

[Working Paper Series: Transitional Justice and Reconciliation in Asia – Part 1]

The Challenge of Transitional Justice in Sri Lanka

Paikiasothy Saravanamuttu (Centre for Policy Alternatives)

The end of the armed ethnic conflict in 2009 brought the issue of transitional justice to the forefront in Sri Lanka. Transitional justice has come to be seen as integral to reconciliation between communities on the grounds that the culture of impunity has to be reversed and the truth acknowledged.

The war ended with the military defeat of the Liberation Tigers for Tamil Eelam (LTTE) by the forces of the Government of Sri Lanka (GOSL). However, the government maintained as did most other stakeholders that the military victory over the LTTE had to be followed by a political settlement between the predominantly ethnic Sinhala government and the minority Tamil ethnic community. The previous attempt at a political settlement was ushered in following the Indo- Sri Lanka Accord in 1987, which also led to the stationing of Indian troops on Sri Lankan soil. The political settlement came with the Provincial Council Act of the same year which established a system of provincial devolution throughout the country and in the north and east, a merger of the two provinces until a referendum was held in the east to decide on the permanence of the merger. However, the referendum was never held – as the President was empowered to postpone it – and the powers of the provincial councils never fully devolved. In particular, land and police powers are yet to be devolved in any province. Subsequent legal action in the Supreme Court abolished the merger of the two provinces and in 2013 the first Provincial Council was elected in the Northern Province. The 5 -year term of the Council has ended, but new elections are yet to be held.

On the basis of the inadequacy of the devolutionary powers and the Centre’s control over finances, the argument of Tamil political parties has been for greater devolution and therefore sometimes termed as Thirteen Plus – the Thirteenth Amendment to the Constitution being the amendment introducing devolution. This demand has been raised in all attempts for constitutional reform and continues to be on the table in the current regime’s attempts at promulgating a new constitution.

Transitional justice for the alleged war crimes and crimes against humanity committed by both GOSL and LTTE forces are associated with the aforementioned political and constitutional demands. The allegations in this respect pertain to the bombing of self-proclaimed no-fire zones and hospitals during the last days of the war and the disappearance of thousands of civilians throughout the nearly three decades duration of it. The latter category of the “disappeared” includes those who surrendered to the armed forces at the end of the war.

Events

In October 2009, five months after the end of the war, in a joint communique issued by the Sri Lankan President Mahinda Rajapaksa and the UN Secretary-General Ban-ki Moon, Sri Lanka pledged to investigate the aforementioned allegations and to hold accountable those responsible. This did not happen and the UN Secretary-General established a Panel of Experts on Accountability in Sri Lanka headed by the Indonesian politician Marzuki Darusman and Yasmin Sooka and Stephen Rapp as members. The members of the panel were not allowed into Sri Lanka for investigations but published their report in March 2011 and found that there was evidence to further investigate alleged violations of war crimes and violations of international humanitarian law. This in turn led to the GOSL establishing the Lessons Learned and Reconciliation Commission (LLRC), which in its report of 2012, reported that war crimes or violations of international humanitarian law were not part of government policy but further stated that there could have been particular incidents which should be investigated. The failure of the government to launch further investigation brought about the U.S.-led resolution on Sri Lanka at the UN Human Rights Council in 2012 which was followed by two more resolutions. The 2014 resolution called on the Office of the UN High Commissioner for Human Rights to commission a report under its aegis to look into allegations of war crimes and violations of international human rights and humanitarian law. The report known as the OISL report was to be submitted to the Council in March 2015 but at the request of the new government in Colombo, was deferred to September 2015. The expectation of a robust mandate from the people in anticipation of the report was a factor in the Rajapaksa government's decision to call for a presidential election. The opposition too was not keen on the publication of the report during the general election, especially after their victory in the pre-election presidential polls.

The September 2015 session of the UNHRC marked a watershed in the process of transitional justice. The Foreign Minister of Sri Lanka, Mangala Samaraweera announced to the Council that the GOSL would establish four mechanisms for transitional justice. This included the Office of Missing Persons (OMP), the Office on Reparations, a Truth and Justice Mechanism, and an Accountability mechanism – all of which were incorporated into a resolution that Sri Lanka co-sponsored. There was immediate controversy regarding the accountability mechanism such as the participation of international actors, including judges and prosecutors.. Domestic criticism mounted on the grounds that this constituted a violation of Sri Lanka's sovereignty.

