determining the composition of the Constitutional Council as well as of the independent commissions. Creation of gender focal points within government departments and the development of national gender policy and legislation (i.e., legislation such as the Equality and Prevention of Unfair Discrimination Act) are also important initiatives that need to be undertaken.

At the level of the provinces, redress can involve legislation ensuring that all structures and bodies within the Councils provide for gender-based composition. Gender Committees should also be established within the Councils. Provincial/regional structures should stipulate budget allocation for addressing gender concerns.

At the level of the local government, a return to the Ward System – and hence a return of local government politics to the community and a de-linking of local government from national politics and/or political representation at local government achieved through individuals contesting on independent lists – is considered important. The current practice of local government elections contested through party lists needs to be abolished; elections need to be held on the basis of independent lists that include people with different political persuasions but common goals to serve the interests of local communities.

There is also a need to strengthen the legal and financial base of local government by ensuring that the system is squarely within the constitutional framework. Taking away the supervisory powers of Provincial Councils over local government bodies, giving them increased powers and providing the necessary finances for the same is critical.

With regard to the North-East, the issues regarding transitional justice and the peculiar rights of women affected by the conflict, and the defects in the proposed Constitutional Bill that have been discussed in this study are relevant.
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Conclusion

This study makes the point that Sri Lanka’s constitutional reform process needs urgent re-working on the basis of a politics of inclusion which would result in gender issues being effectively mainstreamed into national debates on constitutional, electoral and democratic reform.

A superficial reading might lead some to believe that the framework for engendering the country’s legal and constitutional framework is already in place and that the weaknesses exist either in implementation or in the impasse that the decades long conflict has brought about. This is, however, a very misleading impression, as this analysis hopes to make apparent. Thus, re-defining the law and the Constitution – though it will not instantly set right all that is wrong presently in Sri Lanka’s polity as far as gender justice is concerned – remains the primary imperative.

At a basic level, this is necessary to address the tensions, apprehensions and aspirations of Sri Lanka’s women and to enable them to articulate their vision for changes in the political culture as well as in state structures at the central, regional and local levels. It is hoped that this would help inculcate a new gender-friendly context with regard to reconciliation and transitional justice – a context that has been missing hitherto from the public policy debate – and thereby engender future constitutional reform.

Glossary

- DDC: District Development Councils
- FPTP: First Past the Post
- IDPs: Internally Displaced Persons
- IEC: Independent Electoral Commission (South Africa)
- JVP: People’s Liberation Front
- LTTE: Liberation Tigers of Tamil Eelam
- MC: Municipal Councils
- PR: Proportional Representation
- PS: Pradeshiya Sabhas
- PSO: Public Security Ordinance
- PTA: Prevention of Terrorism Act
- SLFP: Sri Lanka Freedom Party
- UC: Urban Councils
- UNF: United National Front
- UNHCR: United Nations’ High Commissioner for Refugees
- UNP: United National Party
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Selected Bibliography


