RECIPES FOR PUBLIC SERVICE SUCCESS: LOOKING FOR ANSWERS IN SOUTH AFRICA & SRI LANKA

This is a tale of two endeavours. Of two essentially developing countries grappling to find the right legislative and institutional frameworks to allow workplace relations to serve effective public service delivery.

The South African journey is more advanced than Sri Lanka's. Twenty years ago now it put in place a modern set of labour laws that conform to the best international labour standards and with design features geared to promoting comprehensive bargaining along with productive and cooperative workplace engagement. Employees, employers and unions in the both the private and public sectors are covered by the same system, sharing common rights and remedies.

But something has gone drastically awry.

The post-Apartheid labour market arrangements have made absolutely no dent in the economically and socially crippling unemployment rate. And over the last decade South African labour relations has all but collapsed into dysfunction and strife. A major casualty has been public service delivery. Is it the legislation and the sponsored institutions that have failed? Or is it something to do with social dynamics and the political economy?

Regulatory arrangements in Sri Lanka are quite different in key respects, and under active review. The country has a public service regime build on highly bureaucratised, individual regulation on the one hand and collective neglect on the other. There are only makeshift processes for social dialogue and collective dispute resolution. Wages and working conditions are the product of the interplay of political forces and favours. Industrial disputation is prevalent and the public are heartily tired of disrupted services. Policy makers are on a mission to develop a system that will provide for employee voice, internalise conflict and promote dependable public services.

South Africa has returned to the drawing board, with the country's apex labour relations policy body, Nedlac,[1] under presidential urging, now intent on engaging with the social partners to 'address the untenable labour relations environment that gives rise to wage inequality and prolonged violent strikes …'.[2] The Department of Labour's 2013 Annual

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[1] Nedlac

[2] And to 'deliberate on measures to combat wage inequality, and examine the role of a national minimum wage in dealing with poverty and inequality, including the modalities of implementing a national minimum wage; consider measures to address the causes of violent and protracted strikes; and measures to promote inclusive negotiations and bargaining processes in an economy that is growing, creating jobs and generating the resources needed to meet the material needs of our people'. See the 'Terms of Reference to take forward the Nedlac Ekurhuleni Declaration' (Nedlac, 21 February 2015).

Industrial Action Report asserted that 'South Africa needs to find a solution for the seemingly failing bargaining structure'.[3]

For more than a decade now Sri Lanka has been aware of the pressing need to revamp its public sector workplace relations system. With the end of the civil war in 2009, the country has at last been given breathing space to address a series of developmental challenges, including those in the employment arena. In 2013, the public service problem was described in the following terms:

> 'One of the major drawbacks in labour-management relations in the public service in Sri Lanka is non-existence of an environment for social dialogue and appropriate mechanisms to prevent and settle disputes. There is no proper environment for the employees and the management to come together to learn and listen to each other in order to find mutually acceptable ways in dealing with common problems and issues."[4]

And so in 2014 an ILO panel of local and international consultants was charged with fashioning proposals on how best to 'build social dialogue at every level within the public service; establish new dispute resolution services and adapt existing regulatory and judicial institutions'.[5]

The ILO consultants' report, originally intended for release in early 2015, is still not yet out[6] for debate amongst the stakeholders. One model introduced into the consultants' thinking is the South African one. Should such a proposition occasion approval or alarm? The South African model turns the establishment of an apex policy-making body, sectoral councils and local workplace forums. Its adoption into Sri Lanka, in whatever form, cannot clearly not be complete. Sri Lanka is contemplating changes only to the public service and not the private sector, and any shifts in relation to social dialogue and dispute resolution would be shaped around a different status quo as well.

More than that: it would be a gross over-simplification to say that Sri Lanka might contemplate adopting some assumed 'South African model'. The South African Labour Relations Act of 1995 is itself an amalgam of features of the domestic antecedent legislation, northern European engagement concepts, North American and UK recognition and unfair dismissal rules, widely sourced alternative dispute resolution approaches and then, very substantially, international labour standards. And, even once the ILO consultants'

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[3] At 3.
[4] Ariyarathne Hewage, Upali Athukorala, DM Somarathne Dissanayake *Final Report of the Pilot Phase of the Project held at Ministry of Health – Dispute Settlement and Social Dialogue Mechanism for the Public Service,* 2013
[5] Extract from the consultants' terms of reference.
[6] At the time of writing. With parliamentary elections scheduled for August 2015, the report's release may have occurred by the time of the ILERA Congress.

report is released, Sri Lanka will be engaging in extensive consultations with its stakeholders before settling on any final legal and institutional changes.

But certain structures and approaches drawn from South Africa are being put forward for emulation, on the understanding that, at least notionally, they represent contemporary best of breed. Were Sri Lanka to run with some of these core features, could it expect a better outcome than the South African experience? Or is it setting itself up for a repeat of a southerly spiral? Answers depends on, amongst other things, an analysis of what went wrong in South Africa, and on whether Sri Lanka can underpin its reforms with a quite different strategy.

