

The Politics of Dealing with the Past in Deeply Divided Sri Lanka

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Introduction

Sri Lanka has commenced a journey to respond to its complicated past. In 2015, for the first time since the end of the war, the Sri Lankan state chose to address the core elements of transitional justice: accountability, non-recurrence, reparations, and truth. There had previously been dozens of commissions of inquiry, both during the civil war and after its conclusion. These commissions had dealt with a multiplicity of crimes and events. Few however, have had any impact. Some of their findings were not even made public.² In 2015, the state promised that this time, it would be different.

Dealing with the past has been a challenge for most societies that have gone down that route. In deeply divided Sri Lanka, still grappling with the scars of a protracted civil war and no unified vision of the state, this challenge is proving to be insurmountable.³ In September 2015, the government announced a plan to establish four mechanisms for transitional justice. Yet it has done little to implement this pledge. The law on the Office on Missing Persons (“OMP”) was passed by Parliament in August 2016. The law was amended in May 2017 and at the time of writing the Office has yet to be established. The government’s response to the report of the Consultation Task Force on Reconciliation Mechanisms, its unwillingness to gazette the legislation on the Office of Missing Persons for over a year, and the public statements of the President, Prime Minister, and the previous Justice Minister on accountability, suggest that it is reconsidering the political feasibility of its original transitional justice plan.

When it is not politically or practically feasible to hold perpetrators of human rights violations criminally accountable, is it acceptable to settle for alternative or more

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² MARIO GOMEZ, *Keeping Rights Alive: Reform and Reconciliation in Post-War Sri Lanka*, 17 ASIAN Y.B. OF INT’L L. 117, 117 (2011).

³ For a discussion about some of the challenges in Uganda, see VALÉRIE ARNOULD, *Transitional justice and democracy in Uganda: between impetus and instrumentalisation*, J. EASTERN AFR. STUD., 9:3, 354-374 (2015), <http://dx.doi.org/10.1080/17531055.2015.1089698>.

limited forms of accountability in order to advance the objectives of truth and reconciliation? What can human rights advocates and lawyers do to advance the goals of truth, justice, and reconciliation in such contexts? This paper sets out to answer these questions in the case of Sri Lanka.

Background

Sri Lanka's civil war ended suddenly in May 2009, when the state defeated the Liberation Tigers of Tamil Eelam ("LTTE"). Rather than push for reconciliation and seek to heal the scars of the conflict, the government at that time celebrated the victory, beat the drums of triumphalism, and invested in economic and infrastructure growth. It also fanned and promoted violence against Sri Lanka's other significant minority, the Muslims. Violence against Muslim and Christians escalated after 2009, and the state apparatus did little to apprehend or prosecute perpetrators of this violence.⁴ The phase immediately after the end of the war would have been an ideal moment to have responded to the legacy of the past violence. The government, however, missed that opportunity, and, as current events show, it is becoming increasingly difficult to address this legacy.

In January 2015, in something that resembled a work of fiction, Sri Lankans voted out autocrat Mahinda Rajapaksa and elected Maithripala Sirisena, himself a onetime ally of Rajapaksa, but at that time part of a multi-party coalition that campaigned against Rajapaksa. Rajapaksa gave up power reluctantly and Sri Lanka showed that it was capable of effecting a transition peacefully and within the framework of the country's constitution. The Parliamentary Election of August 2015 consolidated the new President's grip on power when his National Unity coalition government, consisting of traditional rivals the United National Party and the Sri Lanka Freedom Party, secured a Parliamentary majority.

"Transitional justice" was placed on the public agenda for the first time, when in September 2015, Foreign Minister Samaraweera, addressing the UN Human Rights Council, promised the creation of four transitional justice mechanisms: a Commission for Truth, Justice, Reconciliation, and Non-Recurrence; an Office on Missing Persons (OMP); a Judicial Mechanism with a Special Counsel; and an Office for Reparations.⁵ According to Minister Samaraweera, one of the best guarantees of non-recurrence was a lasting political settlement, which would be achieved by constitutional reform and the adoption of a "new constitution."⁶ On October 1, 2015,

⁴ GEHAN GUNATILLEKE, THE CHRONIC AND THE ACUTE: POST-WAR RELIGIOUS VIOLENCE IN SRI LANKA, International Centre for Ethnic Studies, 46 (2015), <https://equitas.org/wp-content/uploads/2017/05/ICES-Equitas-Research-Report-Final.pdf>.

