



International
Labour
Organization

► Opportunities and Challenges in Formation and Functioning of Trade Unions in Sri Lanka

Opportunities and Challenges in Formation and Functioning of Trade Unions in Sri Lanka

(With Reference to ILO Convention No. 87 on
Freedom of Association and Protection of the Right
to Organise and Convention No. 98 on Right to
Organise and Collective Bargaining)

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Opportunities and challenges in formation and functioning of trade unions in Sri Lanka

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► Executive Summary

Trade unions played a significant part in the history of Sri Lanka, shaping both political emancipation and economic policy. This role and the strength of trade unions also led to the imposition of regulatory mechanisms on trade union formation and activism by various administrations, as a result of which trade unions found it more difficult than in the past to influence policy and politics on behalf of its members.

In the modern era, despite its rich and varied history, the trade union movement has struggled to retain its membership and to attract new members from amongst new entrants to the labour market. This has been exacerbated by hostility from employers and indifference from Governments, to the formation of trade unions and to continued operations. The rapidly changing nature of the employment relationship, the shifting of labour from agriculture to services and manufacturing, the transfer of employment to the informal sector and to different type of working arrangements, will make this environment even more challenging for trade unions.

In this context, and during consultations for Sri Lanka's Decent Work Country Programme of the International Labour Organization (ILO) between trade unions representatives and technical experts of the ILO identified several challenges facing trade unions both in terms of freedom of association and collective bargaining, and the shortcomings in the assurance of the rights guaranteed under the relevant ILO Conventions that have been ratified in Sri Lanka, and this study was initiated as part of the capacity building of trade unions as a means of facilitating joint trade union advocacy on a number of concerns that are common to trade unions and members.

This paper examines existing literature in identifying the legislative and normative framework that underpins trade union formation and activism, and using the input of trade union representatives at a consultation facilitated by the ILO Colombo Office, as well as written contributions from trade unions and consultations with specific trade unions on key issues, develops an analysis of the internal strengths and weaknesses of trade unions in general, and the opportunities and threats in the environment in which they operate (SWOT Analysis). This analytical tool which examines each of the elements in detail, was then used to arrive at strategies to overcome some of the constraints, in order to take this joint trade union advocacy initiative forward.

The paper is organized as follows: Section 1 examines some of the key issues that have shaped the trade union environment in Sri Lanka. Section 2 contains the SWOT Analysis and the identification of key challenges and opportunities facing trade unions in Sri Lanka. Section 3 concludes with key strategies that the trade unions consider as being best suited to help trade unions to overcome constraints faced in forming and operating as trade unions.

List of Abbreviations

CEACR	Committee of Experts on the Application of Conventions and Recommendations
CFA	Committee on Freedom of Association
CGL	Commissioner General of Labour
CSO	Community Service Organisation
EC	Employee Council
EFC	Employers' Federation of Ceylon
EPF	Employees' Provident Fund
EPZ	Export Processing Zone
ETF	Employees' Trust Fund
FoA/FOA	Freedom of Association
IDA	Industrial Disputes Act
ILO	International Labour Organization
LT	Labour Tribunal
NGO	Non-Governmental Organisation
NLAC	National Labour Advisory Council
TUO	Trade Unions Ordinance

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► 1. Introduction

1. The first Trade Union in Sri Lanka (then Ceylon) was formed in 1893 and the Trade Union Ordinance was enacted in 1935 to provide for the registration of trade unions as a pre-requisite to exercise rights granted under the Ordinance, such as the right to immunity from civil liability as a result of legitimate trade union action. However, overall membership in trade unions has been declining steadily over time, and it is estimated that at present only about 9.5 per cent of the labour force is covered by a trade union;¹ the ratio is likely to be even less if the percentage of wage earners that are members of a trade union are considered.

► **Figure 1: Trade union membership and No. of registered trade unions in Sri Lanka 1996-2016**



► *Source: Compiled from Department of Labour, Annual Report various years)*

2. While the data reported by trade unions cannot be independently verified, and is generally perceived as being inaccurate, the total number of registered trade unions has risen while membership has fallen; this may indicate that the relative size and strength of individual unions has decreased. Given the long history of trade union activism and membership, and the significance of trade union support in being elected to Government and to maintaining political power, this reduction in membership (and sometimes marked changes in levels of membership year-on-year) has no apparent cause or socio-economic explanation.

¹ <https://www.ilo.org/colombo/areasofwork/workers-and-employers-organizations/lang--en/index.htm>

3. Trade union representatives also contend that this data is somewhat misleading due to the inclusion of trade unions in the public sector. The latter unions are not permitted to federate under the Trade Union Ordinance and this leads to the registration of numerically small trade unions, especially as all trade unions in the public sector are recognized as representative agents, regardless of whether it is the most representative or not; very often, therefore, public sector trade unions have no reason not to register smaller trade unions, especially as there are favourable concessions granted to trade union officials such as duty leave for trade union activity. Despite specific undertakings being given to remove the restriction on federating imposed on the public sector trade unions, the Government has failed to amend the statute, and the tendency to fragment is reflected as a national problem.
4. The absence of collective bargaining in the public sector (as the right has not been extended to public servants vis-à-vis their employer, the Government) also removes the need for such trade unions to be able to build alliances and to attract membership for bargaining strength, and hence there is little discouragement in registering as many smaller trade unions as the membership and leadership wishes to.
5. In this context, trade unions continue to face many of the old, and a considerable number of new and different challenges, in forming and functioning as trade unions. The ILO Country Office, with the advice of Workers Activities Sub-Regional Specialist Mr Sultan Ahmmed, has commissioned a position paper on 'Opportunities and Challenges in formation and functioning of Trade Unions in Sri Lanka', with particular reference to implementation of C87 (Freedom of Association and Protection of the Right to Organise Convention) and C98 (Right to Organise and Collective Bargaining Convention). This issue was identified as a priority by trade union representatives, who met with Sultan and his predecessor Mr Ariel Castro during their joint mission to Sri Lanka in early 2019.
6. The expected outcome is to support the strategic and collective action of trade unions through a joint platform for advancing workers' rights; strengthening their representation in diverse forums; and through a unified response to current opportunities and challenges, including in labour law reform. Therefore, the ILO Country Office sought national technical and research expertise² in drafting this position paper for discussion, refinement and adoption by trade unions. The paper was based on a review of prior research and existing literature, supplemented by a consultation with trade union representatives and technical experts facilitated by the ILO Country Office. In addition, written comments from trade unions on relevant

² https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-colombo/documents/vacancynotice/wcms_707549.pdf

issues have also been included in strategizing on taking the findings of the study and recommendations forward through joint trade union advocacy.

7. In the context of developing that strategic approach, the following section examines the legal provisions relating to trade unions in Sri Lanka with a view to developing a framework for a SWOT (Strengths, Weaknesses, Opportunities and Threats) Analysis of trade union formation and operation.

► **1.1. Legal Framework applicable to trade unions in Sri Lanka**

8. Trade unions in Sri Lanka are not necessarily the creatures of statute. The first trade unions were formed as trade associations and functioned effectively for its members without the need for legislative validity. It is perhaps due to that very efficacy in representation that legislation was drafted so that such associations would have to conform to set standards in order to access incentives and concessions to operate as trade unions.

► **1.1.1. Trade Unions Ordinance No.14 of 1935**

9. The Trade Unions Ordinance made the registration of trade unions compulsory to access civil liberties and immunities available under the legislation. Since unregistered trade unions were considered to unlawful associations and to be without legal protection in its operations, this Ordinance was viewed as an instrument by the State to control the growth and operations of trade unions (Jayawardena, K., 1972). However, the Ordinance was an important step for trade unions in that for the first time the right of association and the right to bargain collectively recognized. Although a trade union is required to register under this statute to qualify for the privileges and immunities available under the Act, the qualification to do so does not make registration unduly prohibitive, as the initial requirement for registration is only seven members.
10. The definition of a trade union in section 2 of the Trade Union Ordinance (TUO) includes a broad range of objectives for formation:

“trade union” means any association or combination of workmen or employers, whether

temporary or permanent, having among its objects one or more of the following objects:-

- (a) the regulation of relations between workmen and employers, or between workmen and workmen or between employers and employers; or

- (b) the imposing of restrictive conditions on the conduct of any trade or business;
or
- (c) the representation of either workmen or employers in trade disputes; or
- (d) the promotion or organization or financing of strikes or lock-outs in any trade or industry or the provision of pay or other benefits for its members during a strike or lock-out, and includes any federation of two or more trade unions;

11. This definition made it clear that restrictions or disruptions of any trade or business is a legitimate objective for which a trade union may be formed. This legal right has at times led to the unfortunately unfavourable viewing of trade unions by the public in general and industry in particular, as being an unfair or immoral in disrupting the legitimate business activities of another. While a discussion of the theoretical basis of trade unionism is out of place in this research study, this unfavourable view³ is worth keeping in mind in analysing the situation of trade unions in Sri Lanka today.
12. Although the TUO requires trade unions to submit annual statements setting out their membership, it has been found that this is observed in the breach by most unions. In addition, there is reason to believe that some of the data may be incorrect or inflated (Amerasinghe, E.F.G., 2009), which explains the remarkable fluctuations in reported membership in trade unions.
13. One weakness arising from the requirement of few members (seven) for registration is the multiplicity of trade unions in the country. This requirement makes fragmentation of trade unions an almost foregone conclusion in the face of political differences and inadequate power-sharing amongst the leadership. This has been most marked in the plantation sector, where in 1993 over 30 trade unions were reported in the estate sector which had at that time a total workforce of only about 450,000 workers.

