

# Transitional Justice in Post-war Sri Lanka: Dilemmas and Prospects

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The ending of Sri Lanka's armed conflict with the military defeat of the LTTE in May 2009 brought to the fore a plethora of concerns related to accountability and reconciliation. The country is considered a failed test of Transitional Justice (TJ) (Newman 2016), with neither perpetrators of alleged crimes being punished nor victims being compensated. The two principal parties to the conflict are seen as being unable to reach a settlement. This paper explores what prospects remain for TJ with the recent regime change in January 2015 and explores under what circumstances TJ mechanisms can succeed in the country.

President Rajapaksa's 2015 defeat not only marked the end of an era of authoritarianism but also the beginning of a dual transition of the country i.e. from war to peace, and from authoritarianism to democratic rule. This dual transition, however, will not be meaningful unless the ethnic question is addressed in a manner satisfactory to all parties concerned. This is because neither democracy nor peace can be sustained without the genuine interest and involvement of all segments of the population.

The regime change in January 2015 saw the election of a new President, Maithripala Sirisena, and a new coalition government comprising elements of most of the major political parties (including Rajapaksa's Sri Lanka Freedom Party) in August. The new government looks more favourable from a TJ point of view since it has pledged its commitment to further reconciliation and accountability. In particular, it has promised to pursue accountability through a domestic process "within the country's legal framework" (මාස 60කින් අළුත් රටක් හඳුනා පංච වීඛ ක්‍රියාවලිය 2015, p.13).<sup>1</sup> However, it should be noted here that the new government's emphasis is on domestic mechanisms (which remain vague and unspecific) that might not question or undermine the sovereignty of the country. No Sri Lankan government would be willing to risk the displeasure of the Sinhalese voter base. The majority of Sinhalese strongly oppose criminal justice that is central to TJ,<sup>2</sup> claiming that it would be used against the Sri Lankan armed forces that are considered heroes by them.<sup>3</sup>

The Tamil National Alliance, on the other hand, is toning down its hard-line stance in terms of TJ. The United Nations (UN) 'OHCHR Investigation on Sri Lanka' (OISL) released a report<sup>4</sup> in September 2015 and this was given a guarded

welcome by the TNA citing it as the 'best possible' consensual outcome. The report has both restorative and retributive justice elements and the TNA in an unprecedented move declared that it would encourage Tamils to do some soul-searching regarding their own wrongdoings and crimes committed in their name.<sup>5</sup> As Salter (2015) notes, "in their own way both pronouncements were firsts for the Tamil community, opening up new possibilities of inter-ethnic dialogue" (Salter 2015).

In this context, this paper examines the difficulty of pursuing the two diametrically opposed visions of TJ, envisioned by the Sinhalese and Tamils in Sri Lanka. It attempts to understand the failure of communication at both societal and political levels that has led to the Sinhalese and Tamil communities perceiving their predicament in totally different lights. As a result, the discussion about TJ in both communities has led to demands that reflect contradictory views of justice.

## TJ in Sri Lanka after the January 8<sup>th</sup> Election

The United Nations Human Rights Commission (UNHRC) Resolution 30/1 adopted in October 2015, which was co-sponsored by the Government of Sri Lanka (GoSL) and the United States of America, is an interesting and important landmark move by the GoSL. Contrary to earlier efforts to resist international discussion on what took place during the last stages of the war by the previous government, the new government was seen cooperating with international actors in bringing forth a solution to the country's problem.

The new government has pledged many a reform including the promotion of the Rule of Law, constitutional amendments, reconciliation attempts and, most importantly, steps towards TJ. The government's pledge for TJ comes as part of its programme aimed at good governance. While there is much hype about reforming corrupt institutions and establishing the Rule of Law (which clearly serve electoral purposes), this government like its predecessors, is very much silent on accountability issues. While the Rule of Law is a pressing and imminent concern, without accountability it does not promise to address the grievances of the Tamil community in any meaningful way. This is because at the core of the Tamil case for justice lies the need for government accountability in relation to how the war concluded.

As was pointed out previously, this government like its predecessors will be hesitant to invite the wrath of its Sinhalese voter base by responding positively to Tamil demands on accountability. However, it has already taken symbolic steps towards reconciling the two communities. For instance, singing the national anthem in Tamil is one such step that was repeatedly squashed by the previous regime of Rajapaksa. The cancellation of Victory Day celebrations on May 18<sup>th</sup> is another such step. However, the accountability issue that lies at the heart of Tamil demands for justice has still not been discussed as a desirable end by the government. Given the infancy of the new regime, it is still too early to expect it to pursue the establishment of a war crimes court where individual perpetrators of alleged war crimes will be tried. The top priority of the current regime therefore, as is shown by numerous steps it has taken so far, is the promotion of truth and justice by engaging in reconciliation-oriented restorative justice mechanisms.