⁵ Foreign Minister Mangala Samaraweera, 30th Session of the Human Rights Council, Geneva, (Sept. 14, 2015).

⁶ *Id.*

Sri Lanka co-sponsored a resolution making extensive commitments to implement several measures on accountability, truth seeking and reparations.⁷ One of the aspects of that resolution was an ambiguously worded commitment to establish a hybrid court with the participation of foreign judges. In March 2017, the Human Rights Council gave the country two more years to implement the resolution.

In January 2016, the Government established a Consultation Task Force on Reconciliation Mechanisms (“CTF”), consisting of members of civil society, to lead the process of consultations on transitional justice. The CTF in turn set up Zonal Task Forces to lead the regional consultations in the nine provinces of Sri Lanka. The CTF report was released on January 3, 2017. The members had sought a meeting with the President and Prime Minister to present the report. When this did not happen, the report was presented to the former President Chandrika Bandaranaike Kumaratunga, head of the Office for National Unity and Reconciliation (“ONUR”).⁸ The CTF report also recommended the establishment of a hybrid court with at least one international judge per bench.

Plucking the Low Hanging Fruit: The “Office on Missing Persons”

The Office on Missing Persons (OMP) that Parliament set up in August 2016 was seen as ‘low hanging fruit’ – that is, it was considered politically possible under the circumstances.⁹ The OMP was one of the truth-seeking mechanisms promised by the government in September 2015. Its objective was primarily humanitarian: to help trace and clarify the whereabouts of those who had disappeared or gone missing and provide this information to the families. According to the International Committee of the Red Cross (“ICRC”), it had records of approximately 16,000 persons categorized as missing.¹⁰ The OMP was not to be a mechanism for pursuing accountability and the law stated that its findings would not give rise to criminal or civil accountability. The OMP was also required to respect the confidentiality of information if information was given in confidence.¹¹ At the same time, in cases in which it appears that an offence had been committed, it may refer that matter to a law enforcement agency or prosecuting authority.

⁷ U.N. Human Rights Council Res. 30/1, UN Doc. A/HRC/RES/30/1 (Oct. 14, 2015).

⁸ See Secretariat for Coordinating Reconciliation Mechanisms, www.scrm.gov.lk.

⁹ Office of Missing Persons (Establishment, Administration, and Discharge of Functions) Act, No. 14 of 2016, http://imadr.org/wordpress/wp-content/uploads/2016/09/Sri-Lanka_OMP-Act-No.-14_2016.pdf; Office on Missing Persons (Establishment, Administration and Discharge of Functions) (Amendment) Act, No. 9 of 2017, http://srilankalaw.lk/gazette/2017_pdf/09-2017_E.pdf.

¹⁰ INTERNATIONAL COMMITTEE OF THE RED CROSS, LIVING WITH UNCERTAINTY: NEEDS OF THE FAMILIES OF MISSING PERSONS IN SRI LANKA, 31 (July 2016), <https://www.icrc.org/en/document/sri-lanka-families-missing-persons>.

¹¹ Office of Missing Persons Act, No. 14 of 2016, *supra* note 9, § 12 (c) (iv) and (v).

The OMP was projected as a mechanism that would establish the bona fides of the government in dealing with the past. It would help to build trust, especially among victims, and show that this process was different from previous processes. However, since the law was passed the government has come under immense pressure, especially from elements associated with the military, and has been unable to appoint its members and operationalize the institution. The recent amendment passed in May 2017, removed the OMP's power to enter into agreements with other entities.¹²

In September 2016, an amendment was made to the Registration of Deaths Ordinance to enable families of the missing and disappeared to apply for "certificates of absence" instead of certificates of death.¹³ This was one of the promises made by the Foreign Minister in September 2015. In May 2016, the Government ratified the International Convention for the Protection of All Persons from Enforced Disappearance. A bill to implement the Convention's provisions was gazetted in February 2017, but the law has yet to be passed by Parliament.¹⁴