► 1.1.2. Political objectives of Trade Unions

14. Most research into trade unions in Sri Lanka appear to theorise that politicisation of trade unions is 'a result of members or leaders of political parties wanting to establish unions of their own with a view to increasing their political influence, in urban industrial areas.' However, this ignores the specific provisions contained in section 47 of the TUO with regard to the political objectives of a trade union:

“47.(1) A registered trade union may constitute a separate fund, hereinafter in this Ordinance called “the political fund”, from contributions separately levied for or

³ <http://www.ft.lk/ft-view/Trade-unions-and-public-interest/58-660524>

made to that fund, from which payments may be made, for the promotion of the civic and political interests of its members, in furtherance of any of the objects, hereinafter in this Ordinance called “political objects” specified in subsection (2).

(2) The political objects referred to in subsection (1) are -

- (a) the payment of any expenses incurred either directly or indirectly by a candidate or prospective candidate for election as a or Member of Parliament or to any public office [in any local authority], before, during, or after the election, in connection with his candidature or election; or
- (b) the holding of any meeting or the distribution of any literature or documents in support of any such candidate or prospective candidate; or
- (c) the maintenance of any person who is a Member of Parliament or who holds a public office: or
- (d) the compilation or revision of any register of electors, the registration of electors, or the selection of a candidate for election as a or Member of Parliament or for any public office; or
- (e) the holding of political meetings of any kind, or the distribution of political literature or political documents of any kind.”

15. The TUO not only permits, but establishes a specific mechanism for a trade union to pursue political objectives through the establishment of a separate fund, by the collection of contributions by members and ‘voluntary contributions of non-members’ (section 47(9)). The pursuit of these political objectives, which include the financial support for the election candidate of any political candidate, maintenance of such a candidate, holding of political meetings or preparation of election literature, is therefore a lawful and legitimate activity of a trade union. To then either consider such political activity as being an undesirable or ill-judged aspect of trade unionism in Sri Lanka is an unnecessary one; the law provides the means to do so, and a trade union acting in accordance with such provisions must therefore be considered to be acting as it is expected and entitled to do.

► 1.1.3. Trade Unions Ordinance (Amendment) Act No.15 of 1948

16. Public servants also gained a limited right to organize under the Trade Unions Ordinance (Amendment) Act No. 15 of 1948 which permitted the registration of trade unions of public servants other than Judicial Officers, members of the Police and Armed Forces, Prison Officers and members of the Agricultural Corps, setting aside the restriction in the original legislation. But it prohibited their affiliation, amalgamation and federation, and also their having political objects and maintaining political funds. The amendment also empowered the Attorney-General to obtain a judicial order directing the Registrar of Trade Unions to withdraw or cancel the registration of a trade union of public servants if the Court was satisfied that it has promoted or organised

any strike intended to influence or overawe the Government on any political issue not affecting public servants in their official capacity.

17. The right of public servants to organize had been fettered previously by the Public Security Ordinance of 1947 which provided for the proclamation of a State of Emergency and the declaration of Emergency Regulations permitting the suspension, amendment or operation of any ordinary law. Under the Ordinance, the executive was empowered to declare certain services essential, making it obligatory for a strike in such an industry to be preceded by a 21 days' written strike notice to the employer. This Ordinance was to have important consequences for striking public sector workers in the early 1980's, and indeed, despite outward condemnation by all political parties, it is still being used to suspend or prohibit industrial action by workers in some industries.

► 1.1.4. The Industrial Disputes Act No. 43 of 1950

18. Introduced for the prevention, investigation and settlement of industrial disputes, the ID Act is the corner stone of labour administration in Sri Lanka. It applies to all workers and employers in the private sector, and is administered by the Commissioner General of Labour (CGL). The ID Act contains provisions governing conciliation and settlement of disputes, reference of disputes to determination by arbitrators and the industrial court, the entering into and registration of collective agreements, the jurisdiction of Labour Tribunals (LTs) to hear and determine applications by workmen against the termination of services, the powers of various officers authorised to administer the Act, and penalties attached to non-compliance with any of its provisions.
19. The Industrial Disputes Act ("IDA") provides for several mechanisms for dispute resolution:
 - (1) Arbitration (both voluntary and compulsory where parties are required to restore the *status quo* pending a decision);
 - (2) Conciliation (by the Commissioner of Labour between parties to industrial dispute);
 - (3) Adjudication by Labour Tribunals (in matters relating to termination of employment). The IDA empowers the Labour Tribunal to make an order in an application challenging termination notwithstanding any provision in the contract of employment between the employer and employee⁴; and

⁴ Section 31B(5) of the IDA.

- (4) By entering into collective agreements without the intervention of the Commissioner of Labour (especially in relation to wages and terms of employment). The collective agreements are however registered by the Commissioner of Labour to give legal effect to the terms of such agreement.

► **1.1.5. Industrial Disputes (Amendment) Act, No. 56 of 1999**

20. This amendment legally recognized the concept of unfair labour practice by making the non-recognition of a legitimate trade union by an employer a penal offence. The amendment was made through the addition of Section 32A to the ID Act, and was give practical effect to the right to freedom of association.

“32A. No employer shall

- (a) require a workmen to join or refrain from joining, any trade union or to withdraw from, or to refrain from withdrawing from, his membership of a trade union of which he is a member, as a condition of his employment;
- (b) dismiss a workmen by reason only of his membership of a trade union or of his engaging in trade union activities;
- (c) give any inducement or promise to a workmen for the purpose of preventing him from becoming or continuing to be, a member, office bearer or representative of a trade union
- (d) prevent a workmen from –
 - (i) forming a trade union; or
 - (ii) supporting a trade union by financial or other means;
- (e) interfere with the conduct of the activities of a trade union;
- (f) dismiss or otherwise take disciplinary action against, any workman or office-bearer of a trade union-
 - (i) For any statement made by such workmen or office bearer in good faith before any tribunal or person in authority; or
 - (ii) For any statement regarding acts or omissions of the employer relating to the terms and conditions of employment, of the members of such trade union made by such workmen or office-bearer, in pursuance of an industrial dispute for the purpose of securing redress or amelioration of working conditions of such members;
- (g) **refuse to bargain with a trade union, which has in its membership not less than forty percent of the workmen on whose behalf such trade union seeks to bargain.** For the purpose of this paragraph the Commissioner of Labour or an officer authorized by him in that behalf may conduct a poll at any work place in order to ascertain whether at least forty percent of the workmen on whose behalf the trade union seeks to bargain with the employer are members of such trade union.”

21. The amendment also provided that any person who fails to comply with these provisions shall be liable on conviction after summary trial before a magistrate to a fine not exceeding twenty thousand rupees (approximately US\$ 200).
22. The effect of this amendment is that any trade union having a membership of not less than 40% of the workforce in any workplace must be recognized for bargaining purposes by the employer. Where the employer disputes this strength of membership the CGL (or authorized officer) is empowered to ascertain the correct situation by a poll of 'workmen' at the workplace.
23. Where disputes as to the strength of membership have arisen the CGL can authorize the holding of a referendum at the workplace. However, those eligible to vote must be determined based on a list of employees provided by the employer. The Department of Labour has stated that all employees whether permanent, temporary or casual employees (employed for a minimum of 90 days prior to the date of the referendum) must be permitted to vote at this election. The list of names must be exhibited prominently at the work place, and employees are entitled to raise objections or request the CGL to add names of employees if they are alleged to have been left out. The referendum is conducted by secret ballot, and the trade unions and the employer are usually permitted to have two agents each at the poll and the count of ballots.
24. With regard to the poll, many difficulties have arisen in relation to the compilation of the list of employees, as employers have resorted to various methods of reducing the number eligible to vote at a referendum. The resulting acrimony has afflicted the level of dialogue between parties, even where recognition is enforced. Trade unions also allege that –
 - a. The Department of Labour has been persuaded by employers to define the 'bargaining unit' where the trade union must establish 40% of membership as being based on the entire workforce where a group of companies is involved⁵; this makes it virtually impossible for the union to obtain the required numbers;
 - b. The employer provides incentives and benefits to workers that join an Employee Council (EC) or other such association in order to make it less attractive for workers to continue in the membership of the trade union; the latest such association is termed the 'Direct Communication Committee' and these groups are used to undermine the position of the union.⁶

⁵ Discussions with union representatives for this report.