With regard to the TJ mechanisms proposed by the new regime, three important suggestions stand out: Introducing a new Constitution with an emphasis on Fundamental Rights, establishing an Office of Missing Persons and a Consultation Task Force on Reconciliation Mechanisms.

The Subcommittee of the Constitutional Assembly on Fundamental Rights has now called for public proposals for the amendment of the Fundamental Rights chapter. The proposed Constitution will thus have a new Fundamental Rights chapter that will take into account proposals by actors in many a field including but not limited to judicial reforms, the content of the Constitution with regard to Fundamental Rights; what rights are fundamental; how those are enforced, and what remedies are due if such rights are breached. This is an important step within the larger debate of TJ where constitutionalism would come to play an important role in safeguarding the rights of citizens in general and minorities in particular. However, it is too early to comment on this move since it is still at a proposal stage and nothing can be said about its content. However, if executed prudently, this will be a major step in safeguarding the Rule of Law in the country and thereby protecting human rights, particularly minority rights. While the protection of minority rights does not bear any direct significance from a TJ perspective, given the history of oppression of minority rights in post-independence Sri Lanka, this will be a welcome first step in averting further ethnic hatred and its resultant animosity.

Legislation to set up an Office of Missing Persons was passed in the Sri Lankan parliament recently. Importantly, the Office will not have any temporal restrictions, which suggests having the mandate to investigate all disappearances committed during numerous regimes. It will also maintain a database of disappeared persons and shall have provisions for victim and witness protection as well as reparations for disappearances. Certificates of absence (for those who are not established dead beyond reasonable doubt) too shall be issued for the disappeared. This can act as an important office in achieving truth and justice once established. Probing into disappearances is an important step in establishing both

criminal liability and truth. If effectively implemented, this Office could be of great use for achieving the end of TJ in a post-war situation where building inter-ethnic trust is a major task, particularly in the context of Sri Lanka's history of war-related disappearances.

The Consultation Task Force on Reconciliation Mechanisms looks at a long-term solution to the ethnic question with reconciliation as its prime motive. The Task Force is committed to a multi-pronged approach to TJ and reconciliation and includes the Office of Missing Persons, a Reparations Policy, Hybrid Courts to investigate into allegations of war crimes, and a Truth and Reconciliation Commission. While these are all promising steps towards addressing grievances of war affected communities, it should also be noted that they are still at the proposal stage and are calling for proposals from numerous actors including government, non-governmental and civil society actors. There is much controversy regarding the proposed hybrid courts which the Tamil community does not fully endorse. Many in the community believe that domestic actors will invariably have a better say, which in their eyes would result in a decided pro-Sinhala slant to decisions taken by the court (Sivapalan 2015). Given the history of failed Commissions of Inquiry in the country, it is only natural for Tamils to doubt the efficacy of any domestic mechanism. In contrast, the Sinhalese grievance is about incorporating an international character to the courts, however minor they may be. Sinhalese treat any move that is international with much scepticism especially because the popular perception is that the international community is hand in glove with the pro-Tamil Diaspora to promote pro-LTTE sentiments. The proposed model of a Truth Commission is a welcome first step. However, truth alone as is emphasized by the Sinhalese will not serve any purpose in the absence of accountability for mass atrocities.

A noteworthy point here is that despite showing remarkable potential for addressing certain serious issues in a true spirit of reconciliation, there remains the question of implementation. As noted above, in Sri Lanka's heavily polarized society, the presence of a plethora of contending narratives especially among the two principal ethnic groups seems to point to irreconcilable interests regarding the national question. It is important to note the differing readings of the principal ethnic groups regarding the military phase of the conflict. For the Sinhalese, the LTTE's staunch demand for a separate state and disregard for any settlement that would amount to less than this goal made them the main obstacle to any meaningful process of negotiation. The ending of the war has always been of utmost importance to the Sinhalese since the common perception is that for three decades, the war was what prevented the country from progressing. Many Sinhalese also believe that the war engulfed the country in an all pervading fear for life and property. With regard to the military phase and ending of the conflict, the Tamil narrative is essentially negative mainly because many of the casualties occurred in the Tamil dominated areas i.e. the Northern and Eastern parts of the country. These notions in turn have resulted in a call for truth and criminal justice as envisioned by

the diametrically opposed Sinhalese and Tamil worldviews. The Herculean task any government that comes into power is saddled with is to strike a balance between these demands in a manner that would steer the country away from a relapse into violence.

