

## The Quest for Transitional Justice in Sri Lanka

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Seeking transitional justice (TJ) seems daunting in a political context in which armed resistance representing a minority ethnic group has been militarily defeated by government forces. Moreover, a struggling economy, the weakening of democracy due to excessive politicisation of public institutions, disregard for the rule of law, and abuse of power have raised questions regarding the TJ claims in Sri Lanka and their sequencing. In this short opinion piece, I argue that, while there is almost no question about the need for transitional justice in Sri Lanka, the specific ways in which its vocabulary is being employed by the state and the methods by which TJ is being sought to be achieved are often selective and superficial, thereby rendering its promise elusive.

### **The Armed-Conflict**

Structural discrimination of Tamils based on their ethnicity, which was further compounded by the lack of adequate political representation during the post-independence period, paved the way for an armed separatist movement in the late 1970s in Sri Lanka. In fact, ethnicity has been the dominant frame within which politics and political representation has been developed in the Sri Lankan polity from its inception. The ‘Ceylonese’ identity eventually evolved into three ethno-nationalist world views which have dominated political debate and discourse: Sinhala-Buddhist nationalism, Tamil nationalism, and Muslim nationalism. The Liberation Tigers of Tamil Ealam (“LTTE”), who fought the armed forces of the Government of Sri Lanka (“GoSL”), developed into one of the most ruthless terrorist organizations of the time and were alleged to have committed numerous violations of international humanitarian law (“IHL”) and human rights law (“HRL”).<sup>1</sup> Allegations have also been levelled at the armed forces for violations of IHL and HRL during this same time.<sup>2</sup>

The end of this approximately thirty year long internal armed conflict in May 2009 naturally gave rise to demands for, and claims to, transitional justice in Sri Lanka, particularly by the Tamil victims of the war.<sup>3</sup> Their demands and claims have been added to and supported by different actors, including their political representatives and the United Nations.<sup>4</sup> Almost eight years since the end of the armed conflict, the prospects for transitional justice in Sri Lanka continues to be precarious and the actual outcomes by large remain unpredictable. While notable progress has been made with regard to some aspects, the sustainability of that progress is currently uncertain.

### **The Road to Transitional Justice**

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<sup>1</sup> Secretary General’s Panel of Experts on Accountability in Sri Lanka, *Report of the Secretary General’s Panel of Experts on Accountability in Sri Lanka*, ii (Mar. 31, 2011), [http://www.un.org/News/dh/infocus/Sri\\_Lanka/POE\\_Report\\_Full.pdf](http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf).

<sup>2</sup> *Id.*

<sup>3</sup> See, e.g., CONSULTATION TASK FORCE ON RECONCILIATION MECHANISMS, FINAL REPORT OF THE CONSULTATION TASK FORCE ON RECONCILIATION MECHANISMS, VOL. 1 (17 Nov., 2016), <http://www.scrm.gov.lk/documents-reports> (containing a large number of quotes from members of the Sri Lankan Tamil community asking for justice and reparation).

<sup>4</sup> See *Report of the Secretary General’s Panel of Experts on Accountability in Sri Lanka*, *supra* note 1, at 120–22.

The post-war period is commonly viewed as comprising of two periods which are marked by the change of government in 2015. The time period 2009-2014 was overwhelmingly characterised by a defensive approach to transitional justice at the international level and the lack of political commitment and even a denial of the need for it at the domestic level.<sup>5</sup> Post 2015, the GoSL has been comparatively progressive with regard to its commitment to transitional justice and human rights at the international level. Domestic policies too have been generally favourable, with constitutional reform and transitional justice being high on the government's agenda.<sup>6</sup> The post 2015 approach to TJ has provided unprecedented opportunities for its realisation in a country in which hitherto TJ related developments have been inadequate, lacking in political commitment, or even in complete disregard of the need for TJ.

