

Challenges to Transitional Justice in Sri Lanka

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In January 2015, the people of Sri Lanka effected a political change hitherto considered highly unlikely. They voted out of power incumbent President Mahinda Rajapaksa, who sought an unprecedented third term, and, in August of that year, in a general election repeated the electoral verdict.¹ The scale of the achievement should be measured in terms of Rajapaksa's popularity as the President who militarily defeated the Liberation Tigers of Tamil Eelam ("LTTE") in 2009 and thereby ended a protracted civil war of almost 30 years' duration. Rajapaksa's regime was seen as dynastic, corrupt, and authoritarian, projecting an ideology of populist majoritarianism. Its military victory over the LTTE was marred by allegations of war crimes and crimes against humanity, as well as other human rights abuses --all of which was shielded by the culture of impunity sponsored and propagated by the regime.² Rights were seen as irrelevant at best and subversive at worst, and the country was thereby impeded from moving to a post- conflict--as opposed to post-war--phase, in which the roots of conflict would be addressed rather than sustained or reproduced.

The government that was elected in January 2015 was unique in that it saw the two main parties and historic rivals in Sri Lankan politics-- the United National Party ("UNP") and the Sri Lanka Freedom Party ("SLFP")--ensconced in office together for the first time, by choice. The leader of the former, Ranil Wickremasinghe, became the Prime Minister. Mr Maithripala Sirisena, who, like Rajapaksa, was a member of the SLFP as well as a member of his government, broke away to contest Rajapaksa in the Presidential election and emerged the victor. The platform of the new government was one of greater democratic freedom, governance including constitutional reform, independent oversight commissions, and right to information legislation and accountability. The Rajapaksa government was seen by the majority community particularly in terms of the massive financial corruption by the Rajapaksas, and by the minorities, in the main, for major human rights violations and the culture of impunity. In electoral terms, whilst Rajapaksa's considerable support amongst the majority Sinhala community was eroded, it remained considerable. The minorities however defined, turned out in large numbers for Sirisena.³

¹ See ELECTION COMMISSION OF SRI LANKA, PRESIDENTIAL ELECTIONS 2015 DISTRICTS RESULTS BY POLLING DIVISION AND ALL ISLAND RESULTS (2015), http://www.slelections.gov.lk/web/images/pdf/election_results/PE/PresidentialElections2015.pdf; ELECTION COMMISSION OF SRI LANKA, PARLIAMENTARY ELECTIONS 2015 DISTRICTS RESULTS BY POLLING DIVISION AND ALL ISLAND RESULTS (2015), http://www.slelections.gov.lk/web/images/pdf/election_results/GE/ParliamentaryElections2015.pdf

² See generally U.N. Secretary-General, *Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka*, 31 March 2011, <http://www.refworld.org/docid/4db7b23e.html>.

³ See ELECTION COMMISSION OF SRI LANKA, PRESIDENTIAL ELECTIONS 2015 DISTRICTS RESULTS BY POLLING DIVISION AND ALL ISLAND RESULTS (2015), http://www.slelections.gov.lk/web/images/pdf/election_results/PE/PresidentialElections2015.pdf

The new government promised a general election 100 days after acceding to power. This coincided with the scheduled release of the report on Sri Lanka (hereafter referred to as the “OISL report”) under the aegis of the Office of the UN High Commissioner for Human Rights and mandated by a resolution on Sri Lanka in the UN Human Rights Council.⁴ The new government did not want the report and transitional justice to be an issue in the general election and requested that its release be postponed. The OISL report was eventually released at the Council session in September 2015.⁵ Two other developments also took place at the session. The Sri Lankan Foreign Minister, Mangala Samaraweera, announced to the Council that the government intended to establish four mechanisms corresponding to the conventional pillars of transitional justice: an Office for Missing Persons (“OMP”), a truth, justice reconciliation and non-recurrence commission, an office of reparations and an accountability mechanism comprising a special court and a special counsel or prosecutor’s office.⁶ Resolution 30/1, passed by the Council at this session, was co-sponsored by the Government of Sri Lanka (“GOSL”) and incorporated these proposals. Significantly, the resolution provided for the proactive participation of internationals on the accountability mechanism – a recommendation initially made in the OISL report.⁷

Pursuant to the resolution, the GOSL established a Consultative Task Force (“CTF”) to ascertain public views on the proposed mechanisms. The consultations were carried out by 15 Zonal Task Forces (“ZTFs”) throughout the island, at district level in the war-torn Northern and Eastern provinces and at provincial level in the rest of the country. Over half of all ZTFs were women and representations on behalf of some 7,300 persons were made to the CTF through an island wide consultation process with the major demand being for the establishment and acknowledgement of the truth of what had happened. Accountability featured in terms of the accountability of those who gave orders for violations and atrocities.⁸

Notwithstanding the GOSL position presented at the Council in Geneva, the resistance to transitional justice was openly manifested following the Council session. The Rajapaksa opposition stepped up its denunciation of transitional justice, and the accountability mechanism in particular, as a clear violation of national sovereignty and, moreover, as the means by which war heroes would be turned into war criminals, forcing President Sirisena to disavow this aspect of

⁴ Human Rights Council Res. 25/1, U.N. Doc. 2014, A/HRC/RES/25/1 (April 9, 2014), <http://www.refworld.org/docid/53ba60094.html>.