These questions will now be considered. To set the scene, some broad social indicators on South Africa and Sri Lanka are first provided. Next, mention is made of some general policy considerations in relation to public services and enabling frameworks. Then follows a short description of pertinent aspects of the two countries' current labour relations systems, their wage and working determination practices and their strike records. After that an attempt will be made to account for the South African predicament, and to provide some lines on how it might be addressed. A synopsis of some of the propositions put to the ILO consultants in Sri Lanka then follows, and the piece ends with some thoughts on how Sri Lanka might choose to work with these proposals to boost their prospects of successful implementation.

Broad social indicators: South Africa and Sri Lanka compared

South Africa and Sri Lanka have at least one unifying legal attribute, evidence of a shared colonial past: a (rather rare) Roman-Dutch common law system.

South Africa's population is around 54 million, Sri Lanka's around 22 million.

Using the UNDP's Human Development Index for 2014,[7] we see South Africa with an HDI value of 0.654 (lying 118th out of 187 countries and territories, in the 'medium human development' category) and Sri Lanka with a markedly better 0.745 (73rd out of 187, in the 'high human development' category).

South Africa fares better than Sri Lanka in relation to Gross National Income per capita: $11,7886 versus $9,250 – but worse in relation to life expectancy at birth: 56.9 versus 74.3 years (2014). The schooling indicators are close to one another: 9.9 and 10.8 mean years of schooling respectively, although the general quality of South African schooling is seen as inferior.[8]

[7] The Index is a summary measure for assessing long-term progress in three basic dimensions of human development: a long and healthy life, access to knowledge and a decent standard of living. See UNDP *Development Report 2013*(Sri Lanka) and *Development Report 2014* (South Africa).

[8] For instance, the (contested) *Global Information Technology Report 2014* of the World Economic Forum ranks South Africa last in an evaluation of 148 countries with respect to maths and science education in schools. Sri

The HDI improvement trend for Sri Lanka is much stronger than for South Africa. Sri Lanka's GNI per capita increased by about 229 percent between 1980 and 2012, while South Africa's increased by only about 20.8 percent between 1980 and 2013.

The Gini coefficient – a measure of income inequality with a society – is a relatively low 36.4 for Sri Lanka and a very high 63.1 for South Africa (Norway: 25.8; India: 33.9; Russia: 40.1; Kenya: 47.7; Brazil: 54.7; United States: 40.8; China: 42.1).[9]

	South Africa[10]	**Sri Lanka**[11]
Economically active population	20 122 000	8,802,113
Unemployment rate	25 %	4.4 %
Share of youth not in employment, education or training	31.5%	0.5 %
Trade union density rate	28.7 %	23.2 %
Public social protection expenditure (all functions) as a percent of GDP	9.8 %	3 %

South Africa's structural unemployment rate is starkly higher than Sri Lanka's.

Public Sector Labour Relations

During the last century labour relations in the public sector in many countries had a strongly administrative and political character about it. Many of the developments in business restructuring and workforce engagement patterns seen in the private sector simply passed it by. In recent decades, though, there has been something of a convergence in the regulatory schemes, with the models and approaches of the private sector steadily being projected into public sector space. And so –

> 'institutions until recently non-existent within the public administration, such as workers representation bodies, have now been created along the lines of the labour regime. The same has occurred with regulations creating forums for worker participation … thanks to trade union representation and freedom of association, there is growing participation in the setting of terms and conditions of work, collective bargaining and increasingly even the right to strike'.[12]

However, special considerations and objectives apply when it comes to employment relations in the public sector. Public services are embedded in political structures and processes, and the citizens have particularly demanding – and deserving – expectations in relation to their quality and reliability. Even where the private sector renders formerly

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Lanka is ranks at no. 46 in the same survey. See the Report at p 287. (http://www3.weforum.org/docs/WEF_GlobalInformationTechnology_Report_2014.pdf).

[9] UNDP *DevelopmenReport 2014*

[10] South African Department of Labour's *Annual Labour Market Bulletin*, 2014 and ILOSTAT database

[11] ILOSTAT database, 2013

[12] Daza, José L. *Social dialogue in the public service* (ILO, 2002).

public services, community service obligations and other forms of regulatory supervision are often superimposed.

The public service is generally called to a higher standard than other areas of economic activity. Some services are quite simply essential. And in a democracy, political as opposed to (mere) market accountability means that the public service as a whole must not only deliver their namesake but also advance larger goals of social justice, social inclusion, economic progress and national accomplishment.

As any country goes about the reform of its public sector framework, the insights and urgings of the ILO deserve very careful attention:

> 'The reform of public services that is being implemented globally as part of structural adjustment is based on the idea that a reduced role for the State and increased reliance on market forces will result in improved efficiency and delivery. However, there are many examples of public service reforms whose outcomes indicate the contrary. A major lesson is that reforms can be successful only if they are *designed and implemented with the cooperation of, and in consultation with, all the stakeholders who will be affected*.
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> The ILO believes that public service reforms at all levels have to aim at: providing access for all to safe, reliable and affordable services to meet their basic human needs; facilitating sustainable local economic and social development that can achieve the goals of full employment and the alleviation of poverty; providing a safe and healthy environment; improving and enhancing democracy, and securing human rights. Public service reform must, therefore, be guided by the following basic principles: accountability, transparency and openness in government policies and actions; the provision of new and better public services; the importance of maintaining and creating good working conditions, and the *adherence to core labour standards* during the reform process to maintain the morale and improve the performance of public-service workers.'[13]

Another ILO publication develops these sentiments into twelve guidelines:

1. *Social dialogue* between the key parties should be a principal feature of the public sector regulatory system, both in its formation and its operation. Comprehensive and structured collective bargaining and consultation fortified by high levels of information sharing should be constitutive elements of this dialogue.