The military defeat of the LTTE in May 2009 was followed by a Presidential address in Parliament in which some political commitment towards transitional justice and a political solution to the conflict was expressed.<sup>7</sup> Echoes of these commitments were evident in the joint statement that was issued by the then-President and the former Secretary General of the United Nations.<sup>8</sup> Due to the lack of concrete progress on the ground, by 2011, the Secretary-General appointed a panel of experts (PoE) to advise him with regard to the allegations against the government of violations of IHRL and IHL.<sup>9</sup> Possibly as a reaction to the appointment of this panel, a presidential commission, the Lessons Learnt and Reconciliation Commission ("LLRC") was appointed by the government.<sup>10</sup> Its mandate was to inquire into the reasons for the failure of the last cease-fire agreement that had been reached between the GoSL and the LTTE 2002 to 2008.<sup>11</sup> Both bodies issued their reports in 2011. The PoE report concluded that there were credible allegations of war crimes and crimes against humanity against the GoSL as well as the LTTE.<sup>12</sup> The LLRC report concluded that any violation of human rights law or humanitarian law were individual and isolated acts only.<sup>13</sup> However, the LLRC went on to make several other findings and recommendations regarding transitional justice, the rule of law, and democracy. The recommendations were primarily in relation to land rights and resettlement of internally displaced persons,<sup>14</sup> the rights of

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<sup>5</sup> For an analysis of these developments, see Jayadeva Uyangoda, *Sri Lanka in 2009: From Civil War to Political Uncertainties*, 50(1) ASIAN SURVEY 104, 104–11 (2010); Jayadeva Uyangoda, *Sri Lanka in 2010: Regime Consolidation in a Post-Civil War Era*, 51(1) ASIAN SURVEY 131, 131–37 (2011); Jonathan Goodhand, *Sri Lanka in 2012: Securing the State, Enforcing the "Peace"*, 53(1) ASIAN SURVEY 64, 64–72 (2013); Nira Wickramasinghe, *Sri Lanka in 2013: Post-war Oppressive Stability*, 54(1) ASIAN SURVEY 199, 199–205 (2014).

<sup>6</sup> See Resolution for the appointment of the Constitutional Assembly, Jan. 9, 2016 (Sri Lanka), <http://english.constitutionalassembly.lk/images/pdf/motion-en.pdf>. For more information, see the website of the Constitutional Assembly at <http://english.constitutionalassembly.lk/>

<sup>7</sup> See President Mahinda Rajapaksa, Address to Parliament (Sri Lanka) (May 19, 2009).

<sup>8</sup> U.N. Secretary-General, *Joint Statement by United Nations Secretary-General, Government of Sri Lanka* (SG/2151) (May 26, 2009), <https://www.un.org/press/en/2009/sg2151.doc.htm>.

<sup>9</sup> See Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, *supra* note 1, at v.

<sup>10</sup> See *generally* INTERNATIONAL CENTRE FOR ETHNIC STUDIES, WHAT LESSONS LEARNT? (2011), <http://www.llrcarchive.org/related-documents/>.

<sup>11</sup> Warrant issued by President Mahinda Rajapaksa on 15 May 2010, <http://www.llrcarchive.org/about-llrc/>.

<sup>12</sup> See REPORT OF THE SECRETARY GENERAL'S PANEL OF EXPERTS ON ACCOUNTABILITY IN SRI LANKA, *supra* note 1, at ii.

<sup>13</sup> See COMMISSION OF INQUIRY ON LESSONS LEARNT AND RECONCILIATION, REPORT OF THE COMMISSION OF INQUIRY ON LESSONS LEARNT AND RECONCILIATION at 328–32 (Nov. 2011), <http://slmbassyausa.org/downloads/LLRC-REPORT.pdf>.

<sup>14</sup> See *id.* at 351–52.

detainees,<sup>15</sup> the issues related to enforced disappearances,<sup>16</sup> forced recruitment of children, and human rights issues faced by women heads of household.<sup>17</sup>

Since then, the Human Rights Council (UN HRC) adopted a series of resolutions, in 2012,<sup>18</sup> 2013,<sup>19</sup> 2014,<sup>20</sup> and 2015<sup>21</sup> respectively, drawing primarily on the recommendations of the LLRC and their non-implementation. The last resolution was co-sponsored by Sri Lanka and the United States of America.<sup>22</sup> Read together, these resolutions record the gradual intensification of the supervision and monitoring of TJ and reconciliation in Sri Lanka by the UN HRC. In March 2017 the UN HRC reviewed Sri Lanka's performance under the latest resolution (2015) and extended time for full implementation of the commitments made by Sri Lanka.<sup>23</sup>

