

Walking on a Tight Rope: Sri Lanka's Fragile Transitional Justice Process

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Introduction

The Sri Lankan Transitional Justice (“TJ”) process, which commenced primarily at the end of the war in 2009, and then gained momentum after the change of administration in early 2015, is wrought with controversies. This is mainly caused by the inability to strike balances and reach compromises when and where necessary. The laws and institutions that were recently established in Sri Lanka² in response to rising demands for TJ appear to be mere white elephants which are struggling to address the mammoth remnants that have transcended temporal, geographical and political markers of the war.

The tug of war between the ‘joint opposition’ and the ‘unity government’ has created political instabilities and slowed the current administration’s attempts to introduce TJ. This has been rather unnerving for those who have been compelled to live without remedies for past violations for a prolonged period. The general public of Sri Lanka has therefore lost confidence in the TJ process. The international pressure that has been mounting and Sri Lanka’s laboring responses to TJ have only added to existing controversies by facilitating the fears of the masses that the hard won ‘sovereignty’ is now threatened by ‘international conspiracies’ that seek to affix criminal liability on prominent personnel. In this light, this paper seeks to assess Sri Lanka’s TJ process, striving to balance competing demands of democracy, accountability, peace, and justice.

Sri Lanka’s TJ Process

A state’s responsibility to provide redress to victims of violations associated with war or political instabilities cannot be unmoored from the constitutions and domestic legal frameworks of the states concerned. However, given the intensity of most violations associated with fraught political contexts, impunity seems to obscure paths to reconciliation and redress. This is evident in the numerous Sri Lankan attempts, which have proven incapable of bringing justice or accountability. Since the end of the war, Sri Lanka has released three main commission reports

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² See, e.g., Right to Information Act, No. 12 of 2016, http://www.documents.gov.lk/files/act/2016/8/12-2016_E.pdf (2016); Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act, No. 14 of 2016, http://www.documents.gov.lk/files/act/2016/8/14-2016_E.pdf (2016); Establishment of a Secretariat for Coordinating Reconciliation Mechanisms, Office of the Cabinet of Ministers - Sri Lanka, http://www.cabinetoffice.gov.lk/cab/index.php?option=com_content&view=article&id=16&Itemid=49&lang=en&dID=6459.

that are commonly referred to as the ‘Udalagama Commission Report’,³ the ‘LLRC Report’,⁴ and the ‘Paranagama Report’.⁵ These reports have now been complemented by the ‘CTF Report’.⁶ While all four reports address reconciliation to varying extents, only the Paranagama and CTF Reports, both of which were issued subsequent to the change of administration in 2015, make direct references to TJ. Among other things, these reports assess the nature of Sri Lanka’s obligation to prosecute international crimes. All of these reports and the contemporary changes that are being effected in the Sri Lankan legal framework are in line with the four core components of the TJ process: justice, reparations, truth, and institutional reform.⁷

Post-war Sri Lanka’s debate on TJ has mainly focused on how accountability could be achieved, thereby defeating impunity.⁸ Some have begun to erroneously identify accountability as solely emanating from criminal prosecutions and retributive penalties. The ‘Darusman Report’ condemned the Sri Lankan government’s choice of restorative justice⁹ on the above premise, contending that Truth and Reconciliation Commission (“TRC”) processes of many nations have been followed by criminal prosecutions and suggesting that penalties should mandatorily be retributive.¹⁰ This is erroneous in that restorative justice also comprises the imposition of penalties when dealing with past violations.¹¹ These penalties are however not restricted to retributivism and comprise community engagement and participation of stake holders in conflict resolution¹² thus, perhaps, enabling restorative justice to guarantee accountability more strongly.

Domestically established commissions such as the LLRC and the Paranagama Commission have sought to support a more flexible process for establishing accountability. For instance, the LLRC Report emphasizes that reconciliation cannot be achieved solely by punishment, although serious violations of human rights should be dealt with by “some mechanism of accountability”.¹³ While

³ REPORT OF THE PRESIDENTIAL COMMISSION OF INQUIRY APPOINTED TO INVESTIGATE AND INQUIRE INTO ALLEGED SERIOUS VIOLATIONS OF HUMAN RIGHTS ARISING SINCE 1ST AUGUST 2005 (2009). Unpublished report on file with author.

⁴ COMM’N OF INQUIRY ON LESSONS LEARNT AND RECONCILIATION, REPORT OF THE COMMISSION OF INQUIRY ON LESSONS LEARNT AND RECONCILIATION (2011), http://www.priu.gov.lk/news_update/Current_Affairs/ca201112/FINAL%20LLRC%20REPORT.pdf [hereinafter LLRC REPORT].

⁵ PRESIDENTIAL COMM’N OF INQUIRY INTO COMPLAINTS OF ABDUCTIONS AND DISAPPEARANCES, REPORT ON THE SECOND MANDATE OF THE PRESIDENTIAL COMMISSION OF INQUIRY INTO COMPLAINTS OF ABDUCTIONS AND DISAPPEARANCES (2015), http://media.wix.com/ugd/bd81c0_02a8e91c18ab47359763b405c2d9f89e.pdf [hereinafter PARANAGAMA REPORT].