2. If effective institutionalisation of conflict is the goal, then it follows that *all the key parties should be participants in the formative social dialogue, the ensuing regulatory system and the ongoing adaptation of that system.* Key parties would

[13] Ratnam, V. and Tomoda, S. *Practical guide for strengthening social dialogue in public service reform,* Preface, at 5 (ILO, 2005).

extend to the full range of public sector employers, the employees and their representatives (typically trade unions), and possibly also representatives of civil society. There may be a case for the exclusion of some sub-sectors and classes of employees, but then the exclusions must be justified on the basis of sound policy grounds and should not threaten the project of institutionalising conflict.

3. An *overarching system of labour relations projecting a common core of principles and objectives for both the public and private sectors* is the one most likely to achieve coherence of purpose and outcome. Good labour relations policies and practices stand above any public-private sector divide and apply with equal logic to both, the more so as the private sector contribution continues to expand into services previously provided exclusively by the state.

4. Nonetheless, *special considerations come into play in the public sector.* The public interest demands that essential services be maintained and spared from labour disruption, and that key state functions continue at all stages of labour–management engagement.

5. Relatedly, *the role of industrial action should be carefully considered.* The dynamics and effectiveness of collective bargaining is underpinned in important ways by the ability and right of the social parties to use economic leverage to advance their respective interests. Ideally, recourse to industrial action should be regulated and restricted in targeted ways that preserve the integrity of the bargaining process rather than prohibited outright.

6. *Bargaining, consultation and dispute resolution processes should enjoy maximum autonomy.* Clearly, governments, and state treasuries and finance ministries in particular, have a legitimate interest in the impact of public sector wage-setting on budgets, and hence there must be some discourse and lines of relationship between political and labour relations processes. And of course if a breakdown in public sector bargaining precipitates a major disruption in the delivery of services to the public, no government will ever be a disinterested party. Nonetheless, if the labour relations system is to make its desired contribution to public sector efficiency, equity and industrial peace, then it must be given space to do its work. Undue interference or untimely intervention can impair the integrity of the collective bargaining and supporting dispute resolution processes.

7. *Public sector bargaining and consultation should promote best practice features.* There are contrasting traditions, styles and formulas of labour–management relations on display in the world, and some offer better experiences and outcomes than others. A public sector system engaged in reform should consciously look to identify, adopt and adapt as needed the features of the more constructive models.

8. *Dispute prevention and resolution should encompass a flexible but integrated suite of measures, to be drawn on according to need.* Conflict assumes many

guises, and particular measures may be better suited to dealing with particular issues. The challenge for any dispute management systems is to provide a range of remedies within an integrated framework.

9. *Dispute prevention and resolution agencies should operate primarily as loop-backs to the backbone processes of collective bargaining and consultation.* This means that dispute prevention should be centred on education and facilitation, and that dispute resolution should be centred on the promotion and, if need be, restoration of the negotiation process. Substitutes to bargaining and consultation, such as adjudication and arbitration, should be positioned as reserve measures. Voluntary adjudication and arbitration should be preferred above compulsory variants.

10. *Systems need regular review to ensure ongoing relevance and to combat over-elaboration and ossification.* Labour relations has been pioneering territory for Alternative Dispute Resolution (ADR). A prime concern has always been to provide for processes that are informal, accessible, speedy and cost-effective. However, even the alternatives have shown a strong tendency to rust over and mimic the faults of the formal administrative and judicial processes. Systems need to be constantly and rigorously reviewed to maintain their efficacy.

11. There should be provision in the regulatory system for *independent, skilled, properly resourced and credible dispute prevention and dispute resolution agencies.*

12. *Ethos is more important than machinery.* A sound formal system of labour relations integrating appropriate dispute resolution mechanisms is a necessary but insufficient condition for good public sector outcomes. More important still is the cultivation over time of an ethos of cooperative workplace relations geared towards social delivery and employee equity.[14]

It is the last point that deserves as much attention as any other.

Some key features of the South African labour relations framework

South Africa's Bill of Rights in the Constitution extends to labour certain fundamental protections, including rights to freedom of association, to engage in collective bargaining and to strike.

The Labour Relations Act of 1995 then proceeds to give content to these rights. Extensive provision is made for social dialogue through the National Economic Development and Labour Council (Nedlac),[15] bargaining councils, plant level bargaining and plant level consultation.

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[14] Thompson, C *Dispute prevention and resolution in public services labour relations: Good policy and practice* (ILO Working Paper 277 of 2010).