⁶ Comments by FTZGSE Union on the experience of their branch unions.

- c. Absence of regulations on conducting the poll of workers has made it very difficult for even the Department of Labour to compel employers to hold the poll even if it has been decided by the Department of Labour that a poll is necessary. At present, there are only guidelines and these do not have any force or effect. The guidelines should be gazette as Regulations so that employers can be compelled to hold the poll.
 - d. The difficulties of entry into the EPZs⁷ by trade union officials or activists makes it impossible to contact members that are being harassed or pressurized by employers into joining EC and other associations. Even Labour Inspectors do not have the right of unimpeded entry, but must first report to the BOI officials at the EPZ prior to visiting workplaces, which gives the employer sufficient time to suppress or conceal all anti-union activities.
25. In the event of non-compliance with any of these provisions, the CGL must establish such breach before a magistrate by the force of evidence, unlike the summary procedure available for other violations such as non-payment of statutory dues; in contrast, this inquiry-based procedure is a lengthy process, given that the evidence of employees will be inevitably required, and the evidence must be assessed on the highest standard of beyond reasonable doubt. Even if a conviction is obtained under these stringent conditions, trade unions argue that the penalty is not severe enough to be a deterrent to most employers.
26. The lack of precision in the language is also somewhat unsatisfactory. The Act states that the employer shall not 'refuse to bargain with a trade union, which has in its membership not less than forty percent of the workmen on whose behalf such trade union seeks to bargain.' There is no obligation on either party, especially the employer, to enter into any collective agreement or to reach a conclusion in the bargaining process. Thus, a recognised trade union may find that there is little or no advancement in its bargaining process, and it is doubtful whether there could be genuine social dialogue in such a circumstance.
27. Employers, when queried on this position, in turn complain that, although they are penalised for non-recognition, there is no reciprocal statement of obligations that

⁷ EPZs are designated as customs-bonded areas, due to the nature of the duty-free concessions granted on the import of raw materials and the need to ensure that such imports are used only for production within EPZs. No unauthorized personnel may enter into such Zones, which are surrounded by a number of protective measures such as barbed wire fences, deployment of armed security personnel and entry restricted only to persons authorized by each enterprise within the Zones. Employees are given identity cards or passes that are not transferable and which are stringently scrutinized to ensure that only approved persons are permitted to enter (Gunatilaka, 2000).

Trade unions must abide by, in return for recognition⁸; employers also contend that the CGL has not acted against trade unions where violations of collective agreements or unfair trade union action has taken place although such action is possible under the IDA. Thus neither employers nor trade unions appear to be satisfied with the provisions of this amendment, although it is acknowledged that it has helped some trade unions to achieve recognition, especially in the hitherto restricted Export Processing Zones (EPZs).

► 1.1.6. 1978 Constitution of Sri Lanka

28. Chapter III of the Constitution provides that:

“**Article 14.** (1) Every citizen is entitled to –

- (a) the freedom of speech and expression including publication;
- (b) the freedom of peaceful assembly;
- (c) the freedom of association;
- (d) the freedom to form and join a trade union;

.....
 (4) The exercise and operation of the fundamental right declared and recognized by Article 14 (1) (c) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or national economy.

.....
 (7) The exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13 (1), 13 (2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. For the purposes of this paragraph " law " includes regulations made under the law for the time being relating to public security.

(8) The exercise and operation of the fundamental rights declared and recognized by Articles 12 (1), 13 and 14 shall, in their application to the members of the Armed Forces, Police Force and other Forces charged with the maintenance of public order, *be subject to such restrictions as may be prescribed by law in the interests of the proper discharge of their duties and the maintenance of discipline among them.*”

29. Freedom of association and its concomitant rights are guaranteed under the Constitution of Sri Lanka only to its own citizens, and not “every person” as in the case of the Fundamental rights set out in Articles 10-13, such as the right to equality. The right to Freedom of association and the right to form and join a trade union is therefore

⁸ Discussion with Employers’ Federation of Ceylon for this report.

of a narrower scope, in that it is a right dependent on citizenship, and not to any and every person present in the country.

30. All these rights can also be restricted in the interests of national security, etc. (Article 15(7) and (8)), and in addition, the freedom of association can also be restricted in the interests of the national economy (Article 15(4)).
31. The violation of a fundamental right is justiciable by Constitutional provision itself, which is an unusual and very powerful provision: Article 17 provides that “**Every person** shall be entitled to apply to the Supreme Court, as provided by Article 126, **in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such person is entitled under the provisions of this Chapter.**” An expeditious procedure for an application alleging an infringement or imminent infringement of a fundamental right is provided under Article 126 where an aggrieved person may apply to the Supreme Court for relief within 30 days of the alleged infringement.
32. The Constitution does not provide an explicit remedy for a violation of a fundamental right of any person or citizen, by another individual not considered to be a member of the administrative or executive; however, this has been held to be not because there is no remedy, but because a special remedy has been provided in the case of a violation being committed by executive or administrative action. In the case of *Saman v Leeladasa* (1989 (1) SLR) the Supreme Court held that “On the contrary, in truth our Constitutional guarantees of fundamental rights are not only against State action, but even against violations by individuals. Under our Constitution, if the infringement is by " executive or administrative action " the remedy is by petition under Article 126; **if it is not by "executive or administrative action ", the common law or statutory remedies are available.** There is thus no need to seek to strain the meaning of that expression, or to expand the scope of Article 126, on the assumption that otherwise there would be no remedy. It is clear that even without Article 126, common law remedies would be available otherwise in *Gunaratne v. People's Bank* (1986) 1 SRI LR 338, 353) no relief could have been granted.”
33. This principle has been reiterated in many subsequent cases, that a violation of a fundamental right by a private individual or entity is justiciable, the difference being that it cannot be brought before the Supreme Court under the mechanism provided in Articles 17, and 126; the remedy for such a violation lies elsewhere. For instance, a violation of the fundamental right of freedom of association of an employee by an employer can be brought before the judicial process; it is clear from the judgements of the Supreme Court of Sri Lanka that the Chapter on Fundamental Rights is not a ‘toothless’ ornamentation, but an actionable Bill of Rights.

► 1.1.7. Emergency Regulations under the Prevention of Terrorism Act

34. The emergency regulations enacted since independence in 1947 have often been unfairly disproportionate to the actual situation, being used indiscriminately to regulate a limitless range of issues⁹. Coomaraswamy (2004) notes that one of the reasons for its enactment was because "...politically active trade unions, dominated by the Marxist parties, proliferated from the late 1940s into the 1960s, the pressure to deal with worker strikes motivated the government to enact the Public Security Act (now the Public Security Ordinance (PSO)). This regime legitimated emergency rule. From the government's perspective, public services such as food distribution, transportation, and communication services were essential to the nation's survival and protecting them justified overriding civil liberties through emergency legislation. At a subsequent point, certain government-proposed changes to legislation legitimizing emergency rule in 1959 inspired political strikes by trade unions. By 1968, many government departments were declared essential services under the Public Security Ordinance, which facilitated action against strikers, although emergency rule in response to trade union activity was not invoked until July 1971. Over time, ethnic-nationalist and political activity superseded trade union activity as the principal reason for invoking emergency powers.
35. In 1979 in addition to the PSO the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (PTA) was enacted, purportedly as a temporary measure, to ensure the security of the country. However, these two statutes continue to operate in tandem and can be activated to include issues and situations not directly related to security. A case in point is the proclamation of a State of Emergency after the April 2019 terrorist attacks in Sri Lanka, and the gazette notification issued thereunder in June 2019 making the railways an essential service, in the wake of a series of strikes by railway workers.

► 1.2. The normative framework relating to trade unions in Sri Lanka

36. In addition to these specific legal provisions there are others without the force of enacted law that have an impact on freedom of association and trade unionism in the country. These provide persuasive guidelines and in some instances regulations that affect trade union formation and operations.

⁹ Goodhart, William, et al (1998), Judicial Independence In Sri Lanka: Report Of A Mission, 14-23 September 1987, Centre for the Independence of Judges and Lawyers: Geneva, 36.

► **1.2.1. ILO Conventions on Freedom of Association and Collective Bargaining ratified by Sri Lanka**

37. The following Conventions on Freedom of Association have been ratified by Sri Lanka.

C98	Right to Organise and Collective Bargaining Convention, 1949	13.12.72	Ratified
C13	Workers' Representatives Convention, 1971	16.11.76	Ratified
C87	Freedom of Association and Protection of the Right to Organise Convention, 1948	15.09.95	Ratified

38. Of the main Standards on freedom of association only Convention 154, the Collective Bargaining Convention, has not been ratified by Sri Lanka. Ratification of these ILO instruments binds member states to a system of supervision of the compliance with specific provisions by firstly, the independent, 20-member, Committee of Experts (CEACR) on the Application of Conventions and Recommendations that examines State reporting on application as well as social partner reports, and secondly, the very specific mechanism set up by the ILO's Governing Body of the tripartite, nine-member, Committee on Freedom of Association (CFA), which inquires into allegations of infringement of FOA principles by ILO member States from employers' and workers' organizations whether or not the Conventions concerned have been ratified by the State in question. Much of the supervisory focus is on compliance with conventions on freedom of association and Sri Lanka has been requested to take corrective measures by both bodies on several instances (Ranaraja, 2010).