Constitutional Reform

The government is also trying to respond to the past through constitutional reform. The conflict emerged out of previous governments' reluctance to share power and install far-reaching power sharing arrangements. On March 10, 2016, Parliament established itself as a Constitutional Assembly to draft a new constitution for Sri Lanka. The Constitutional Assembly set up a Steering Committee and six sub-committees to generate proposals on six themes.¹⁵ A Public Representations Committee ("PRC") held extensive consultations throughout the country and produced a report based on these consultations.¹⁶ Constitutional reform can play an important role in responding to the past by creating a more imaginative system of power sharing, a stronger bill of rights, enabling judicial review of legislation, strengthening the independence of the judiciary, and ensuring a better balance of power among the three organs of government. It is an imperative should Sri Lanka wish to transcend its legacy of violence and build a sustainable peace.

The "Hybrid Court"

¹² Office on Missing Persons (Establishment, Administration and Discharge of Functions) (Amendment) Act, No. 9 of 2017

¹³ Registration of Deaths (Temporary Provisions) (Amendment) Act No. 16 (2016).

¹⁴ Gazette of the Democratic Socialist Republic of Sri Lanka, Part II, Feb. 9, 2017, Supplement.

¹⁵ Parliament of Sri Lanka, Constitutional Assembly, www.parliament.lk/constitutional-assembly; Constitutional Assembly of Sri Lanka, Sub-Committees, <http://english.constitutionalassembly.lk/sub-committees>.

¹⁶ Public Representations Committee on Constitutional Reform, Report on Public Representations on Constitutional Reform, May 10, 2016, www.yourconstitution.lk.

In 2015, the government committed itself to establishing a hybrid court with the participation of foreign judges.¹⁷ Despite this commitment, several statements by the President, the Prime Minister, and the previous Minister of Justice since then have suggested that foreign judges will not participate in a domestic accountability mechanism.¹⁸ The High Commissioner for Human Rights, in his recent statement before the Human Rights Council, reiterated the view that any future accountability mechanism must include foreign judges. He noted that “international participation in accountability mechanisms remains a necessary guarantee for the independence, credibility and impartiality of the process and an integral part of the commitments of the Government under Human Rights Council resolution 30/1.”¹⁹

The Politics of Dealing with the Past

Having articulated the broad contours of a transitional justice strategy in the heady days of its electoral victory, the Sri Lankan state is now finding the political challenges of implementing this strategy difficult to surmount. Sri Lankan society remains deeply divided on a number of fundamental issues, including reconciliation, the celebration of religious pluralism, constitutional reform, electoral reform, the representation of women in Parliament, and transitional justice. Attempts to prosecute members of the military for war crimes committed during the last phase of the war will meet with strong resistance and it is unlikely that the current coalition government will risk its political future by pursuing accountability in the face of this opposition.

However, pressure from the international community, the Tamil diaspora, and human rights groups (both locally and internationally) for a credible accountability process continues. These pressures are unlikely to wane and are likely to gather momentum in the absence of a credible accountability or truth seeking process and without far-reaching constitutional reform.²⁰ Pressure from families of the disappeared, who have been protesting for over six months, will also continue.²¹

¹⁷ U.N. Human Rights Council Res. 30/1, *supra* note 7, ¶ 6.

¹⁸ Daily FT, Mar. 6, 2017, 2, www.ft.lk; The Island, Mar. 4 2017, 1, www.island.lk.

¹⁹ Rep. of the High Comm’r for Hum. Rts., 34th Session of the Hum. Rts. Council, A/HRC/34/20 § 42, § 67 (f) (Feb. 10, 2017).