[15] Established in terms of the National Economic Development and Labour Council Act of 1994

Nedlac membership is drawn from four quarters: representatives of labour, business, government and the community. Its job is to develop through consensus policies on social and economic matters, and all legislation relating to labour must be referred to it for consideration before being introduced into Parliament.

Bargaining councils are bilateral bodies set up largely on industry lines, although dedicated councils have also been set up for all the major areas of the public service such as health and education. A Public Service Co-ordinating Bargaining Council has been established to deal with matters pertaining to all or at least multiple areas of the public service. Councils are responsible for the negotiation of collective agreements regulating most aspect of wages and working conditions in their respective domains, although minimum wage legislation and the Basic Conditions of Employment Act of 1997 set basic floors.

In the private sector, bargaining council collective agreements are often supplemented by enterprise level agreements negotiated between employers and locally recognised unions.

The really singular innovation of the 1995 legislation, however, was the provision it made for 'dual channel' workplace relations in a broadly northern European tradition. And so the Act allowed workplace forums – enterprise-level consultative bodies with a mix of consultative and co-determination functions – to come into existence. These bodies were intended to both turn the adversarial tide and to promote, for the first time, a joint focus on productivity. Collaborative consultation would drive the creation of wealth, traditional bargaining would deal with the distributive possibilities.

Labour relations outcomes in South Africa

The scope of what is covered here is clearly selective, but a big picture can fairly be sketched. There is a national consensus that the South African system of labour relations is failing in its legislated mission to 'advance economic development, social justice, labour peace and the democratisation of the workplace'.[16] In his State of the Nation Address of 17 June 2015 President Zuma announced the convening of an urgent national dialogue, under the auspices of Nedlac, to 'deliberate on the state of the labour relations environment, and in particular address low wages, wage inequalities and violent as well as protracted strikes'.[17]

In its 2013/14 Annual Report, the Commission for Conciliation, Mediation and Arbitration noted:

> 'Twenty years after democracy South Africa is experiencing increasing pressure from multiple fault lines across all spheres of society; socially, politically and economically. These deep-rooted challenges have culminated in ruptures in the labour market manifest in the longest ever national strike in the platinum sector. The roots of this defining strike can be found in inequality, poverty, politics, poor labour relations and the violence of Marikana.'

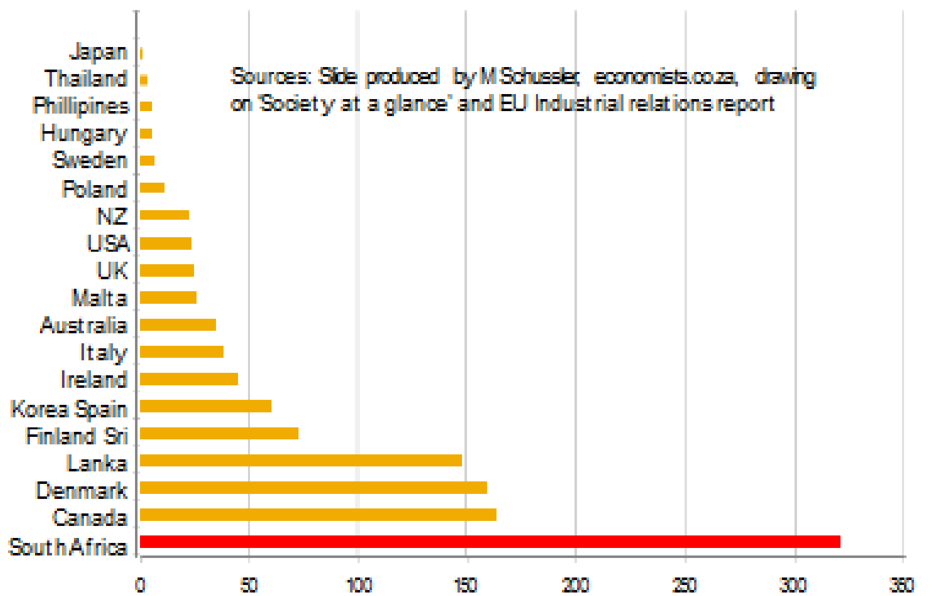
[16] An extract from section 1 ('Purpose of this Ac') of the 1995 Labour Relations Act.

[17] 'Terms of Reference to take forward the Nedlac Ekurhuleni Declaration' (Nedlac, 21 February 2015).