In the meantime, another presidential commission was established to investigate into complaints regarding missing persons in 2013. Its report was submitted in 2016.<sup>24</sup> Subsequent to the change of government and in accordance with the co-sponsored resolution, the government appointed a task force with a mandate to consult the public on the proposed mechanisms for reconciliation (CTF).<sup>25</sup> That report was released end of 2016. Based on submissions received the CTF recommended, among other things, a judicial mechanism with international involvement,<sup>26</sup> reparations,<sup>27</sup> and a truth commission.<sup>28</sup> It is notable that the CTF report also notes the competing and conflict submissions that were made on these aspects and in fact the CTF calls on the government to engage with the people to increase awareness on the need for TJ<sup>29</sup> and reconciliation.<sup>30</sup> The constitutional reform process was initiated in early 2016 and several new laws have been adopted with several more being developed for adoption in

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<sup>15</sup> See *id.* at 342–44.

<sup>16</sup> See *id.* at 339–42.

<sup>17</sup> See *id.* at 345–46. See also Committee on the Elimination of Discrimination against Women, Concluding observations on the eighth periodic report of Sri Lanka, ¶ 36–37, CEDAW/C/LKA/CO/8 (March 3, 2017).

<sup>18</sup> Human Rights Council Res. 19/2, U.N. Doc. A/HRC/19/2 (Aug. 16, 2012).

<sup>19</sup> Human Rights Council Res. 22/1, U.N. Doc. A/HRC/22/1 (March 19, 2013).

<sup>20</sup> Human Rights Council Res. 25/1, U.N. Doc. A/HRC/25/1 (April 9, 2014).

<sup>21</sup> Human Rights Council Res. 30/29, U.N. Doc. A/HRC/30/29 (Sep. 29, 2015).

<sup>22</sup> *Id.*

<sup>23</sup> *Promoting reconciliation, accountability and human rights in Sri Lanka* resolution adopted without a vote at the 34<sup>th</sup> Session of the UN Human Rights Council on 15 March 2017 (A/HRC/34/L1)

<sup>24</sup> Report on the Second Mandate of the Presidential Commission of Inquiry into Complaints of Abductions and Disappearances (August 2015) (also known as the 'Maxwell Paranagama Commission report').

<sup>25</sup> CONSULTATION TASK FORCE ON RECONCILIATION MECHANISMS, *supra* note 3.

<sup>26</sup> See *id.* at 443.

<sup>27</sup> See *id.* at 440–41.

<sup>28</sup> See *id.* at 441–43.

<sup>29</sup> See *id.* at 443.

<sup>30</sup> See *id.* at 435.

the near future. The Right to Information Act,<sup>31</sup> the Act to establish an Office of Missing Persons (OMP),<sup>32</sup> and an amendment to introduce Certificates of Absence<sup>33</sup> are examples of such law reform.

### **Accountability in Multiple Solitudes**

I would argue that in Sri Lanka it is not a question of maintaining a 'balance' in the TJ process between ensuring justice and accountability on the one part and in being open to a bargaining process on the other. Even now, the TJ fault lines of the TJ discourse marks out alternative worldviews which generate conflicting accounts of 'truth', categorically different perceptions of 'justice' and competing views on the need for 'transition'. Narratives of the horrors of war and the registers for accounting for these horrors vary in fundamental ways depending on the voices that animate the storytelling. While this is a predictable characteristic of societies in conflict, more than eight years since the conclusion of the armed conflict few interventions have been made to bridge these alternative world views. Consequently, even well-meaning political and legal interventions for ensuring accountability in the transitional justice process have had to ultimately contend with these alternative world views.

Political and even state power vests with the majority world view in Sri Lankan society and therefore is shaped by the numerous iterations of Sinhala-Buddhist nationalism. Perhaps taking a cue from this way of 'framing' issues of TJ, other political responses too often are framed within other nationalisms. Responses from the human rights community, domestic or international, employ the frame of liberal ideology and the vocabulary of human rights. These different interventions hardly find a point of convergence except sometimes in genuine commitments to seeking resolutions to the conflict or in political expediency. These alternative frames lead to conflicting political and even legal commitments being made at the national, sub-national and supra-national levels.