► **1.2.2. National Framework for Social Dialogue (2009)**

39. As part of the Decent Work Country Programme for the period 2008 -2012 the tripartite constituents committed to carry forward the "tradition and legacy of social dialogue, which spans many centuries in time," by recognising that social dialogue and tripartism are indispensable democratic means to address economic development and social concerns. The constituents accepted the following specific responsibilities:

1. Ensure the observance and application of employment related laws, and the promotion of freedom of association and the right to collective bargaining, as means of achieving social justice and equality.
2. Assist in the review of employment related laws which comply with international standards and enter into a continuous dialogue to monitor compliance.

3. Respect the rights of employers and workers to organize themselves in accordance with the Trade Unions Ordinance and the Industrial Disputes Act to conduct their collective activities without hindrance and interference.
 4. Desist from any form of discrimination against any employer and worker organization and their leaders or their members and to recognize their fundamental right to associate and carry on their activities freely and without restraint, other than those imposed by national law.
 5. Introduce efficient and impartial dispute and grievance procedures and to ensure that employment related issues are resolved peacefully, and in a manner which gives the nation a reputation for embracing best practice in industrial relations.
 6. Avoid unfair practices which result in loss and damage to the community, loss or hardship to affected individuals and to co-operate in resolving issues through dialogue and mediation where the latter is appropriate.
 7. Support, design and introduce machinery for consultation and dialogue at the national, regional, sector and enterprise levels and to ensure that such machinery is effective; and to engage in research individually and collectively to support meaningful dialogue and problem solving.
 8. Reach out to unorganised sectors of the economy in order to support the development of responsible business which values tripartism and social dialogue.
 9. Recognizing that an environment conducive to investment, efficient production and trade is essential for the creation of jobs, to engage in identifying positive contributions which could be made by the tripartite constituents towards this end.
 10. Organize regular activities for the exchange of information between the employers and workers organizations so that issues of national importance could be discussed and the parties could participate meaningfully in national development and socioeconomic development issues.
 11. Promote the creation of bipartite mechanisms at enterprise level and to assist in creating capacity necessary to promote active and meaningful participation in such bodies created.
40. Despite this salutary commitment, a systematic approach to reducing obstacles to social dialogue and freedom of association has been lacking and shortcomings highlighted in prior research persist and have not been overcome. The normative framework has therefore not supported the specific legislative provisions as intended.

► 2. SWOT Analysis of the forming and functioning of Trade Unions

41. The legal and normative framework outlined in the previous chapter creates both advantages and disadvantages for trade union operations. Some have been intentionally created by legislators, but other are the consequences of legislative provisions, internal or external environment or a combination of factors. Based on a review of available research and consultations with trade union representatives for this report, it is useful to construct a SWOT Analysis as a tool to identifying current internal strengths and weaknesses of trade unions and external/environmental opportunities and threats.

► 2.1. Internal Strengths of trade unions

42. Trade unions in Sri Lanka have a strong historical basis and are linked with the political and social history; leaders of trade unions are generally well-experienced both in trade unionism as well as activism. Trade unions have also built of strong alliances and relationships, with employers (EFC), non-governmental and international organisations (ILO/IOM/UN/EU), international trade unions and trade union confederations (ITUC/GUF)¹⁰ and the Industry ALL Global Union.¹¹ These strengths have enabled trade unions to demand a seat at the table in deciding labour and employment policy, and many of the trade unions are represented at the National Labour Advisory Council.

43. Trade unions also have access to skills-development and technical capacity building, with both national and international level access available for leadership and members for skills-acquisition with assistance from donors as well as being sponsored by own trade unions. Regular and continuous training and development activities are undertaken by non-governmental and international organisations, and the Department of Labour and other state agencies also provide such training opportunities.

44. Trade unions themselves have formed alliances for activism and lobbying such as forming NATURE (National Association for Trade Union Research and Education), formation of CENTU (Centre for Trade Union Unity) in 2010.¹² However, these

¹⁰ While several unions are affiliated to the Global Union Federations (GUFs), there are four unions that are affiliated to the International Trade Union Confederation (ITUC). The ITUC members being: Ceylon Workers Congress (CWC), Sri Lanka Nidahas Sevaka Sangamaya (SLNSS), National Trade Union Federation (NTUF) and the National Workers Congress (NWC).

¹¹ <http://www.industrialall-union.org/affiliates/sri-lanka>

¹² <http://www.sundaytimes.lk/101017/BusinessTimes/bt42.html>

alliances have proved to be short-lived, failing to emerge as a nationally recognized force, due to the inability of individual members to overcome differences to build lasting general positions.¹³

¹³ Discussion with trade union representatives.

	Helpful Conditions		Harmful Conditions	
Internal	1.Human Resources in management 2.Economic Resources 3.Social Links – <ul style="list-style-type: none"> Employers NGO/CSO International TUs ILO recognition 4.Experienced Leadership 5.Political strength : Strong trade union culture of more than a century, with significant contributions to historical events Training and skills development opportunities – national/international	STRENGTHS	1.Reducing membership/no increase in overall membership in trade unions 2.Aging membership/less attractive to new entrants 3.Lack of technological capacity/Digital skills in TU operations 4.Lack of awareness of members/workers of legal rights in employment 5.Lack of motivation of members in engaging in TU activities 6.Low levels of networking with other TUs, no collective action 7.Lack of support by members for political activities 8.Lack of media/PR expertise 9.Weaker Second-tier leadership and difficulties in retention of staff 10.Lack of female leaders, no proportionate right to leadership roles for women 11. Issues with Accountability/Transparency in management and operations <ul style="list-style-type: none"> Reporting of Finances to CGL unverified Membership details unverified 	WEAKNESSES
External	1.Ease of registering a trade union (7 members) 2. availability of technical assistance to TUs 3. Strong Political links and influence can convert to lobbying advantage 4.National tripartite body (NLAC) established 5.Use of Technology in operations 6. Many emerging sectors of employment that can be unionized – tourism, transport, construction	OPPORTUNITIES	1.Failure by Government to ensure compliance with C87 and C98 <ul style="list-style-type: none"> Weak tri-partite consultation mechanisms at national level (NLAC lacks representation, inefficient in operation) Anti-union discrimination by Government and employers <ul style="list-style-type: none"> Use of force to disrupt trade union activities Establishment of Workers' Councils/JCC at enterprise level Harassment of members and branch union officials Refusal to recognize TUs for bargaining purposes even with 40% TUs cannot file action on complaints of anti-union discrimination and trade union rights 2. Power of the Minister to refer a dispute to arbitration even where there a union is engaging in trade union action to compel parties to restore the status quo 3. No national protocol for engagement with TUs 4. No national apex body to represent TUs – inability to form alliances 5. Trade unions attack other trade unions at enterprise and national level for survival 6. Low levels of membership in trade unions 7. Negative perception of Trade unions of general public/working population 7. Increasingly precarious working arrangements makes organizing difficult <ul style="list-style-type: none"> Recruitment through Manpower agencies/Casualisation of labour/Use of Contract labour 9.Large size of informal sector, and large number of informal workers 10.Lack of access to Free Trade Zones 11.Delays in Court system on employee matters, industrial disputes and trade union complaints 12.Uni-lateral/discretionary cancellation of TUs by CGL creates vulnerability 13.TU Division of DOL lacks capacity and skills to provide support and guidance to TUs in forming and maintaining a TU and compliance	THREATS

► 2.2. Internal Weaknesses in forming and functioning of trade union

45. One of the key weaknesses identified in existing research is the steady decline in trade union membership despite the increase in the size of the labour force (see paragraph 1 of this report), as well as the difficulties in attracting those entering the labour force for the first time to join trade unions. This is part of a larger problem, and even where newer entrants become members of a trade union they are less likely to be inclined to take part in trade union action, and are less aware of their rights in employment as well as the importance of trade unionism. These members also do not engage in support for the political activities of trade unions that are necessary to increase its visibility and bargaining power and are generally reluctant to take up position of leadership and active roles in union management.¹⁴ This is different where workers join or form a trade union as a response to a dispute or crisis and members are more easily mobilised and active in seeking a solution to the dispute.
46. **Fragmentation:** Another aspect of this challenge is the fragmentation of trade unions. A large number of small trade unions consisting of a few members confers little advantage to any of these unions. As any seven members are sufficient to form a union under the provisions of the TUO, the initial fragmentation was a result of the fringe benefits conferred by the Government in the mid 1950's such as railway warrants and duty leave to attend annual general meetings. However, this pattern persisted due to politicisation of trade unions with different factions breaking away to establish splinter-unions when internal differences of opinion were experienced. Although the 1999 amendment to the ID Act was intended to reduce this to some extent by requiring recognition of trade unions with 40% of the workforce or more for bargaining purposes, the alliances and confederations to take advantage of this provision did not take place within workplaces.
47. Trade unions note that although only seven members are required to register the trade union, in order to be recognised as a bargaining agent a trade union has to have many more members. Therefore, how trade unions attract members is critical to its survival, and to its growth. It is noteworthy that trade unions when they are queried on what they do, don't seem to list 'membership drives' or attracting members as one of its core duties. However, it should be self-evident that increasing membership should not be left to chance. The methods used to attract membership or to establish a trade union are different but appear to fall into the following categories:
- a. Where female workers are concerned, referral system or 'word-of-mouth' is the most common method of attracting new members;

¹⁴ Based on discussions with trade union representatives.