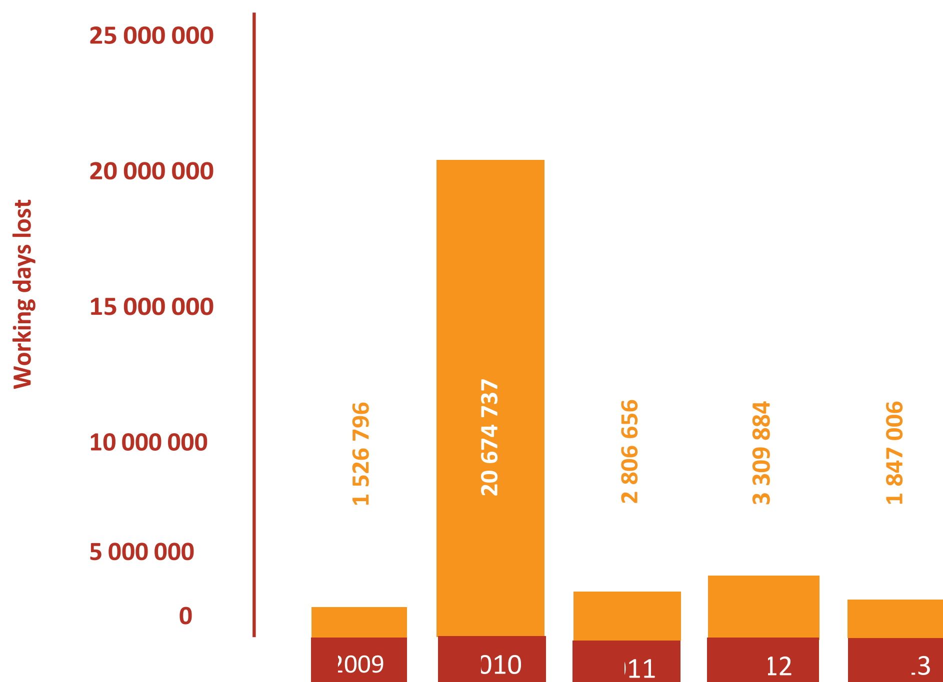
Unemployment remains at levels amounting to a permanent national crisis, real incomes are in decline and public services ranging across education, health and energy supply are faltering. The strike statistics tell their own graphic story.

Workdays lost per 100 workers

five-year average 2005 - 2009



Working days lost in South Africa, 2009-2013



Department of Labour, Annual Industrial Action Report 2013

The surge in the lost days' rate in 2010 was principally the result of the three-week public sector strike, involving around 1.3 million workers, including teachers, police, nurses, customs officials and office workers. It was accompanied by a great deal of violence and intimidation, including the loss of life amongst hospital patients. Much of the strike action was unprocedural, offending against the requirements of the governing legislation, including the prohibition against strike action in essential services.[18]

In August 2012, strike-associated violence reached new heights with the death of several members of the police and then the killing by the police of thirty four mineworkers and the wounding of seventy others at the Lonmin Platinum Mine in Marikana.

In 2014, massive and protracted strikes occurred across mines in the platinum belt, followed by more industrial unrest in the auto assembly industry.

Labour lawyers and economists have pointed out that much of the strike action in South Africa is of the classic lose-lose variety, even in the short term. In the course of the 2010 public sector strike the employees extracted through their action an increase of 1 percent over the state's last offer. In that same period, they lost three weeks' worth of salary, equating to some 6 percent of their annual salary.[19] The nett effect was a loss of 5 percent in take-home pay for that year, even if the base rate for succeeding years was (marginally) improved. The cost to the public in terms of the interruption of ranges of social services was, of course, extensive.

When the same cost-benefit exercise is done in respect of the virtually all the major strikes over the last five years, public and private sector, the same financial conclusion is reached.[20]

While the right to strike is essential to a fair system of collective bargaining and is guaranteed under South African law, the dysfunctionality, illegality and sheer violence associated with much of that action is imposing a huge social cost. The judiciary, too, is losing patience:

> 'These actions undermine the very essence of disciplined collective bargaining and the very substructure of our labour relations regime.'[21]

Can the South African labour relations trajectory be turned? And should other countries have any interest at all in tapping its systems? Before turning to these questions, developments in relation to Sri Lanka are considered.

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[18] Precipitating a fresh debate over appropriate policy responses not only amongst social planners but also the legal fraternity. See, for instance, Rycroft 'What Can Be Done about Strike-Related Violence?' *The International Journal of Comparative Labour Law and Industrial Relations* 30, no. 2 (2014): 199–216.

[19] Analysis provided by Brand, J *The future of collective bargaining in South Africa – Time for a different approach?*, presentation to SEIFSA, 24 February 2015

[20] Ibid. See also the analyses of economist Mike Schussler, accessible at www.economists.co.za.

[21] Steenkamp J in *In2FOOD (Pty) Ltd v. FAWU & Others* (LC Case Number: J350/13,1 March 2013)

Employment Relations in the public service in Sri Lanka

Sri Lanka has, in regional terms, a relatively large public service sector. By deliberate policy design of recent decades, it is an area for employment promotion and absorption. Some 1,400,000 employees are currently engaged there.

For a middle-income nation, Sri Lanka has a reasonable reputation for public sector service delivery, notable in areas such as health and education. The Constitution set outs directive principles of state policy that oblige the state to, amongst other things, further:

- the promotion of the welfare of the People by securing and protecting as effectively as it may, a social order in which justice (social, economic and political) shall guide all the institutions of the national life; and
- the realisation by all citizens of an adequate standard of living for themselves and their families, including adequate food, clothing and housing, the continuous improvement of living conditions and the full enjoyment of leisure and social and cultural opportunities.[22]

Sri Lanka has a comparatively strong legal framework for the security of employment and welfare of working people. The basic law of the country, the Constitution, establishes the fundamental right to set up and join trade unions,[23] and special legislation support the existence and functioning of unions.[24] Public sector employees, too, are free to join trade unions.[25] Various other legislative instruments[26] regulate and offer protection in relation to particular areas of the employment relationship.