The Northern Provincial Council (NPC), the Central Government and the international community have been three sites for generating such conflicting commitments, perhaps with the Central Government engaging in a Janus-faced strategy. These approaches to TJ are manifest in the ways in which, for instance, the proposal for a 'hybrid court' has been dealt with. The recommendations for an independent and international inquiry into the allegations of war crimes and crimes against humanity culminated in an undertaking by the GoSL before the UN HRC in its co-sponsored resolution. Since then, while the UN has expected Sri Lanka to comply, at the domestic level the GoSL has repeatedly stated that it would not establish a judicial mechanism with an international presence.<sup>34</sup> At the international

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<sup>31</sup> Right to Information Act, No. 12 of 2016, GAZETTE OF SRI LANKA OF AUG. 05, 2016, PART II (2016), [http://www.media.gov.lk/images/pdf\\_word/2016/12-2016\\_E.pdf](http://www.media.gov.lk/images/pdf_word/2016/12-2016_E.pdf).

<sup>32</sup> Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act, No. 14 of 2016, GAZETTE OF SRI LANKA OF AUG. 26, 2016, PART II (2016), [http://imadr.org/wordpress/wp-content/uploads/2016/09/Sri-Lanka\\_OMP-Act-No.-14\\_2016.pdf](http://imadr.org/wordpress/wp-content/uploads/2016/09/Sri-Lanka_OMP-Act-No.-14_2016.pdf)

<sup>33</sup> Registration of Deaths (Temporary Provisions) (Amendment) Act, No. 16 of 2016, GAZETTE OF SRI LANKA OF SEP. 09, 2016, PART II (2016), [http://www.srilankalaw.lk/gazette/2016\\_pdf/16-2016\\_E.pdf](http://www.srilankalaw.lk/gazette/2016_pdf/16-2016_E.pdf).

<sup>34</sup> See, e.g., Sam Bresnick, *No foreign judges in transitional justice mechanisms: Mangala*, DAILY NEWS, March 17, 2017, <http://dailynews.lk/2017/03/17/local/110712/no-foreign-judges-transitional-justice-mechanisms-mangala>.

level, the GoSL maintains that it will uphold its commitments.<sup>35</sup> The NPC, on the other hand, has gone so far as to even call for the GoSL to ratify the Statute of the International Criminal Court.<sup>36</sup>

### **Embedding Transitional Justice in Democratisation**

The contestations in the terrain of TJ are echoed in the broader democratisation process itself in Sri Lanka. In comparison to the Eighteenth Amendment to the Constitution of the previous government, which was retrogressive,<sup>37</sup> the current government made explicit commitments to introducing a constitution that was progressive and would offer a political solution to the conflict.<sup>38</sup> For the first time in Sri Lanka's history, public consultations were conducted in every district and a report was published within a short period of time, capturing people's aspirations for constitutional reform.<sup>39</sup> As with the LLRC report, the report of the Public Representations Committee (PRC) effectively represented the acute need for constitutional reform including greater protection for fundamental rights,<sup>40</sup> devolution of power,<sup>41</sup> repeal of the Executive Presidency,<sup>42</sup> and respect for the rule of law.<sup>43</sup>

Four aspects of constitutional reform that are being debated currently are critical from a TJ point of view. One is the 'nature' of the state--that is to say whether the constitution should continue to describe Sri Lanka as a 'unitary' state.<sup>44</sup> Another is whether Buddhism should continue to be afforded the 'foremost' place in the Constitution.<sup>45</sup> The third is the arrangements for devolution of power, and the fourth is whether economic, social, and cultural rights would be subject to judicial enforcement.<sup>46</sup> The six sub-committees of the Constitutional Assembly which was appointed by resolution in parliament

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<sup>35</sup> See, e.g., Dharisha Bastians, *Fresh from Geneva, Mangala promises transitional justice next steps soon*, DAILY FT, July 7, 2016, <http://www.ft.lk/article/553317/Fresh-from-Geneva--Mangala-promises-transitional-justice-next-steps-soon>.

<sup>36</sup> Northern Provincial Council, *Resolution on the Need for an International Mechanism*, Sept. 1, 2015, [https://www.countercurrents.org/Resolution\\_NPC\\_international\\_investigation.pdf](https://www.countercurrents.org/Resolution_NPC_international_investigation.pdf).

<sup>37</sup> Eighteenth Amendment to the Constitution of Sri Lanka, adopted on the 8<sup>th</sup> of September 2010. See also Edrisinha R & Jayakody A (eds), *The Eighteenth Amendment to the Constitution; substance and process*, (CPA 2011).