- b. Male workers are more self-driven, they are more likely to seek out trade union officials or other members, although 'word-of-mouth' situation is common too.
 - c. Membership in crisis situations, where a dispute or disadvantageous situation with an employer/s will provide the impetus to join a trade union, or union officials will actively seek to enrol members in order to overcome the crisis by strength of numbers.
 - d. Community activities, social activities which lead to formation of groups that then link up with an established trade union due to the efforts of a key common member.
 - e. Media or publicity driven membership, as the result of interest generated in one enterprise may lead to interest in workers in another enterprise
48. Trade unions therefore do not approach attracting members in a systematic or proactive manner, but more often as part of a reactive process. This will undoubtedly affect the long term survival of these trade unions.
49. **Out-dated leadership structures and lack of gender representation:** Male-dominated leadership in trade unions and lack of change in leadership positions and roles have been long identified as a hindrance to the ability of trade unions in Sri Lanka to adapt and grow to environmental challenges, or to take advantage of the likelihood of women leaders being able to convince the large cohort of female workers to become members of trade unions. Vitharana (2014) and others, argue that "even though there is no proper data available on the percentage of women's participation in trade unions, according to anecdotal information, at least 35% of trade union members in Sri Lanka are women. Yet despite the rising number of women in the labour force, their contribution to the Sri Lankan economy and their participation in trade unions and trade union activities, women are underrepresented in trade union decision making bodies. As long as the leadership composition of a trade union continues to be under representative and the interests of its female membership continue to be marginalized..' the trade unions are losing out on making headway in building more effective and powerful trade unions. Although some trade unions have successfully established and promoted a 'Womens' Wing' approach to attract and retain members, and have elected women to high positions,¹⁵ this is by no means a regular occurrence, and even trade unions where 95 per cent of the membership is female (such as the public sector nurses trade union), the leadership is overwhelmingly male.

¹⁵ For instance, the present General Secretary of the Ceylon Workers' Congress (CWC) is a veteran female trade union leader who was previously elected to the Central Provincial Council. The CWC has 27 female trade union leaders elected members of various local authorities, and is seeking to increase this number.

50. Weaker Second-tier leadership that lacks the experience and strategising ability of veteran leaders, and difficulties in retention of staff (as opposed to elected office-bearers) due to economic constraints and changing expectations also negatively impact on trade unions. One trade union representative pointed out that trade unions themselves must accept responsibility for the lack of secondary leadership, as the democratic election process was changed due to political considerations and most trade unions now appoint leaders, which means that the wishes of the members may not be reflected. This will be a source of discouragement to younger members and may result in loss of interest of this age group.
51. **Lack of media and public relations expertise:** When questioned for this report and in other discussions, none of the main trade unions had an official staff member in charge of monitoring media relations activities; the most common response to this function was a case-by-case approach, again a reactive response rather than an ongoing one. There was little monitoring of activities and initiatives by the State, employer groups and individual employers and NGOs and International organisations, and trade unions would often request that information be forwarded through official channels for response, even if such information was available in the public domain and was easily accessible. However, some of the younger trade union leaders report successful campaigns on specific issues or awareness raising through the use of Facebook, and WhatsApp social media platforms. One of the main difficulties has been the lack of interest of younger trade union members to participate in campaigns actively although they were willing to extend support on social media.
52. **Low levels of networking with other trade unions:** As discussed at paragraph 44 above trade unions in Sri Lanka have not been successful in forming lasting and representative alliances at national or industry level. This can be compared with the position of employers, where the Employers' Federation of Ceylon (EFC) represents over 800 employers in the private sector at all tri-partite and other forums where the interests of employers may be affected in any way. However, even otherwise trade unions are not prone to building partnerships for mutual gain, and are seemingly unable or reluctant to overcome ideological, political or other differences in the interests of promoting common causes and resisting threats.
53. **Issues with Accountability/Transparency in management and operations of trade unions:** Trade union leaders themselves identified the inaccurate reporting of membership under the TUO as being one of the main reasons for disunity among trade unions. Although the Trade Union Division was required to verify membership details, this was not done at all even randomly, and therefore trade unions over-estimated membership in reporting. This caused friction amongst trade unions as

trade unions with very few members were able to obtain right to represent workers at the NLAC or be invited to the annual International Labour Conference in Geneva by this unfair practice. The Trade Union Division did not also verify financial particularly, and legitimate trade unions that reported accurate data were at a disadvantage due to this practice.

54. Internal weaknesses in turn make it difficult to take advantage of opportunities that arise as well as to overcome external threats. Keeping both internal strengths and weaknesses in mind the following section examines briefly those threats and opportunities.

► 2.3. Threats to trade union formation and functioning

55. The biggest challenge for trade unions to overcome is the growing anti-trade union sentiment by employers, the public, media and in some instances, the State. This sentiment in turn makes it difficult for trade unions to enjoy the civil liberties and exemptions assured under the TUO to all trade unions upon registration, the Police, civil administration and local authorities do not act quickly when a trade union complains of discrimination or harassment. However, this is only one part of a much larger problem as can be seen from the following discussion.
56. **Multiplicity of trade unions:** Multiplicity is one of the main features of industrial relations in Sri Lanka and also one of its great drawbacks. While it is not unique to Sri Lanka it has not been viewed positively in other parts of the world where it has been researched extensively. In Sri Lanka, multiplicity can be traced back to the 1940's where trade unions were established based on various categories of workers on an industry wide or island wide basis; the occupational 'caste' system – blue collar worker, white collar worker, professional worker, management – commonly found in colonial cultures meant that unionization across these levels was less likely to happen. Political rivalry too which led to the organization of unions linked with the prevailing political parties also meant that only the members of that political party were in that trade union. In addition to occupational status, language differences, leadership and even self-interest were also determinants of proliferation.
57. This multiplicity as the result of politicization created many difficulties for industrial relations in Sri Lanka (Rao, 1983), as factors beyond the employer-employee relationship affected the workplace and industrial harmony. This was unfortunate as prior research has indicated that even union members and workers believe that multiplicity of trade unions leads to inter-union rivalries and other such problems (Palmer, 1997). Taher (1999) found that multiplicity of unions create a number of problems like intra-union and interunion rivalries among trade unions, increase in

political influence among trade unions, developing militant attitudes among the leaders as well as the tendency to avoid collective bargaining processes offered by the employer.

58. Political rivalry which leads to the organization of unions associated with competing political parties is a common cited cause of multiplicity of unions within a single industry (Kearney, 1971). This can be seen in Sri Lanka in government owned enterprises such as that national Telecom company, where there are over 30 trade unions to represent a workforce of approximately 6000. In the context where professional workers such as medical officers, engineers, lawyers, administrative officers, clerical officers are members of combined or national trade unions that are very effective in managing the rights of their members, there are few trade unions representing all the employees of a particular department or enterprise.
59. However, trade union representatives note that prior research has tended to overlook the situation in much of the private sector, where it is increasingly difficult for even a single trade union to establish itself in a workplaces; multiplicity is likely to be more a feature in public sector organisations as has been discussed before.
60. **Reduction in popularity of Collective bargaining:** Collective bargaining has not gained a strong foothold in industrial relations in Sri Lanka despite the multiplicity of trade unions or more likely, because of it. From 2012-2017 the number of registered Collective Agreements were 43, 34, 50, 40, 37 and 23 respectively, and at least half of that number registered are cyclical renewals of prior agreements, such as the Plantation Workers' Agreement with the EFC. Trade unions cited the reluctance by employers to recognise trade unions as bargaining agents to explain the relatively low number of collective agreements, although union representatives indicated that this could be due to public sector trade unions being excluded from entering into collective agreements.
61. The EFC noted that there was little incentive for employers to enter into collective agreements as it does not ensure industrial peace as it should. Employers alleged that very often, the Department of Labour was not willing to take action against trade unions for violations of a collective agreement such as strikes in breach of notice requirements, which makes it difficult to promote collective bargaining. Other reasons such as decisions by courts to continue to impose obligations arising from collective agreements on employers even after the repudiation of the agreement, contribute to the lack of attractiveness of collective agreements as a dispute resolution mechanism for employers.