⁵ Human Rights Council, Report of the OHCHR Investigation on Sri Lanka (OISL), U.N. Doc. A/HRC/30/CRP.2 (Sept. 16, 2015), <http://www.refworld.org/docid/55ffb1d04.html>.

⁶ Mangala Samaraweera, Statement at the 30th Session of the UNHRC, Geneva (Sept. 14, 2015), <https://www.news.lk/fetures/item/9742-statement-by-mangala-samaraweera-at-the-30th-session-of-the-unhrc-geneva>.

⁷ Human Rights Council Res. 30/1, U.N. Doc. A/HRC/RES/30/1, ¶ 6 (Oct. 14, 2015), <http://www.refworld.org/docid/56b1bdb64.html>.

⁸ CONSULTATION TASK FORCE ON RECONCILIATION MECHANISMS, FINAL REPORT (Nov. 17, 2016), <http://www.scrm.gov.lk/documents-reports>.

the Geneva resolution 30/1 or risk adverse political and electoral consequences – nationalist elements within the majority Sinhala community being seen as a core constituent element of the SLFP. Consequently, President Sirisena on a number of occasions has stated that there will be no foreign judges, a position also echoed by Prime Minister Wickremasinghe and other government leaders⁹ and some factions of the opposition in Parliament.¹⁰

Indeed, it is precisely this aspect of the Final Report of the CTF, presented to the GOSL in January of this year, which has attracted the most attention, even though the report of some 900 pages covers the gamut of issues comprising transitional justice and reconciliation in the Sri Lankan context. The CTF in its recommendations calls for a hybrid court consisting of at least one international judge as well as international participation in the office of the Special Counsel. This recommendation, reinforcing that made in the OISL Report, was made on account of the widespread perception in the predominantly Tamil North and East that, given the culture of impunity, an exclusively domestic accountability mechanism would not be credible. The CTF also recommended that once trust and confidence as well as capacity was built up in respect of nationals and domestic mechanisms, internationals should be phased out, as in other contexts.¹¹

The controversy over the accountability mechanism also encompasses the issue of its powers and those of other mechanisms vis-a-vis the chain of command, granting of amnesties, and criminal prosecution. Political exigencies as identified by the GOSL have as a consequence been cited as the principal reason for putting transitional justice on the backburner, albeit, as the GOSL insists, by no means indefinitely.¹²

Presently, the GOSL has dichotomized constitutional reform and transitional justice, prioritising the former on the grounds of its overarching importance as well as on the argument that, given the prevailing political discourse and dynamics, any movement on transitional justice risks an adverse, even fatal impact on constitutional reform. It should be noted that if constitutional reform is to entail an entirely new constitution, as sections of the government insist it should, it cannot be promulgated without a two-thirds majority vote in its

⁹ President says no need to import judges, THE SUNDAY TIMES, Nov. 29, 2014, <http://www.sundaytimes.lk/151129/news/president-says-no-need-to-import-judges-173173.html>; Sri Lanka President rejects foreign judges in war probe, ECONOMYNEXT, March 5, 2017, http://www.economynext.com/Sri_Lanka_President_rejects_foreign_judges_in_war_probe-3-7490-10.html; Uditha Kumarasinghe, No hybrid courts, No foreign judges – PM, SUNDAY OBSERVER, March 25, 2017, <http://www.sundayobserver.lk/2017/03/26/news/no-hybrid-courts-no-foreign-judges-pm>.

¹⁰ Foreign judges politically unacceptable, unconstitutional –MR, THE DAILY NEWS, Nov. 6, 2015, <http://www.dailynews.lk/?q=2015/10/21/local/foreign-judges-politically-unacceptable-unconstitutional-mr>; Dasun Edirisinghe, JVP rejects hybrid court proposed by UNHRC, THE ISLAND, Sept. 22, 2015: http://island.lk/index.php?page_cat=article-details&page=article-details&code_title=132218.

¹¹ Consultation Task Force, *supra* note 8.