In response to this and the inadequacy of information in the public realm regarding transitional justice, the government set up a Consultative Task Force (CTF) in 2016 to ascertain public views on the four mechanisms introduced at Geneva. The CTF was an entirely civil society body in its composition and conducted hearings throughout the country through zonal task forces and through the format of focus group discussions and town hall-style meetings.

Despite initial suspicion and distrust that the CTF was yet another government body to seek public support and not much else, the response improved over time with the CTF receiving some 7,500 submissions. The 900-page Final Report of the CTF contained over forty-five recommendations and endorsed the view on the basis of opinions expressed by the public. An example of such a recommendation is that the Accountability

Mechanism should have at least one foreign judge on every panel or bench dealing with accountability and once trust in the judicial system is established for victims and survivors, this could be phased out. The government deemed the recommendations unacceptable and the recommendations have largely been unacknowledged.

Whilst the CTF was conducting its hearings, the government decided to go ahead and set up the Office of Missing Persons (OMP) 2016. There are some 22,000 case files of disappeared persons and in order for families to have access to funds and other resources, the government issued Certificates of Absence (COA). This, however, has not been welcomed by the families of the disappeared on the grounds that the COA could constitute acceptance that their loved ones are no longer on this earth. An additional concern with respect to the OMP is the appointment of individuals to the Office due to their past associations and record in previous positions. The Office of Reparations has also been established. However, the remaining mechanisms on accountability and truth and reconciliation are yet to be resolved.

The Mahinda Rajapaksa regime appeared to be interested in a Truth and Reconciliation Commission and looked to South Africa for assistance. The current president of South Africa, Cyril Ramaphosa, was appointed by then-President Zuma as his Special Envoy to Sri Lanka in 2014. The attraction of South African assistance was largely based on a misunderstanding of the South African experience and the belief that amnesty played a key role in it. Amnesty was posited as key to the process by the Sri Lankan regime, arguing that what was needed was restorative as opposed to punitive justice. In the South African case, amnesty was granted to 849 out of 7,112 applications after full confession and testimonies by perpetrators and victims. The South Africans for their part maintained that the TRC could not be cherry-picked from a series of recommendations for a political settlement and reconciliation.

The key mechanism that aroused the most amount of uproar and outrage was the accountability mechanism and the provision for the proactive participation of international judges and prosecutors. There is no legal impediment in the laws of Sri Lanka regarding this. Nonetheless, the objection to it was framed on the basis of the violation of national sovereignty and most importantly from a political standpoint that Sri Lanka could not agree to a process in which war heroes would be turned into war criminals. This was the work of traitors and on both sides of the political divide, protestations were made that no soldier would ever have to face war crimes proceedings. The Prime Minister pointed out that Sri Lanka was not a signatory to the Rome Statute that set up the International Criminal Court.

Once the government changed with the 2019 presidential election and the 2020 general election, which saw the return of the Rajapaksa family to power with Gotabaya Rajapaksa as president and a two-third majority in parliament, pressure continued with regard to the establishment of the remaining mechanisms, in particular, in the 2015 UNHRC resolution from local civil society and internationally. The unwillingness of the new government to go ahead with the implementation of the resolution but rather to defy it led to another UNHRC resolution in 2021 which called for the establishment of a Unit within the Office of the High Commissioner to collect and collate information on war crimes and crimes against humanity in Sri Lanka.

In order to hold their Sinhala Buddhist constituency together, the Rajapaksas have taken a hardline stance with respect to accountability and emblematic cases involving members of the armed forces have been dismissed. In one particular case, Sergeant Ratnayake was convicted by all courts for murder, including the

slashing of the throat of a five-year old child, only to be pardoned by the president. Memorialization is another issue in which the government has taken a hardline stance, disallowing memorialization of family members in the north on the grounds that it constitutes as glorification of the LTTE.

The fact that Sri Lanka has remained on the agenda of the UNHRC, informed by local civil society, has been the one motivating factor for the government to make move toward transitional justice. In the March 2022 sessions of the Council, the government claimed to have taken some measures in this regard. A key measure was that the Prevention of Terrorism Act of 43 years, first introduced as a temporary measure in 1979, was to be amended. Critics and other states in the Council pointed out that the proposed amendments do not go to the heart of the draconian legislation which allows for confessions and facilitates torture in obtaining confessions from victims. The Supreme Court of Sri Lanka, in response to a number of petitions filed against the amendments, has ruled that some amendments would require a two-thirds majority and some would require a referendum in the entire country to be made law. Other criticisms in Geneva have been of the increased militarization of the government and governance, the appointment of unsuitable individuals to the reconciliation mechanisms established, and hostility towards civil society.