Many aspects of public sector employment are governed in great detail by the Establishment Code, a now rather anachronistic document that has grown by accretion over many decades, supplemented by quasi-legislative circulars. Included within its provisions are ones extending a number of privileges and concessions to employees, such as the recovery of subscriptions, duty leave, free travel, the release of an officer for trade union work, salary payable to such released officers, forming trade union federations, prevention of transfers, furnishing of information and more.[27]

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[22]See Article 27(2)(b) and (c) of the 1978 Constitution

[23]See Article 14(d) of the 1978 Constitution.

[24] See the *Trade Unions Ordinance 15 of 1935*, which covers both the public and private sectors.

[25] With some restrictions: senior employees – staff officers – are not permitted to form or join unions.

[26] See generally the *Workmen's Compensation Ordinance 19 of 1934*; *The Maternity Benefits Ordinance 32 of 1939*; *The Wages Boards Ordinance 27 of 1941*; *The Factories Ordinance No 45 of 1942*; the *Industrial Disputes Act No 50 of 1950* and amendment no 11 of 1957; the *Shop & Office Employees Act No 19 of 1954*; the *Employment of Women, Young Persons & Children's Act 47 of 1956*; the *Employees Provident Fund Act 15 of 1958*; the *Gratuity Act*, the *Employees Trust Fund Acts*, The *Termination of Employment (Special Provisions) Act 45 of 1971*; the *Employees Trust Fund Act No 46 of 1980* and the *Payment of Gratuity Act No 12 of 1983.*

[27] See Chapter XXV of the Code.

Employees may also themselves directly invoke the fundamental rights provisions in the Constitution,[28] mostly in relation to individual disputes with their employer (whether in the capacity of an official, a department, an agency or a ministry).

Trade unions make their presence felt by interventions at both workplace and national level, including through strike action and the making of representations through the political process.

Constitutional rights aside, disputes relating to remuneration or conditions of service are often brought before the National Pay Commission (NPC) by employees, unions or the relevant departments, institutes or ministries. Pursuant to meetings attended by all the parties concerned and where the NPC actively engages in mediation efforts, settlements are typically – but not always – reached.

Disputes concerning matters within the scope of the Public Service Commission (PSC) – appointments, promotion, transfer, disciplinary cases and dismissals – are also commonly referred to that body by either the employer or employee concerned. In the event that an employee is not satisfied with a decision of the PSC, she can appeal to the Administrative Appeal Tribunal (AAT) and from there to the Court of Appeal and ultimately the Supreme Court.

It is also quite common for disputes to be referred to the Human Rights Commission, Parliamentary Ombudsman and the Public Petitions Committee of Parliament.

Despite these multiple protections and avenues for redress, experience shows that these institutions and processes are not up to the task of preventing or settling many disputes; hence the widespread employee and trade union dissatisfaction with the status quo and the high incidence of strike action.

Two features of the prevailing public sector labour relations system give serious cause for concern and impair service delivery:

- Employees and their unions have limited formal opportunities to express their voice. There is only meagre scope for them to engage in the shaping of pay, conditions of service and other workplace matters.
- There is a high level of strike action.

Appropriate 21st century legislation, institutions and practices for the fair and effective regulation of workplace relations are conspicuous by their absence. The human resource functions across government departments and agencies are not well developed. Public

[28] Section 12 of the Constitution guarantees the right to equality, Article 14 (c) the right to freedom of association generally and Article 14(d) the right to form and join trade unions specifically. Under Article 17 read with Article 126, any person may petition the Supreme Court in respect of any apprehended violations of fundamental rights, including violations by administrative or executive action.

sector workplace dynamics are often characterised by a raw recourse to workplace power coupled with political intervention in various guises.

Then there is the real problem of union proliferation in Sri Lanka. A union may be formed with but seven members, and the invitation to do so has been taken up with gusto. Poor reporting reduces confidence on accuracy, but in any year well over a thousand different trade unions are probably up and functioning, several hundred of these being in the public sector.[29]

In the sixties, Employee Councils for the public service were introduced but their record was chequered and by the early eighties they had effectively become defunct.

In 1989 The National Labour Advisory Council (NLAC) was established. A tripartite consultative body, its mandate is to facilitate consultation and co-operation between the government and the organisations of workers and employers at the national level on matters relating to social and labour policies and international labour standards.

In terms of its constitution, of the objectives of the NLAC are:

I. To promote social dialogue between the government and the organisations of workers and employers on social and labour issues.
II. To provide a forum for the government to seek the views, advice and assistance of organisations of workers and employers on matters relating to social and labour policies, labour legislation and matters concerning the ratification, application and implementation of international labour standards.
III. To promote mutual understanding and good relations and foster closer co-operation between the government and organisations of workers and employers with a view to developing the economy, improving conditions of work and raising standards of living.