<sup>38</sup> Smriti Daniel, *Sri Lanka is creating a new Constitution and the people have spoken – more than 7,000 of them*, SCROLL.IN, Jan. 9, 2017, <https://scroll.in/article/826105/sri-lanka-is-the-process-of-creating-a-new-constitution-and-the-people-have-spoken>.

<sup>39</sup> See PUBLIC REPRESENTATIONS COMMITTEE ON CONSTITUTIONAL REFORM, REPORT ON PUBLIC REPRESENTATIONS ON CONSTITUTIONAL REFORM (May 2016), [http://www.yourconstitution.lk/PRCpt/PRC\\_english\\_report-A4.pdf](http://www.yourconstitution.lk/PRCpt/PRC_english_report-A4.pdf).

<sup>40</sup> See *id.*, 91–125.

<sup>41</sup> See *id.*, 47–68.

<sup>42</sup> See *id.*, 32–35.

<sup>43</sup> See *id.*, 29–31.

<sup>44</sup> See e.g., Asanga Welikala, THE SRI LANKAN CONCEPTION OF THE UNITARY STATE: THEORY, PRACTICE, AND HISTORY, CPA Working Papers on Constitutional Reform No 1, June 2016.

<sup>45</sup> See, e.g., Benjamin Schonthal and Asanga Welikala, BUDDHISM AND THE REGULATION OF RELIGION IN THE NEW CONSTITUTION: PAST DEBATES, PRESENT CHALLENGES, AND FUTURE OPTIONS, CPA Working Papers on Constitutional Reform No. 3, July 2016

<sup>46</sup> See, e.g., Asanga Welikala, DEVOLUTION UNDER THE THIRTEENTH AMENDMENT: EXTENT, LIMITS, AND AVENUES FOR REFORM, CPA Working Papers on Constitutional Reform No. 10, November 2016; Mario Gomez, Conor Hartnett and Dinesha Samararatne, CONSTITUTIONALISING ECONOMIC AND SOCIAL RIGHTS IN SRI LANKA, CPA Working Papers on Constitutional Reform No. 7, September 2016; and Asanga Welikala, THE CASE AGAINST CONSTITUTIONALISING JUSTICIABLE SOCIOECONOMIC RIGHTS IN SRI LANKA, CPA Working Papers on Constitutional Reform No. 12, January 2017

have submitted their reports to its Steering Committee.<sup>47</sup> The draft constitution has to be approved by the Constitutional Assembly and referred to the Cabinet which will thereafter follow the constitutionally mandated procedure for repeal of the constitution which includes a referendum.<sup>48</sup>

The necessity for re-democratisation is evident in all aspects of TJ in Sri Lanka. Institutional reform must include the judiciary, law enforcement agencies, and independent commissions. The deepening of democracy requires engagement with the sticky and difficult task of strengthening citizenship as an alternative to ethno-nationalism. Attempts at TJ and attempts at strengthening democracy are, then, mutually constitutive. Current political negotiations, however, seem to posit them as two fragile and alternative exercises between which a choice must be made.

### **Advocating for Transitional justice**

Over the last eight years, victims and advocates have risked even their lives in maintaining pressure on Sri Lanka in relation to TJ issues. Alleged violations of HRL and IHL have been meticulously documented and victims have been empowered and mobilized to raise awareness on the urgency of TJ interventions. All evidence suggests that a longer wait is to be anticipated for these efforts to yield results. The international pressure and attention must, at some point, be met with similar domestic political, legal, and social support if effective TJ measures are to be implemented in Sri Lanka. The temptation would be to accept compromises for outcomes in the short term by a government that is not expressly hostile to TJ measures or to constitutional reform. Even if such compromises are to be made, the deepening of democratization across all of Sri Lankan society should be recognized as a non-negotiable by all concerned. Structural discrimination can be addressed effectively only if democracy is deepened and the polity is set free from the shackles of ethno-nationalisms.

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<sup>47</sup> See the reports available at <http://english.constitutionalassembly.lk/interim-report>.

<sup>48</sup> Clause 23 of the resolution adopted in Parliament for the appointment of the Constitutional Assembly on the 9<sup>th</sup> of January 2016, also known as the 'Framework Resolution.'