62. However, the reduction in the use of collective agreements also affects the strength and visibility of trade unions as a whole; if trade unions are seen as being able to regularly negotiate and conclude collective agreements to obtain better terms and conditions of employment for their members this will serve to attract and retain members. It is well established that "...collective bargaining delivers [better terms] at a workplace level. Workers in unionised workplaces [that conclude collective agreements] have better pay, more training, better work-life balance policies, better pensions, and are less likely to leave their job.¹⁶ The Department of Labour did not actively promote collective agreements as a means of dispute resolution, and trade union representatives saw this as one of the reasons for its relatively random occurrence.
63. **Anti-union sentiment and discrimination:** Despite the long established trade union history in Sri Lanka, more recent research has recognised that some employers do not like employees to form trade unions because they believe that unions lead to increased production cost, employee agitation and bad image of the organization among the general public (Gunatilake, 2000). That this is not confined to a few random or isolated employers is clear from the findings of the CEACR in relation to Sri Lanka where as recently as 2018¹⁷ it was stated that:
- “The Committee, however, notes with **concern** the observations of the ITUC according to which several peaceful strikes were violently suppressed by the police and the army in 2016 and 2017, leaving many workers injured, and alleging incidences of intimidation and threats of physical attacks, in particular against workers in Free Trade Zones (FTZs). ***Once again recalling that a truly free and independent trade union movement can only develop in a climate free from violence, pressure and threats of any kind against the leaders and members of workers’ organizations, the Committee requests the Government to provide its comments on the above allegations, and to take the necessary measures to ensure that the use of excessive violence in trying to control demonstrations is prohibited, that arrests are made only where serious violence or other criminal acts have been committed, and that the police are called in a strike situation only where there is a genuine and imminent threat to public order.***”
64. Trade unions point out that that several cases of anti-union discrimination aimed to prevent the establishment or recognition of trade unions have been reported to the authorities since the adoption of the Industrial Disputes Act of December 1999, but without an appropriate response, and to date there has not been a single instance of

¹⁶ <https://www.tuc.org.uk/sites/default/files/The%20added%20value%20of%20trade%20unions%20RS.pdf>

¹⁷ https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3960346

a successful prosecution of an employer for engaging in unfair labour practices. These circumstances have been noted as being non-compliant by the ILO Committee of Experts with the provisions of Convention 87. The Department of Labour cites the high standard of proof required, and the lack of credible evidence, but these are issues or procedure which cannot be used to avoid implementation of the principle.

65. The absence of a legal provision to enable trade unions to file action against the employer where an unfair labour practice is alleged against an employer has been a major shortcoming, and despite repeated undertakings by the Government, there has been no action to remedy this situation.
66. **Power of the Minister to refer an industrial dispute for settlement to any industrial court without the consent of the parties:**¹⁸ Union representatives have maintained that the power of the Minister to refer an industrial dispute, where s/he is of the opinion that it is a minor dispute to compulsory arbitration, without the consent of the parties is an unacceptable restriction on the right of a trade union to engage in lawful trade union activity such as strikes to achieve their demands on behalf of their members; moreover, the provision that no worker or trade union may continue to agitate or pursue any form of industrial action once such a dispute has been referred to arbitration, while considered by the Government to be necessary to maintain industrial peace, is a violation of the right to organise under the Convention. This provision has also been criticised by the CEACR and although the Government has undertaken to remove this provision, no such amendment has been made, nor is it contemplated.
67. **Cancellation of registration of a trade union:** The Registrar may withdraw, cancel or refuse the registration of a Trade Union¹⁹ in several circumstances, and upon such withdrawal, cancellation or refusal of registration, Section 18 provides that 'the trade union shall be deemed to be an unlawful association and shall cease to enjoy any of the rights, immunities, or privileges of a registered trade union, but without prejudice to any liabilities incurred or to be incurred by the trade union which may be enforced against the union and its assets
68. Although it is possible for a trade union to challenge dissolution by way of an injunction or an appeal to a superior court, the CEACR takes up the position that, the administrative decision of the Registrar to withdraw, refuse, or cancel the registration of a trade union should not take effect until such judicial review has been complete OR that such withdrawal, refusal or cancellation should only be affected through a

¹⁸ Industrial Disputes Act, Section 4(2) and 40: further agitation an offence once a dispute is referred.

¹⁹ Trade Unions Ordinance (sections 15-17).

judicial process, where it becomes effective only at the end of the judicial proceedings; otherwise, there is a likelihood that a trade union may be arbitrarily dissolved in the midst of an industrial action, whereupon it becomes an illegal association if it continues further activities, and that irreparable harm may thereby be done to its members even if a subsequent judicial review were to reverse such dissolution.

69. There is no doubt that the current provision violates Article 4 of Convention 87, and that this provision must therefore be amended.
70. **Emergency Regulations Services can be listed as Essential services by Presidential order and industrial action in such services are prohibited:** Trade unions have consistently pointed out that industries that may be considered as being essential services are those the interruption of which would endanger the life, personal safety or health of the whole or part of the population, and unlikely to include services such as broadcasting services or railways. Sri Lanka has also restrained other activities which would appear to go beyond maintaining services to the existence of the community such as control of publications, detention of persons and distribution of leaflets, but which can be used to prevent lawful trade union activities.
71. The proposal by the Government that proclamations issued under Emergency Regulations be stated to not apply to industrial disputes is worthy of consideration; however, since the end of the civil war, further recourse to Emergency Regulations was increasingly difficult to justify, but the terrorist attacks in April 2019 has resulted in the revival of these regulations.
72. **Section 31 of the TUO: Minimum age qualification of 16 years for Trade union membership:** The position of the Government that those under 16 years 'lack maturity' to participate in trade union activity is without basis, and ignores that workers' organisations have an important role to play in improving working conditions and rights at work of young workers. Unless Sri Lanka revises the minimum age for employment to 16 years, thus restriction will have to be repealed.
73. **The Forty per cent threshold should not be compulsory for recognition as bargaining agent:** This threshold, and the manner of ascertaining whether it has been achieved by any trade union, has no justifiable basis; some trade unions also resist a reduction in order to avoid a multiplicity of unions in a workplace; others demand that the threshold should be reduced to 25% in order to be more realistic. A reduction of the limit is opposed by employers. However, Ravi Samithadasa, a trade union specialist who has worked extensively with trade unions while working at the ILO points out that the principle that should be applied is the recognition of the most

representative trade union, rather than the imposition of an arbitrary limit; in any workplace, the trade union with the highest representation of workers should be recognised as the bargaining agent, but this would not mean that no other trade union was able to negotiate with the employer; an employer would be free to recognise more than one bargaining agent, or to negotiate with more than one trade union.

74. **Weak tri-partite consultation mechanisms at national level:** Despite the NLAC having been established as a national tripartite consultative body, both employers and trade unions complain that it lacks representativeness and that it is inefficient in operation. A full review of the NLAC has been carried out by the ILO and a proposal for a statutory body that meets requirements has been accepted by the Government; however, its implementation is still under consideration. Moreover, despite the national framework for social dialogue having been in existence for a decade, there is no national protocol for the State to engage and interact with trade unions. Any consultation is sporadic and ad hoc, and there is no realistic intention to make trade unions an active part of policy-setting or decision-making bodies.
75. **Absence of a national apex body to represent trade unions:** One of the reasons put forward by the Government for the lack of success of tripartite consultative bodies such as the NLAC is the absence of a single body or authority to represent trade unions at national-level discussions. The employers are effectively represented by the EFC, which appoints representatives from among its members where different industries are concerned. However, both the EFC and the Government contend that in order to build a practicable process for consultation, trade unions need to establish a single or common voice to address worker concerns. Without such a mechanism, any consultative process is likely to be cumbersome and election of representatives contentious.
76. **Inter-trade union conflict:** During some of the consultations for this report, several trade unions alleged that trade unions attack other trade unions at enterprise and national level in order to survive; this type of internal rivalry is not conducive to building a common platform, and only the trade unions involved can determine a way to overcome this challenge.
77. **Increasingly precarious working arrangements makes organizing difficult:** The ILO's centenary publication "Future of Work in Sri Lanka"²⁰ identifies several ways in which working arrangements will become more precarious in the future:

²⁰ https://www.ilo.org/colombo/whatwedo/publications/WCMS_677026/lang--en/index.htm

- Non-standard forms of employment (such as casualization) will increase, particularly for low-skilled occupations.
- The platformisation of work will increase, rendering irrelevant conventional labour protection mechanisms, restructuring the employer-employee relationship.
- The 'gig-economy' will offer new job opportunities to part-time and casual workers, but it will also erode rights at work and working conditions by removing traditional employer-employee relationships.
- In addition, the large size of the informal sector with more than two-thirds of the labour force working in the informal sector, and the increasing number of informal workers working in formal enterprises, will make it difficult for workers to demand decent working conditions or rights at work.
- As a result of these changes collective bargaining and traditional forms of unionisation are likely to weaken as workers will become increasingly isolated, and unable to band-together due to the very nature of that work as a result of platformisation and proliferation of non-standard work.