While the constitution clearly allows the body to cover both the public and private sectors – explicit provision is made for public service ministries – in practice it has turned into a forum for private sector players. Only one of its fourteen participating unions is from the public sector. It is convened and supervised by the (private sector-focussed) Ministry for Labour and Labour Relations.

Proposals for reform in public sector workplace relations

Over the last decade the Sri Lankan government has commissioned studies, convened stakeholder workshops and contemplated strategies to with a view to modernising the workplace relations regime within the public sector. In 2013 a delegation of unions approached the Government to urge it to act on recommendations arising out of an ILO initiative of 2007. That led to an agreement to conduct a pilot study on how to improve

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[29] See Amerasinghe, F *The current status and evolution of industrial relations in Sri Lanka* (ILO, 2009)

social dialogue, dispute resolution and human resource management within the Ministry of Health. That study was completed in 2014, and a decision was then taken by the Secretariat of Senior Ministers to extend that exercise to cover the entire public service.

The ILO was then asked to continue its assistance, and national and international consultants were retained to consult with stakeholders and to prepare a report presenting options to modernise human resources and employee relations in the country's public service. Three main areas were identified for attention and reform:

1. Social dialogue
2. Dispute resolution
3. HR development within the public service administration

Only the first two are discussed further here.

As already mentioned, one proposal canvassed by the ILO consultants – and the only one examined here because it facilitates a comparison with developments in South Africa for present purposes – draws extensively on the South African experience. This would then see social dialogue occurring at three levels: the workplace, sectoral level and national level.

The apex organ of the new institution would be a national forum. This forum would consult over all employment and labour relations matters common to the entire public sector, and play an important late-stage dispute resolution role as well.

The role of the top forum would be to –

(i) establish rules, norms and standards that apply across the public service, or to two or more sectors, and to conclude collective agreement in this regard after liaison with the national advisory bodies such as the General Treasury;
(ii) negotiate pay and reward arrangements across the public service where appropriate, and to conclude collective agreement in this regard after liaison with national advisory bodies and the General Treasury;
(iii) sanction draft collective agreements negotiated at sectoral councils after liaison with the National Pay Commission and the General Treasury;
(iv) engage in high-level dispute resolution in the event of major disputes, especially those involving strike action.

The primary mode of engagement would be consultation, preferably with a firm emphasis on collaborative problem-solving, with a negotiating mode (admitting a right to use power) as the next stage in the event that agreement escapes the parties.

It is then proposed that separate sectoral councils be established for each such department and agency. The principal form of engagement here would be consultation backed by negotiation – conferring over pay and terms and conditions of employment with the

intention of regulating terms and conditions for the future. Careful consideration would need to be given to the interplay between negotiations and the national budget-setting process. Each sector council should also have a dispute resolution role.

These councils would feature as the pivot of the social dialogue system, supervising workplace forums beneath them and reporting in to the national forum above them.

On this model, then, each key sector within the public service, with exclusions, could have its own council in the wider dialogue framework.

The expectation is that the greatest contribution that dialogue can make to improved service delivery would be at the workplace level. The object is that the employer engage with its workforce over process improvements, the introduction of new technologies and the better organisation of work, amongst many other things. And in the matched expectation is that employees will share their close and often expert knowledge of the way in which work is performed and could be improved with their employing organisation. The principal form of interaction here would be consultation.

Parties would be encouraged to establish Forums at each appropriately delineated workplace: the hospital, the school, the depot, the office complex, etc.

Training for the parties in effective consultation, negotiation and problem-solving approaches and skills would be essential at every engagement level. Provision would also be made for technical assistance and research.

These are but the bare bones of a proposal – amongst others – still in the making. But, given the South African experience, should Sri Lanka be flirting in a sub-Saharan direction at all?

Thoughts on the South African predicament

> 'It seems apparent that many of our recent upheavals have less to do with the specific design of laws or institutions and more to do with the capacity, conduct and commitment of the social actors involved. This leads to a more intractable challenge for the future of social dialogue, tripartism and collective bargaining. It calls for strong leadership and a paradigm shift away from the culture of adversarialism and a greater focus on building relationships and a network of trust and collaboration rather than just legislative intervention.' (Alistair Smith, Executive Director of Nedlac)

The leadership tapestry of the South African labour relations community is made up of the usual strands of humanity. On show are the far-sighted, the wise, the optimistic, the pragmatic, the indifferent, the conflicted, the ideological, the short-sighted, the wildly wrong, the embittered and the bloody-minded, to mention just some of the more prominent categories.

The top institutions such as Nedlac, the Labour Courts and the CCMA are generally governed by people who take the long view and who know how, above everything else, to negotiate. Indeed, South Africa's peaceful political transition, against the odds, is often attributed to the participation, skills, experience and sheer can-do negotiating prowess of a coterie of labour relations personalities who had been through it all in the eighties and early nineties. The annual reports of Nedlac stand as testimony to thoughtfulness of the spokespeople of business, labour and government.