²⁰ See The Joint Appeal by Tamil Civil Society Organisations, Political Parties and Trade Unions, The credibility of the UNHRC has been put at stake by Sri Lanka: The UNHRC must respond strongly, Mar. 9, 2017; Credibility Of The UNHRC Has Been Put At Stake By Sri Lanka: Tamil Civil Society, Trade Unions And Political Parties, COLOMBO TELEGRAPH, Mar. 9, 2017, <https://www.colombotelegraph.com/index.php/credibility-of-the-unhrc-has-been-put-at-stake-by-sri-lanka-tamil-civil-society-trade-unions-and-political-parties/>

²¹ Taylor Dibbert, Putting Sri Lanka’s Office of Missing Persons in Perspective, THE DIPLOMAT (Sept. 19, 2017), <http://thediplomat.com/2017/09/putting-sri-lankas-office-of-missing-persons-in-perspective/>.

Divisions within the ruling coalition government, speculation about the electoral support commanded by the former President and the “Joint Opposition,” and hostility among many sections of the public are pushing accountability to the background.

At the moment, what is politically feasible with regard to accountability would be criminal trials for “emblematic cases,” even if the process has been slow. Investigations are currently underway with regard to the disappearance of journalist Prageeth Ekneligoda and the killings of journalist Lasantha Wickremetunga, Member of Parliament Joseph Pararajasingham, and rugby player Wasim Thajudeen. However, little progress has been made with regard to the killing of the five students in Trincomalee in 2006 and the killing of seventeen aid workers of the organisation “ACF” in August 2006.²² In October 2015, four soldiers were convicted by the High Court in Jaffna for raping and sexually assaulting two Tamil women in Vishwamadu, Killinochchi in June 2010.²³ However, in the ‘Raviraj’ case and the ‘Kumarappuram’ case, two all Sinhala juries acquitted the accused.²⁴ Both cases are now on appeal. In June 2017, the Supreme Court upheld the rights of parents of two people who had been taken into police custody and had been disappeared in 2008. The Court held that the rights of the two persons who were taken into police custody and were subsequently found dead were infringed, and devolved on the parents.²⁵

The implementation of the OMP, the initiation of a truth seeking process through a Truth Commission, and the establishment of an Office of Reparations are possible and likely over the next two years. Releasing land to civilians and displaced persons could boost confidence in the transitional justice and establish that this process is different from previous processes. Prosecution of members of the previous government for financial misappropriation and abuse of power will also continue.

Constitutional reform is vital for creating a sustainable peace and preventing a return to violence. Yet it is unclear if the coalition government would be willing to commence a political campaign around a referendum. Replacing the existing constitution is not legally possible without a referendum and it is not clear if the government will take this step. The government may tinker with the constitution,

²² See Rep. of the High Comm’r for Hum. Rts., A/HRC/34/20, for a fuller discussion of the emblematic cases.

²³ See *Sri Lanka: State of Human Rights*, L. & Soc’y Tr. 163–65 (2016), for a discussion of the “Vishwamadu” case and the High Commissioner’s Report at ¶ 38 for a discussion of the “Kumarappuram” case.

²⁴ Raviraj murder accused cleared, Sumanthiran faults all-Sinhala jury, *THE ISLAND*, Dec. 24, 2016, http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=157748; Marisa de Silva, Justice Denied To Survivors Of The Kumarapuram Massacre Of ‘96, *THE SUNDAY LEADER*, Feb. 19, 2017, <http://www.thesundayleader.lk/2017/02/19/justice-denied-to-survivors-of-the-kumarapuram-massacre-of-96/>.

²⁵ *Selvarajah Pushparani v Wickramasinghe*, SC (FR) 512/2008 and 513 2008; Supreme Court determination of 22nd June 2017 (Sri Lanka).

but this will not please the Tamil National Alliance, the main Tamil party engaged in the constitutional negotiating process.

However, even modest gains in transitional justice would be important in enlarging the space for accountability, truth, and reparations at some future point. These modest gains could also prevent another outbreak of violence. If these modest gains are accompanied by constitutional reform, even incremental reform, then perhaps the country might be better set on a path to reconciliation.

What Sri Lanka shows us is that although eight years have passed since the end of the war (in this case as a result of a conclusive military victory for one side), not enough water has flowed to address the scars of the conflict. Although key actors within government know that the issue will not fade and must be dealt with, this has not generated the political will to deal with the country's complicated past. At the moment, the current regime has to manage the tensions within a coalition government and contend with the "speculative" electoral popularity of the former President, under whose leadership the war ceased. On many occasions the political will to respond to complex issues emerges out of the euphoria of an electoral victory. Sri Lanka chose to postpone its response in order to engage in public consultations and for other reasons. This political will has now dissipated.