78. These shifting work arrangements, which are outside of the control of trade unions and employees as they are the result of automation and technological changes over which they have no control, will require trade unions to recruit members in circumstances that make it difficult to identify workers, and to identify employers and workplaces by traditional standards. In the last two years, platform operations in relation to taxi drivers and food-delivery from restaurants/home caterers to customers has proliferated in Sri Lanka, and in some cases both services have been combined. A very different approach will therefore be required, if trade unions are to remain relevant in this rapidly changing context.

79. **Lack of access to EPZs:** Despite recurring admonitions from the CEACR and other reviewers, the failure to remove restrictions on entering the EPZs is a continuing barrier cited by trade unions in relation to organizing workers in these zones (see paragraph 24(d)). Trade union representatives point out that the employees in EPZs work on shift basis and are unlikely to wish to be approached by trade unionists at the end of a long work day; as most workers live in communal or shared accommodation, it is not possible to approach these workers during their rest periods. However, employers cite the customs regulations and state that they are merely following guidelines of the relevant authorities and that they are required to comply with those provisions.

80. The CEACR of the ILO noted that the Government had indicated that a special committee would be established at national level to oversee complaints regarding lack of access to EPZs, requested "the Government to provide information on the progress made in reforming the NLAC, in particular with regard to how it will address the issues

of application of the Convention with respect to workers in the FTZs.” Given that this issue has been raised continuously the Government needs to provide a permanent resolution to this serious problem.

81. **Delays in Court and adjudication systems on employee complaints, industrial disputes and trade union complaint:** Much of the costs associated with Labour Tribunal litigation is caused by the time taken to dispose of applications. Although the number of Labour Tribunals in operation was increased in 2010 to 39 there is still a considerable number of cases unresolved annually, even though the number of new cases being filed has reduced by about half. According to several Attorneys practicing in Labour Tribunals interviewed for this study this reduction signified a reluctance on the part of aggrieved employees to file cases in the Labour Tribunal, most likely as a result of long delays in finalising Labour Tribunal cases, which makes it difficult for an employee whose services have been terminated to sustain a case for the length of time required: at present, the time taken from the filing of an application in the LT to an order being made after a judicial inquiry is on average not less than three years.²¹ Given the cost of litigation for such a length of time and the relief likely to be awarded, many employees consider it preferable to obtain employment elsewhere rather than resort to litigation.

► **Table 1. Performance of Labour Tribunals (2005-2017)**

Year	Number of LTs	Pending cases	Cases instituted	Cases disposed of	Total pending
2005	24	16,104	5,516	8,286	13,334
2006	24	13,334	5,327	5,525	13,136
2007	24	13,136	4,881	5,872	12,145
2008	24	12,145	4,314	5,486	1,9873
2009	24	10,973	6,929	5,008	12,891
2010	39	11,775	3,705	5,521	9,959
2011	38	9,605	3,339	6,160	6,784
2012 (end August)	38	6,799	852	908	6,743
2013 (end August)	38	6,464	1704	2395	5773
2014	37	5431	2320	2933	4818
2015	37	4,818	2,529	2,344	5,003
2016	39	5031	2281	2281	5031
2017	39	5,031	1,532	1,590	4,973 (as at 30.09.2017)

► Source: Ministry of Justice, Annual Progress Report (various years)

²¹ This was confirmed by two staff of Labour tribunals in Colombo that maintain case records.

82. Delay in litigation affects other types of cases as well, and is not confined only to labour and employment related matters.²² This includes appeals from Labour Tribunals, orders of the CGL, Arbitrations and other dispute settlement systems and appeals to superior courts, which are all equally affected. A judge of the Court of Appeal recently explained that some of the reasons for these delays "...included Counsel suddenly falling ill on the trial or argument date, taking up unwanted technical objections designed to delay proceedings, and the procedure being complicated."²³ This indicates that delays can both be contrived by parties, and can be the result of cumbersome procedure. In a decision by the Supreme Court against an award made by an Arbitrator, the Supreme Court observed as follows:

"[The Supreme Court] also [wishes] to observe that the inquiry before the Arbitrator which commenced on 18th September 1997 concluded on 25th October 2002, and the lengthy proceedings and **the consequent delay has defeated the objective of the reference for arbitration made by the relevant Minister** in terms of Section 4(1) of the Industrial Disputes Act. In particular, it is observed that the proceedings before the Arbitrator very much resembled court proceedings, and demonstrated a failure on the part of the Arbitrator to take advantage of the equitable jurisdiction conferred, and the flexibility in proceedings envisaged, by the said Act, which has expressly provided in Section 36(4) that the provisions of even the Evidence Ordinance will not apply thereto. It is a great pity that due to the delay resulting from the protracted arbitration proceedings and the subsequent judicial proceedings, a minor dispute that arose in 1992 is still unresolved after the lapse of nearly two decades."²⁴

83. In that case the employer appealed against the award to the Court of Appeal and thence to the Supreme Court, and the final decision was received in 2011; the termination of the services that was referred to arbitration took place in 1994 and therefore the resolution of a dispute between an employer and employee has taken 17 years to be resolved.

84. It is also noted that in 2019, Labour Tribunal Presidents were appointed as Additional Magistrates by the Judicial Services Commission²⁵ for the limited purpose of enforcing of statutory provisions such as non-payment of EPF and ETF contributions. However, Trade Union representatives state that this defeats the purpose for which Labour Tribunals were established as 'grass—roots' tribunals, and the informal, and less-legalistic procedure was designed to make relief more accessible to workers as these Tribunals were established as just and equitable tribunals. By reconstituting Labour

²² <http://www.ft.lk/ft-view/Justice-delayed/58-652015>

²³ <http://www.sundaytimes.lk/180513/news/existing-laws-sufficient-to-arrest-laws-delays-if-used-properly-samayawardhena-j-293898.html>

²⁴ Brown and Co PLC v Minister of Labour and 6 others, 2011 1 Sri L.R. 300.

²⁵ <http://www.sundayobserver.lk/2019/01/13/news/labour-tribunal-presidents-serve-additional-magistrates>

Tribunals and conferring dual jurisdiction (as Magistrates would operate under criminal jurisdiction) this essential nature of Labour Tribunals has been taken away and this can only be to the detriment of the interests of the worker. No guidance has been provided on how this dual jurisdiction will operate in practice, and this change is likely to mean that worker representatives who are not attorneys-at-law will not be able to appear before a Labour Tribunal as the Judicature Act will not permit such appearance before a Magistrates' Court. This will increase the cost of legal representation to employees and is likely to make it financially not viable for workers to seek relief from the Labour Tribunal.

85. **The Department of Labour could provide support and guidance to trade unions in forming and maintaining a trade union:** The Department of Labor through its Social Dialogue and Workers' Cooperation Unit provides some training in social dialogue and tripartism, but could be used together with the trade union division to establish guidelines in trade unions management and operation to newly registered trade unions to ensure that annual reporting requirements are met and complied with. The Trade Union Division does not follow up on registered trade unions on a regular basis, but could provide valuable assistance in developing a group of responsible and knowledgeable trade union officials.
86. The scope and extent of the threats faced by the trade unions as discussed above is a daunting challenge; however, there are many opportunities for growth that may be used to meet these threats and to ensure the survival and growth of trade unions.

► **2.4. Opportunities available to trade unions**

87. The internal strengths of trade unions can convert to providing opportunities for growth to all trade unions. The weaknesses identified can be addressed through relevant skills building of leadership and members through the technical assistance and training opportunities from organisations such as the ILO and other international organisations. Such training will generate new ideas and help emerging trade union leadership to use best practices in other countries to counter the identified threats. One of the key threats is the unwillingness of the political leadership and the Government to make meaningful changes or to accommodate the interests of trade union; however, the access of trade unions to 'grass-roots level communities' and the membership can be converted into political advantage and lobbying power by the development of key demands for change to political parties at election time, and by encouraging trade union members and leaders to stand for election to public office.

88. Fast changing technology, although it can provide a barrier to be overcome by trade unions, can be used to access and attract new members amongst youth. These younger age groups interact with each other and society in a different way and are influenced primarily by social media. Traditional public relations and media outreach will not succeed with this demographic, but the use of the technology they are most familiar with in terms of digital media access, provides an exciting opportunity for improving the position of trade unions.
89. The NLAC as the only tripartite national level body that addressed issues of labour and employment is an opportunity for trade unions to make their positions felt in relation to common problems. However, trade unions need to devise a strategy to ensure that the NLAC remains a mere discussion forum without any decision-making authority or opportunity, due to the shortcomings identified in prior research.²⁶ Trade unions need to provide the answers required to address the question of representation by developing a mechanism amongst themselves.
90. Employment growth in Sri Lanka is likely to be focused on specific sectors such as tourism, transport and construction. These are sectors that provide less barriers to unionisation than others discussed in the previous section on weaknesses, where access and entry is problematic. While not abandoning efforts to form trade unions in those sectors, it may be more proactive to develop new partnerships and mechanisms to organise workers in these emerging sectors of employment (see Box for case study of a successful organising strategy for a platform-based industry,)
91. Based on the foregoing SWOT analysis the trade union representatives have identified key initiatives to be pursued as a priority as a strategic outcome of this exercise.