Uyangoda presents a more nuanced argument regarding the dichotomy between the Sinhalese and Tamils, which he characterizes as “twin solitudes” (2012: 19). According to him ethnic solitudes continue to be reproduced preventing the two communities from engaging in any meaningful dialogue. Twin ethnic solitudes are thus the manner in which the national question is perceived by each community. These perceptions run parallel to each other offering no common ground for discussion and ultimately end in a blame game. In Sri Lanka, political life is primarily defined by ethnic politics mainly due to the three decades long war and the resultant polarization of society. As a result of the war, ethnicities now tend to view themselves as mutually exclusive political communities with divergent political aspirations. Therefore, the aspirations of one ethnic group are viewed inimically by the other and vice versa. As eloquently explained by Uyangoda (2012), such ethno-nationalist ideologies overpower democratic ideals thus tainting democratic aspirations and issues related to justice. Explaining this dichotomy, Uyangoda (2012: 22) states among other things that the “incapacity of the two dominant ethno-nationalisms in Sri Lanka to understand each other” renders reconciliation an impossible end to achieve. Economic and security overtones of the Sinhalese establishment and political undertones of the Tamil politicians as an answer to the national question are the visible manifestations of this ethno-national dichotomy. Uyangoda’s account ends by calling for a revision of the value framework that envisions a “shared political destiny” (2012: 31).

Against such a polarized backdrop, there arise numerous important questions applicable in the context of post-war Sri Lanka: In the absence of a will for a shared political destiny, how will TJ succeed in Sri Lanka? Is there any one mechanism that will be welcomed by both the Sinhalese and the Tamils? How can a government satisfy polarized groups in delivering justice? Will deliverance of such justice avoid a relapse to violence?

### Reflections on the TJ Dilemma in Sri Lanka

Within a context of lingering legacies, TJ mechanisms should be tactfully negotiated because the long-term aim of any such mechanism is preventing societies from relapsing into violence. Accountability for mass crimes can never be ‘overemphasized’. There cannot be democratic transition without addressing the question of accountability. However, if it is addressed in the immediate aftermath of the conflict where political and military leaders held in high regard are tried, chances are high that the society might relapse into violence.<sup>6</sup> What then should be done? Does this mean criminal justice is not a viable option?

The best way to handle such a situation according to much of the literature on TJ, would be to start off with restorative

justice mechanisms including and especially Truth Commissions.<sup>7</sup> Here, the truth of all victims, victors (if there are any) and perpetrators should be recorded and publicly presented. The ultimate aim of this body would be to arrive at a shared truth.<sup>8</sup> This truth would then form the basis for administration of all needed requirements and forms of justice. If these diverse narratives are not entertained, Sri Lanka will always remain a contested case with no proper justice administered. Postponing justice carries with it the danger of the truth being distorted or even vanishing particularly with the passage of time since Sri Lanka does not have the truth properly documented and has a history of failed commissions of inquiry and unpublished reports.

Once truth is established according to this literature, what should be done about it? This literature suggests that establishing the truth alone will not suffice for TJ to be meaningful. Given the sensitivity of the Sri Lankan situation, it would be desirable to have an open and inclusive process of truth seeking, which would result in the acceptance of legally binding instructions about how to proceed with the legacies of crime.<sup>9</sup> It should be noted here that a society’s moral inclination to seek redress of grievances in this way is also instrumental for the success of such an endeavour.

The above is the standard approach adopted by TJ literature. But in Sri Lanka, given the heavy polarization of society, is this workable? This paper by no means attempts to suggest a workable mechanism for TJ in Sri Lanka. It rather attempts to highlight the main obstacles in the path of TJ in the Sri Lankan society. As commonly discussed in TJ literature, Sri Lanka too needs a plethora of TJ mechanisms to address grievances. However, this plethora of mechanisms includes strands preferred and opposed by each respective community. As mentioned before, for Sinhalese truth is the preferred way, while criminal justice is not. For the Tamils, it is vice versa. Against such a backdrop and the underpinning political calculations, is a meaningful middle path possible? Given the current situation, “many things that appear to be compromises can turn out to be immensely problematic for one group or the other. Take the issue of investigations: to begin with, what’s the ‘compromise’ one has in mind here? Between the two ‘extremes’ of international investigation and no investigation, the compromise/middle path would be a domestic inquiry (or is it a hybrid?). Then again, if it’s domestic, it would be an absolute farce for the Tamils. If it’s genuinely hybrid, then it would be immensely problematic for the Sinhalese” (Senaratne 2016).<sup>10</sup>

### Conclusion

The Sri Lankan situation regarding TJ raises more questions than answers. The dilemma of pursuing two diametrically opposed views of TJ is the most pressing issue any government that comes into power has to deal with. While the need for the adoption of a multitude of approaches is very much felt, as explained before, the heavy polarization of society poses multiple questions as to how one can negotiate TJ in Sri Lanka. While the new government shows potential and willingness to engage in a meaningful TJ process,

it is still too early to comment on its ability to bring forth a workable solution. Such a solution would be premised on a recognition of the inter-dependent processes that can ensure that the national question is addressed, victims are compensated and perpetrators are brought to justice.