¹² See, e.g., INTERNATIONAL CRISIS GROUP, SRI LANKA'S TRANSITION TO NOWHERE (May 16, 2017), <https://www.crisisgroup.org/asia/south-asia/sri-lanka/286-sri-lanka-s-transition-nowhere>

support, in Parliament followed by a majority vote in its favour at a national referendum. Some sections of the polity do argue that a new constitution will go far in creating the enabling environment for transitional justice and therefore such sequencing is in order and should be encouraged and supported.¹³

The issue, however, is the extent to which the government's bona fides on transitional justice are quickly becoming perceived as less than genuine. For instance, in August 2016, just before a session of the Human Rights Council and whilst the CTF consultations were ongoing, the GOSL rushed legislation to Parliament to create the Office of Missing Persons (OMP). The OMP, however, is yet to be set up and new legislation with regard to it is forthcoming.¹⁴ Likewise, the GOSL has yet to publicly associate itself with the CTF report as opposed to dismissing out of hand its recommendation on an accountability mechanism. Even in respect of the perceived political imperatives, movement on constitutional reform is currently negligible. Confusion reigns as to what should be pursued in respect of constitutional reform, stemming in the main from fears that a referendum, given recent international examples and the current domestic political and economic climate, will be lost. Minimalist reform will not require a referendum; a new constitution will. A political and constitutional settlement to the ethnic conflict which will attract Tamil minority support is unlikely through piecemeal constitutional reform and therefore most certainly will require a referendum. The non-recurrence pillar of transitional justice is pertinent in this regard as is, indeed, the presence of incentives for the Tamil community to support a new constitution in a national referendum, should it come to that.

Whilst the CTF consultations were not preceded by a government -led information campaign on the importance of transitional justice and what it intended by the four mechanisms, the consultations nevertheless revealed the views of victims on all aspects of transitional justice and reconciliation.¹⁵ Across the country, the consultations initially attracted public frustration, suspicion and even anger based on the experience of making submissions before numerous commissions on human rights abuses over decades – the reports of which were never made public and recommendations never implemented. Once people realised that their views were being sought on the mechanisms before they were to be set up, they warmed to the consultations, insisting that victims should be part of the mechanisms and that the mechanisms should be accessible to them in terms of operational language and location. As mentioned above, the establishment of the truth of what had happened and its acknowledgement by the state was a common demand in all consultations. Likewise, the emphasis on accountability was directly related to the chain of command – amnesty was

¹³ Jehan Perera, Sri Lanka: Constitutional Reform To The Fore Again, THE CITIZEN, Feb. 12, 2017, <http://www.thecitizen.in/index.php/NewsDetail/index/4/9921/Sri-Lanka-Constitutional-Reform-To-The-Fore-Again>.

¹⁴ CENTRE FOR POLICY ALTERNATIVES, TWO YEARS IN GOVERNMENT: A REVIEW OF THE PLEDGES MADE IN 2015 THROUGH THE LENS OF CONSTITUTIONAL REFORM, GOVERNANCE AND TRANSITIONAL JUSTICE, 30–32 (2017), <http://www.cpalanka.org/two-years-in-government-a-review-of-the-pledges-made-in-2015-through-the-lens-of-constitutional-reform-governance-and-transitional-justice/>.

¹⁵ Consultation task force, *supra* note 8.

considered for lower ranks by some, but not for those who gave the orders irrespective of whether they were from the armed forces or the LTTE.

Positing transitional justice as integral to reconciliation in a post-war context requires that it be understood and accepted by all sections of the polity, especially by the ethnic and/or religious groups that are party to the conflict. Country-wide consensus expressing the indispensable popular legitimacy for the transitional justice and reconciliation process will invariably require compromise. In the Sri Lankan context, for example, with regard to accountability three positions can be identified—an exclusively domestic mechanism, a hybrid one, as well as an exclusively international one. The choice will be determined by political considerations and will not satisfy any one stakeholder entirely.

There is no substitute for a country-wide information campaign outlining the rationale for transitional justice and the measures to achieve it that are being considered. This has to be championed and implemented by the government of the day – ostensibly one of National Unity; civil society can only complement this effort. In the absence of such a government campaign, there is a key role for civil society to play in keeping the issue on the agenda of public policy and reform through popular advocacy and countering the opposition definition, if not distortion of transitional justice as a mask for revenge, dishonour, betrayal and the violation of national sovereignty.

In the Sri Lankan context, the government embarked on constitutional reform and transitional justice simultaneously, raising expectations with regard to both. Its failure to communicate to the wider polity the rationale for its policies and proposals has ceded agenda setting of public political discourse to its opponents and it now finds itself on the defensive, frequently having to assure the polity as to what it will not do as opposed to what it will. In this respect, it has fallen into a political trap of its own making and risks sinking the prospects for both constitutional reform and transitional justice. Civil society, which championed the latter, has no option but to counter the arguments against constitutional reform and transitional justice by providing the intellectual and political rationale for both in the hope of galvanizing a critical mass of popular support.

As much as justice should be tempered by mercy, it is also conditioned by politics. And in this regard there is no substitute for the government of the day informing its citizens as to its policy choices and intentions – even if it is to be in terms of the possible over the desirable, the best not being the enemy of the good. Most importantly, the voices of victims must be heeded in a truly national conversation if there is to be a durable national unity based on meaningful reconciliation and democratic governance.