Beyond the rhetoric, the government has little to flaunt on transitional justice. It has established a few institutional structures (Secretariat for Coordinating Reconciliation Mechanisms and the Office of National Unity), set up a technical group that has drafted the law on the OMP, and generated drafts on the Truth Commission and the Office of Reparations. Yet beyond this single law (the OMP), the legal amendment that allows for "certificates of absence," the ratification of the Convention on Disappearances, and draft legislation on Truth Commissions and Reparations, little in terms of concrete measures have emerged. The prosecution of emblematic cases and the anti-corruption cases are lagging behind. The government had presented a calibrated approach: pluck the low hanging fruit and then progress to the more challenging issues of accountability. At the moment, even the low hanging fruit is overripe and begs to be plucked.

Far reaching constitutional reform would have helped. A better balance among the three organs of government; a stronger Bill of Rights; judicial review of legislation; a second chamber and extensive power sharing with the provinces would have shown that this process was different from previous processes. Yet even the constitutional reform process has lost momentum and the ambitious transformative agenda of the government is not moving forward. In the areas of governance and institutional reform, the Nineteenth Amendment to the Constitution, the re-establishment of the Constitutional Council, and the enactment of the Right to Information Act are the only accomplishments the government can show after two years in office.

Institutional credibility has been a problem in Sri Lanka from the 1970s. Public institutions such as the courts, the police, the public service, the Attorney-General's department, and the independent institutions on corruption, human rights, and elections lacked the robustness and dynamism to play an important role in public life. These past two years have enabled these institutions to recover their legitimacy. One possible legacy of this regime could be the reestablishment of the independence of these institutions and laying a framework for a more comprehensive transformation in these institutions at some future point.

The Challenges of Transformational Governance

Sri Lanka is currently in the midst of a challenging political transition. It was a transition that when it commenced, exhibited the potential for radical transformation of the institutions of governance. This potential has now diminished as the political coalition in power has sought to neutralize the political opposition, entrench its hold on government and manage internal fissures within the ruling coalition.

Sri Lanka has had its share of democratically elected transformational governments. In 1994, as a response to the constitutional dictatorship of the previous regimes, a transformational political leadership emerged and took office through the electoral process. Sri Lanka had its first authentic truth seeking process during that period, but no prosecutions resulted. The complete reports of that process are yet to be made public.²⁶

In 2015, a transformational political regime emerged yet again, in response to the excesses of the Rajapaksa government, and was elected through the democratic process. Yet since 1994, little has changed in the Sri Lankan state beyond the elimination of the LTTE. Transformative leadership is particularly lacking in Sri Lanka. Potential transformative leaders tend to get captured by military mind sets or by those involved in the perpetration of crimes and the process of transformation soon grinds to a halt.

Transitional justice processes are deeply divisive, but societies emerging out of violent conflict have no option but to manage these divisions. Truth seeking, truth telling, and reparations should not be viewed as an alternative to accountability, but rather as part of a broad based approach to respond to the past. For societies seeking to grapple with its past, all these elements are vital if a sustainable peace is to be built and they are to transcend the legacy of the past. In the case of Sri Lanka, accountability, truth seeking, truth telling, and reparations will have to be accompanied by imaginative constitutional reforms and power sharing

²⁶ See Gomez, *supra* note 2.

arrangements if the scars of the past are to be allowed to heal. Responding to the abuse of political power and corruption will facilitate a transformation of the institutions of governance. Sri Lanka requires that hard and difficult choices be made with regard to its past. Economic growth alone, even if socially inclusive, will not create conditions that prevent violence in the future.

Prosecuting the emblematic cases is currently possible. It is possible for the state to prosecute a dozen or so emblematic cases without eroding its electoral base. However, even this “core minimum” has not been pursued with vigour. The “Vishwamadu” case and the “Selvarajah Pushparani” case shows that some courts may be willing to act independently, and the decisions in the “Raviraj” case and the “Kumarapuram” case indicate that justice may easily be “ethnicized” and lack impartiality.