However, it would be naïve to expect that the Tamil community would be willing to move forward in the absence of any meaningful initiative to acknowledge and address their need for criminal justice. The question is – would this government be any different from its predecessors in terms of addressing the ethnic question? Would it risk the wrath of the majority voter base in the name of justice? If the answer is no, can it be expected of any government in Sri Lanka to deliver justice to part of the citizenry at the risk of losing popular endorsement? Given the track record of the Good Governance regime so far, it is unlikely that it would ‘shake things up’ to accommodate Tamil demands.

## Notes

1 Mahinda Rajapaksa also promised to deliver on this through the Lessons Learnt and Reconciliation Committee (LLRC). However, the extremist character of his regime that was mainly backed by Sinhalese Nationalist forces made minorities lose faith in his ability to deliver any good through the proposed mechanisms. The new regime on the other hand, is a coalition of many a faction including Tamils and Muslims and therefore, this regime’s promises look more “favourable” to TJ than the ones made by the previous administration.

2 Criminal justice or criminal prosecutions aims to punish the perpetrators of crimes. One standard consequence of a protracted violent conflict is a large number of agents involved in crimes. Crimes are typically the result of coordinated efforts of many individuals, groups, and organizations, from direct perpetrators to military and political leadership. Not all of them can be prosecuted, and this is why criminal justice involves a difficult problem of selecting those who will be brought to the court (Mendez 1997). But, even if selectivity in criminal justice is done in a legitimate way, more remains to be done. This is due to two broad considerations. First, responsibility goes beyond legally defined guilt: many contributed to wrongdoing in a manner that is not captured by criminal law. Second, the suffering of victims and harm they endured cannot be fully addressed by prosecution. This is why in most post-conflict situations TJ requires using additional mechanisms. The choice of such mechanisms depends on the character of conflict, the types of harm and suffering, and the character of the post-conflict situation.

3 See DeVotta (2016) and ‘Sinhala Opposition to Accountability for Tamil Suffering’ (2011).

4 See <http://tinyurl.com/hah83cw> for the full report.

5 See Jeyaraj (2015) for a detailed analysis of the UN report that exposed the LTTE’s brutality against Tamil civilians and Sampanthan’s change of stance regarding the Tamil narrative that dominates the TJ discourse.

6 Timing plays an important role in delivering criminal justice. Since the aim of any TJ mechanism is to ultimately reconcile warring factions and to end injustice, any mechanism adopted in the name of TJ should be tailored prudently so as to ensure the society is on the way to reconciliation. Mendez (1997 & 2008) discusses the importance of the timing factor with regard to criminal justice. He argues that it is prudent to postpone criminal justice given the sensitivity of each situation. However, this is by no means a hint that criminal justice should be dropped.

7 See Hayner (2010) for a comprehensive account of successes and failures of Truth Commissions along with their goals. Truth is an important component of TJ since it helps establish facts regarding a conflict. According to the International Center for Transitional Justice

... establishing the truth about what happened and who is responsible for serious crimes helps communities to understand the causes of past abuse and end it. Without accurate knowledge of past violations, it is difficult for a society to prevent them from happening again. The truth can assist in the healing process after traumatic events; restore personal dignity,

often after years of stigmatization; and safeguard against impunity and public denial. Establishing truth can initiate a process of reconciliation, as denial and silence can increase mistrust and social polarization. (eds. González & Varney 2013, p.4)

8 The idea of a shared truth is important in heavily polarized societies since a ‘shared truth’ contains elements of the truth held by all communities. While the objective of establishing such a truth is not pleasing all communities, at the end of the day by documenting the truth or facts regarding a conflict to the furthest possible extent. However, it is possible to arrive at a solution that can be accepted by many since a ‘shared truth’ will involve evidence regarding perpetrators and victims from all sides.

9 See *Truth Seeking: Elements of Creating an Effective Truth Commission* (eds. González & Varney 2013) for an account of the role of Truth commissions in establishing “social and historical contexts of violations” that help “establish moral or political responsibility” (pp.10-11). See Flory (2015) for the relationship between Truth Commissions and criminal justice and how they have come to complement each other over time rather than the commonly held misconception of them opposing each other.

10 Kalana Senaratne, personal communication, email, 13 May 2016.

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