But this top-level sagacity is overwhelmed by a multitude of other louder and more compelling voices, some in top places, many amongst the rank and file. And it is their tunnel vision that has determined and continues to determine the direction of things.

The key potential game changer of the 1995 Labour Relations Act was not the tidy suite of organisational rights, the additional bargaining edifices, the elevation of the right to strike or the more streamlined unfair dismissal remedies. These reformulations and formalisations merely enshrined what had already been won in bitter battles since the Durban Strikes of 1973[30] and presaged in the Wiehahn reforms of the early eighties.[31]

What was new was a declaration of statutory intent to move South African labour relations with its history of intense adversarialism into an era of cooperation. Swords would be beaten into ploughshares; continuous education and skills formation would inject new workforce capability and there would be a shared focus on and commitment to productivity. 'Dual channel' industrial relations was *the* revolutionary new concept for the country. Wealth would be created through consultation and codetermination at the level at which goods and services are produced, and gains would be distributed through separate processes of bargaining, principally at sectoral level. And, reparations for historical injustices aside, the implicit assumption was that gains had to be created in the investment channel before they could be distributed in the allocation one. Integrative efforts would enable distributive ones. A Nordic future beckoned.

It was not to be. A preference for power over influence and a fixation with bargaining (of a particular character) meant there was never to be a balancing pact on productivity. The dual channel never emerged. Evolution has demonstrated that bipedalism can be a successful mode of getting around and getting on: humans and kangaroos have done well. But the pogo stick is pretty much not seen in nature. It produces highs and lows but its inherent instability delivers more falls than headway.

Bargaining in South Africa remains adversarial. It is expressive and reproductive of the country's social and labour relations history; it is not transformative.

[30] For an account of those formative years, see Friedman, S *Building Tomorrow Today – African Workers in Trade Unions 1970 – 1984* (Ravan 1987)
[31] See *The Complete Wiehahn Report* (Lex Patria, 1982)

Nedlac's 2015/15 terms of reference for its technical task teams entrusted with resetting labour relations and labour market outcomes direct them to two areas: wage inequality and labour relations itself.

The team on labour relations has been instructed to engage on 'employment, labour market stability, including the right to strike, protracted strikes; violence, collective bargaining and the role of the State; employment and vulnerability'. It has also been asked to think about more effective dispute prevention and resolution approaches as well as 'measures to strengthen and promote collective bargaining throughout South Africa'.

The team on wage inequality must focus on 'engaging on a national minimum wage'.

There would appear to be no appreciation in these terms of reference for the build component of the 1995 Act: cooperative consultation at the level of the workplace over innovation, training and productivity. The fixation with bargaining and distribution remains. The engine of patient, incremental, long-term capacity-building is ignored. The prospects for a transformation of South African labour relations remain bleak.

What should be done? Regrettably, the negotiation insights and skills of the frontline labour relations community have not progressed to meet contemporary challenges. Their endeavours are ending in serial, spectacular failures: country-disturbing, violent and costly conflicts without any winners at all. And beyond the mutually damaging outcomes, no fundamentals have been changed either. Labour cannot claim that the price it has paid in lost incomes and jobs has been offset by progress towards a more just and productive order over the long run. On the contrary.

The leaders and negotiators need exposure to and education and training in qualitatively different strategies and approaches. And while that is going on, they might want to agree to place upon their constituencies a moratorium on strikes and lockouts. Not for a year. For five. Unless and until the bargaining system generates socially progressive results, there can be no doubt that voluntary interest arbitration at the point of an impasse in negotiations will be more salutary than industrial action. In fact, given the history of the last decade, it would be all but impossible for arbitration not to produce better outcomes than what has degenerated into a mindless alternative.

And during the breather, the parties can also turn their minds to enlivening the forgotten but indispensable companion of bargaining.

Possibilities in Sri Lanka

Should Sri Lanka be the first country in the world, including South Africa, to adopt the key ingredients of the South African 1995 Labour Relations Act? The formula has much to commend it. It was drafted by an international and domestic panel of advisors who were closely attuned to the lessons of the world and the challenges of developing countries with

histories of division and conflict. It was informed by the experience of seasoned union and employer leaders. It gives the process of collective bargaining its full due; it protects the right to strike; it offers balancing structures and processes of consultation shaped to boost collaboration, productivity and economic growth; and it provides for modern approaches to dispute prevention and resolution.

But culture, attitude and insight are far more important than architecture. If Sri Lanka, starting with the public service, wants to foster a system for inclusive social dialogue directed towards delivering dependable and high-quality social services, than that evolution must centre on early, comprehensive and then continuous education in new perspectives on how to make social and economic progress, on appropriate vehicles and on a new ethos for engagement. And the mechanisms for social dialogue cannot be confined to bargaining, especially old school adversarial bargaining. They must extend to constructive consultation as well.

If this is to be its pathway, Sri Lanka would do well to take however long is required – and this may be a year or more – to achieve a sufficient social consensus on reform amongst the vital actors before introducing any legislative changes and certainly before attempting to move on to any kind of wholescale implementation.