²⁶ https://www.ilo.org/colombo/info/pub/pr/WCMS_564267/lang--en/index.htm

► Box 1: A Landmark Agreement with a Platform Company

In January 2019 the latest addition to the Island's e-Taxi hailing mobile application market, YOUCAB, was announced with the partnership of former Sri Lanka Cricket Captains Mahela Jayawardena and Kumar Sangakkara. "YOUCAB is not just another taxi app, we are committed to adding value to the industry and empowering individual service providers, who are literally, the wheels that the taxi industry rides on..." said YOUCAB Chief Operating Officer Thushan Jayaratne. Mahela said: "We are excited to be a part of VirTrans because we believe that it has the potential to be a true game-changer in the industry. There are many values that YOUCAB and SYTRANS is committed to upholding, which both Kumar and I believe are crucial in running a business such as this."

Both YOUCAB and SYTRANS have acknowledged the importance of enrolling high-quality service providers and transport partners to ensure a supreme level of service to the end customer, and it started recruiting and registering vehicle owners and service partners from February.²⁷

Platform work was a relatively Unknown process in Sri Lanka at the time drivers signed up with platforms such as PickMe, and they were not aware of the essential differences between employment and such platform work. Therefore some protests were held in March 2019 where drivers registered with PickMe alleged that the company offered reduced rates to its customers but recovered the balance of the regular hire from the drivers; it was also alleged that the 90,000 drivers registered with PickMe were charged Rs. 100 per day irrespective of whether they had had any hires that day or not. High Commission costs (10%), with fuel, maintenance and insurance costs, meant that drivers did not derive sufficient income from their work with PickMe.²⁸



Becoming aware of these difficulties of platform drivers, NUSS took steps to initiate a dialogue with an association established by Taxi drivers (All Island Association to Protect the Rights of Taxi Owners and Drivers – AIAPORD)). After approaching the holding company of YOUCAB and Messrs.Sangakkara and Jayawardena, a Memorandum of Agreement was signed setting out the following:

- The term Driver will be replaced with Travel Assistant (TA)
- No registration fee/no fee for APP/No daily fee
- 15% of the commission charged by YOUCAB will be refunded at the end of each month to TA
- Restrooms to be established in several locations islandwide
- All TA will automatically become members of the AIAPORD on registration
- A contributory insurance scheme for TA.
- In litigation with a customer, YOUCAB will provide legal representation to TA
- Any revision of fares to customer will only be through discussion with AIAPORD/NUSS
- AIAPORD/NUSS organized training will be sponsored by YOUCAB
- Increase in number of registered vehicles beyond an agreed limit will be through mutual discussion
- Any disputes to be resolved amicably or through arbitration; no unilateral withdrawal

²⁷ While number of drivers registered with YOUCAB is not available, as a point of comparison, it is reported that a year after introduction in 2015, PickMe (the most popularly hailed platform cab) had over 3000 tuk tuk drivers and 4000 minicab drivers registered; its expansion into the provinces and into food and goods delivery, is likely to have rapidly increased these numbers. Uber, though a later start-up, is also rapidly becoming a significant player.

²⁸ <https://srilankamirror.com/news/13443-drivers-reveal-pickme-mafia>

► 3. Strategies/Recommendations on trade union formation and functioning, with special emphasis on gender inclusion

92. Based on the foregoing discussion and analysis, and the recommendations of trade union representatives there are key strategic initiatives that address the threats while maximising internal strengths and external opportunities.

► 3.1. Establishing a national level body to represent trade unions

93. The absence of a national body to represent common interests of trade unions and workers is clearly the paramount need to address many cross-cutting issues, such as negative perceptions of trade unions as well as disinterest of potential members, etc. Moreover, the absence of such a body has made it possible for the Government to avoid or ignore addressing of trade union concerns or to engage regularly with trade unions.

94. The failure of previous efforts should not hamper further action, but an open and conscious dialogue amongst trade unions is essential to establish a national body. Since election of current trade union representatives as officials of such a body is at present a contentious matter and unlikely due to political and ideological differences, the appointment of an external party that is well-regarded by all unions, such as a former labour official, a former member of the judiciary/Attorney-General's Department/diplomat may be an acceptable and practicable alternative.

95. A brief and rapid assessment of similar bodies in other countries, such as South Africa, Ireland, and Britain may provide useful information on how to structure and establish such a national body and to ensure its continuity in a formal manner. Establishing such a body will also provide a basis to require the Government and the Minister of Labour to engage regularly with trade unions outside of the NLAC and tripartite mechanisms, so that the concerns of trade unions and workers can be raised directly. At present the EFC carries out such lobbying or consultations with the Government on behalf of its members as and when it is necessary, but trade unions do not have a mechanism to raise common issues directly with the Government.

96. Therefore the establishment of such a national body is the first and most important step in any strategic initiatives for future action.

► **3.2. Develop a strategic plan on attracting new members based on data on different demographic and other groups in the labour force**

97. Given the paucity of data and information on trade unions, members and potential members, it would be useful to obtain professional assistance to prepare a study of this area with the intention of developing a strategic plan of action based on different age groups. This could be a common exercise or could be undertaken by each trade union where considered necessary, but it may make it more practicable to prepare such assessments across groups or industries as there may be commonalities.

► **3.3. Develop a strategic plan on media and public relations responses for trade unions**

98. As can be seen from the previous discussion, trade unions traditionally react to events and changes, and do not engage proactively with employers or the Government; there is also no common response to regular events, such as the presentation of the budget of the Government, the Central Bank Annual Report, annual inflation and economic data, etc. If a national representative body is established as in the first of these strategic initiatives, or even otherwise, obtaining the services of a suitable organisation or individual to monitor such events and to draft responses is a positive development that should be considered.

► **3.4. Develop a strategy to pressurise the Government to implement undertakings on implementing C87 and C98**

99. The Government of Sri Lanka has assured the CEACR as well as the European Union and investment promotion initiatives, that restrictions and shortcomings on the freedom of association and right to bargain collectively will be removed. However, these assurances have in the main not been honoured, and monitoring and review mechanisms of international agencies too seem to be unable to bring any pressure on the Government to implement its undertakings.

100. Even if no national body to represent trade unions is established or until then, it would be proactive to extract the undertakings of the Government in respect of such provisions and develop a plan of action, including intense and joint lobbying, to ensure that the Government cannot evade or avoid such undertakings.

101. The most urgent and uniformly accepted initiative in this is the need for trade unions to have the right to bring anti-union discrimination cases directly before the courts; and file such complaints directly. It may be useful to consider if the trade unions may propose a private members' Bill or amendment to the Industrial Dispute Act in order to compel the Government to implement its undertaking in this area.

► **3.5. Establish a representative committee from all trade unions to address and raise issues of anti-union discrimination, including in the EPZ**

102. The anti-union discrimination, including denial of entry into the EPZ is a common issue faced by all trade unions and could be dealt with by a committee which is authorised to inquire into such complaints and to issue statements or recommend further action. This would provide publicity and focus attention continuously on this violation, as well as provide up to date information for review by monitoring bodies. These could also form the basis for litigation under other laws (such as fundamental rights legislation) and serve to provide an incentive for witnesses and activists to support such litigation.

► **3.6. Develop strategy based on best practices in other countries on recognition as bargaining agent**

103. The vexed question of determining threshold levels for recognition of bargaining agents is a divisive factor among trade unions as can be seen by the representations of various trade unions. The lack of consensus makes it possible for the Government to avoid making changes to the relevant legislation. Obtaining technical assistance to study and disseminate best practices in other countries such may provide a basis for recommending changes to law and practice.

► **3.7. Develop and announce internal policy changes to give effect to gender inclusion in leadership roles**

104. There is acceptance by trade union representatives that internal policies of trade unions on election of office-bearers, nomination/selection for training opportunities, inclusion in negotiations, needs to be based on democratic principles. In addition, the need to provide mechanisms for greater representation than at present for women in leadership roles has also been accepted. These may be made as common decisions or as internal decisions by each trade union in its management structures, but these changes must be made in order for trade unions to remain relevant and to give effect to the above strategic initiatives.

105. In conclusion, while there are other changes that need to be made, such as for awareness raising amongst the general public and for inclusion of trade union rights and civic responsibilities in the school curriculum these are matters that are largely outside of the control of trade unions and are unlikely to have an immediate impact. Therefore, it is more productive to prioritise the above strategies and to develop a time-bound action plan to for the planned outcomes to bring-about systematic changes required to overcome identified threats to trade union formation and operation.

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ILO Country Office for Sri Lanka and the Maldives
202-204, Bauddhaloka Mawatha
Colombo 7
Sri Lanka
Tel: +94 11259 2525 Fax: +94 11 250 0865
Email: colombo@ilo.org
www.ilo.org/colombo

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