In addition to the thirty-year war, transitional justice on the treatment of the Muslim community following the Easter Sunday bombings of 2019 should be focused on. The attack was made by Muslim extremists, killing over 250 persons in churches and hotels. However, it should be noted that violence against the Muslim community preceded the Easter Sunday atrocity. Under the presidency of Mahinda Rajapaksa in which his brother, the current president Gotabhaya was the Defense Secretary, Sinhala Buddhist violent hostility was unleashed against the Muslim community in a number of areas. These attacks and hate speech were spearheaded by Ven Gnanasara Thero, a Buddhist monk who now heads a Presidential Task Force for One Country; One Law. Gnanasara Thero was found guilty of contempt by the Court but was pardoned by President Sirisena. The issue of the hijab has also been raised by the current government on the grounds of security. The reform of the Muslim Marriages and Divorce Law, which allows for child marriages and polygamy, is being firmly resisted by the conservative elements within the community. Another issue in the context of the pandemic was the requirement that only cremation was permitted and that burial could take place only in one location in the east. This was in defiance of the local and international medical opinion but burial is now permitted throughout the country.

The Challenge

There are a number of reasons for the impediments to transitional justice in Sri Lanka. Some have already been mentioned, stemming from the Rajapaksa family, in particular, presenting themselves to the masses as the defenders of the Sinhala Buddhist nation who defeated the LTTE; forces seen as the most bloodthirsty terrorist group in the world causing three decades of damaging armed conflict. The Rajapaksa's political legitimacy is derived from the Buddhist clergy, or Sangha, and the security forces. Neither of these powerful groups in the Sri Lankan polity is willing to consider the possibility of accountability for war crimes. As far as they and the other Sinhala nationalists are concerned, war crimes are a fabrication by the remnant LTTE sympathizers and the West, who in turn are dependent on Tamil diaspora votes to stay in power in their own countries. There is also the

cultural issue of whether full confession will be possible in a society based more on shame than guilt. Societies where TRCs have been established have had a strong Christian influence with a focus on guilt.

Another argument made is that accountability will only rake up old wounds and be divisive when the overarching objective is to heal and reconcile. It is argued that accountability leads to punitive justice, whilst what is needed is restorative justice. The government instead favors focusing on economic development and is open to the charge that they believe that reconciliation can be best achieved through amnesia and the building of toilets. What the government fails, or indeed refuses, to accept is the simple demand of the families of the disappeared, for example, of what happened to their loved ones, especially when they were witnesses being taken in by the security forces. The demand is for the truth and the acknowledgment of the state. This was echoed in the consultations of the Consultation Task Force in 2016. Those who appeared before the Task Force made this point repeatedly as well as insisting on being included in the mechanisms for transitional justice. Furthermore, they requested that the mechanisms would not be Colombo-based or work in a language unfamiliar to them.

Sri Lankan demand confronts the barrier of impunity that has been erected over the years and cloaked in a notion of narrow patriotism and nationalism. This leaves the Human Rights Council in Geneva as the only forum in which arguments for transitional justice are taken seriously and, if possible, advanced in terms of implementation. In addition, the international community has issued travel bans on leading members of the security forces. However, a real movement has to take place in Sri Lanka with the majority opinion shifting out of the narrow nationalist paradigm to a realization of the importance of accountability for reconciliation and the pivotal role of reconciliation for national unity and prosperity. This in turn is being severely inhibited by the shrinking of space for civil society to function through intimidation by the security and intelligence services and the generally confrontational role of the current government towards civil society. ■

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- **Paikiasothy Saravanamuttu** is the founding Executive Director of the Centre for Policy Alternatives. He was the Secretary of the Consultation Task Force on Reconciliation Mechanisms and the first winner of the Citizens Peace Award presented by the National Peace Council of Sri Lanka. He was a founder of the Transparency International Sri Lanka Chapter and has been nominated for numerous peace awards. He is quoted widely in the local and international media on Sri Lanka.

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For inquiries:

Ha Eun Yoon, Research Associate

Tel. 82 2 2277 1683 (ext. 208) hyoon@eai.or.kr

The East Asia Institute
#909 Sampoong B/D, Eulji-ro 158, Jung-gu,
Seoul 04548, South Korea
Phone 82 2 2277 1683 Fax 82 2 2277 1697
Email eai@eai.or.kr Website www.eai.or.kr