Prosecutions of the last phase of the war would be politically disastrous for the government at the current moment. Yet this should not preclude truth seeking and truth telling through the OMP and a Truth Commission. In a situation that cried for “reparations first” to build confidence and establish the bona fides of this process, the release of military held land and the demilitarisation of the former conflict areas has been excruciatingly slow. The reluctance of the state to allow victims to memorialize their family members has undermined the good faith of the regime.

Transitional justice has had its critics. As Arnould observes, the practice of using transitional justice mechanisms to deal with the past has been problematic and generated a variety of impacts across different societies.²⁷ In an important piece Gready and Robbins critique transitional justice and called for a process of transformative justice instead. They observe:

While transformative justice does not seek to completely dismiss or replace transitional justice, it does seek to radically reform its politics, locus and priorities. Transformative justice entails a shift in focus from the legal to the social and political, and from the state and institutions to communities and everyday concerns. Transformative justice is not the result of a top-down imposition of external legal frameworks or institutional templates, but of a more bottom-up understanding and analysis of the lives and needs of populations. Similarly, the tools of transformation will not be restricted to the courts and truth commissions of transitional justice, but will comprise a range of policies and approaches that can impact on the social, political and economic status of a large range of stakeholders.²⁸

²⁷ See VALÉRIE ARNOULD, *supra* note 3, 354-374.

²⁸ PAUL GREARY & SIMON ROBINS, *From Transitional Justice to Transformative Justice: A New Agenda for Practice*. INT'L J. TRANSIT'L JUST., 8, no 3, 339, 340 (2014).

The domain of transformative or transformational justice remains ambiguous. Yet, when the political transition commenced in 2015, it had elements of both the transitional and the transformational. The momentum has slowed on both fronts. At the current moment, Sri Lanka requires both: a process of transitional justice that will address the legacy of the past violence; and a process of transformational governance and justice that will radically alter the structure and the practice of the institutions of governance, the nature of social relations and facilitate inclusive growth. Both processes will have to be socially inclusive and entail the participation of a broad range of stakeholders. It cannot rely on state-led processes alone and will have to include civil society initiatives and straddle law, psychology, art, memorialization, education and access to economic opportunities. Transitional justice processes are more likely to succeed should they be accompanied by transformational governance. Sri Lanka had a transformational moment in 2015. That moment slipped yet again and the political leadership has lost the courage to take the hard decisions the country requires.

The Sri Lankan state has struggled with rule of law based constitutional and institutional reforms. It has struggled with reconciliation and pluralism. It has struggled with social inclusion and the celebration of its ethnic, religious, and linguistic diversity. While some have pegged this to the insecurity of the majority Sinhala-Buddhist community, it has had more to do with temerity in political leadership than the pressures generated by Sinhala-Buddhist nationalism alone.

One of the questions the paper seeks to answer is: what can human rights advocates and lawyers do to advance the goals of truth, justice, and reconciliation in such a context? Human rights advocates and donors should, at a minimum, focus on retaining the robustness and independence of the judiciary, the independent institutions, civil society, and the media that has emerged since January 2015. At the same time, they should advocate for a larger transformation that encompasses 'dealing with the past'; social inequality; transparent and rule of law-based governance; and inclusive economic growth.

Human rights advocates and donors would do well to divide energy and resources between state and non-state led processes. State-led processes have struggled with a low political will, timid leadership, a lack of capacity and corruption. Non-state led processes have struggled with sustaining their initiatives, a lack of capacity, and an inability to think out of the box and innovate. Both processes would be required to trigger the transformation that Sri Lanka requires. Trade related and economic concessions such as the GSP Plus and the Millennium Challenge Corporation will

present carrots that may also stimulate political reform.²⁹ International leverage, through a mix of monitoring, advocacy, universal jurisdiction, capacity building, economic incentives, and trade concessions, could create the conditions for incremental transformations, even if they are excruciatingly slow.

²⁹ Gehan Guntalilleke, *GSP+: A Revaluation of Benefits*, XXII Bar Association Law Journal (Sri Lanka) 112 (2016).