⁶ CONSULTATION TASK FORCE ON RECONCILIATION MECHANISMS, FINAL REPORT OF THE CONSULTATION TASK FORCE ON RECONCILIATION MECHANISMS (2016), <http://www.scrm.gov.lk/documents-reports> [hereinafter CTF REPORT].

⁷ PARANAGAMA REPORT, *supra* note 5, at 137.

⁸ *See* Human Rights Council, Report of the OHCHR Investigation on Sri Lanka (OISL), U.N. Doc A/HRC/30/CRP.2, at 1–2 (2015) [hereinafter OISL Report].

⁹ Marzuki Darusman (Chair), et. al., Rep. of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka (2011), http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf [hereinafter Darusman Report].

¹⁰ *Id.* at 79

¹¹ *See* U.N. OFF. ON DRUGS AND CRIME, HANDBOOK ON RESTORATIVE JUSTICE PROGRAMMES: CRIMINAL JUSTICE HANDBOOK SERIES 6 (2006).

¹² *Id.*

¹³ LLRC REPORT, *supra* note 4, at 317.

recommending the adoption of a “spiritual form of accountability,”¹⁴ the LLRC emphasizes the State’s responsibility to ensure effective enjoyment of human rights by all communities.¹⁵ Commenting on similar issues, the Paranagama Report notes that the duty to prosecute has not become a customary international legal norm and that a wide range of options for dealing with past violations and achieving reconciliation have been adopted by States and international institutions.¹⁶ The report underscores that most treaty provisions also do not create a mandatory obligation of conducting criminal prosecutions.¹⁷ The seemingly mandatory criminal prosecutions advocated for by the Rome Statute of the International Criminal Court¹⁸ are inapplicable to Sri Lanka as it is not a party to the Rome Statute.

Even though it has been suggested that ‘victims’ require criminal prosecutions leading to retributive penalties, these suggestions have, however, not been substantiated with reference to empirical studies. Recent reports, such as the CTF report, indicate that there is a higher demand for knowing the truth than for criminal prosecutions.¹⁹ Moreover, the victim-centred approach that the Darusman Committee appears to be promoting is very much a part of the restorative justice project and Darusman Report’s negative comments on Sri Lanka’s choice of restorative justice appears to be based on a misguided approach to TJ.

In the absence of a customary international legal norm making criminal prosecutions mandatory, it is wrong to impose on Sri Lanka the mandatory duty to adopt criminal prosecutions to the detriment of reconciliation. Moreover, the reconciliation processes adopted previously by countries in transitional contexts have not necessarily granted focal centrality to criminal prosecutions.²⁰ This stance has also been accepted in the Belfast Guidelines on Amnesty and Accountability, which advocates for the replacement of criminal prosecutions by non-legal mechanisms of accountability.²¹

Peace, reconciliation, and security, as has been stipulated in the UN Charter, can override ‘justice’ in certain contexts.²² Given that the UN Charter had granted primacy to reconciliation over justice over a half century ago, it is questionable when exactly the contemporary human rights and democratization dialogue adopted a single tracked view of justice as being synonymous with retribution. Alternatively, justice would only have to be sacrificed if only one view of justice is accepted.

¹⁴ *Id.*

¹⁵ *Id.* at 155

¹⁶ PARANAGAMA REPORT, *supra* note 5, at xxvii.

¹⁷ *Id.*

¹⁸ Rome Statute of the International Criminal Court, Jul. 1, 2002, 37 ILM 1002, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

¹⁹ CTF Report, *supra* note 6, at 166.

²⁰ PARANAGAMA REPORT, *supra* note 5, at 137.

²¹ TRANSITIONAL JUSTICE INSTITUTE, BELFAST GUIDELINES ON AMNESTY AND ACCOUNTABILITY (2013), *available at* https://www.ulster.ac.uk/__data/assets/pdf_file/0005/57839/TheBelfastGuidelinesFINAL_000.pdf.

²² PARANAGAMA REPORT, *supra* note 5, at xxvii.

Paranagama Report contends that a “one size fits all” approach should be rejected, as “national assessments” should frame accountability mechanisms.²³ It notes that political authorities should determine whether a TRC with prosecutions, as in Sierra Leone, or without prosecutions, as in South Africa, should be adopted based on Sri Lanka’s post-conflict needs.²⁴ Irrespective of the mechanisms used for establishing accountability, there is undoubtedly an ‘urgent need’ for guaranteeing accountability as the intransigence and delay in doing so creates a greater likelihood for international pressure to demand criminal prosecutions which would be forced on the state along with potential trade and other sanctions.²⁵ However, these reports also note that the public has lost confidence in many of the domestic processes due to political interferences and lack of transparency.²⁶ Although the present administration of Sri Lanka appears to have adopted a favorable stance towards constitutional, institutional, and legislative reform, administrative and political will, transparency, and implementation mechanisms leave much to be desired.²⁷ Additionally, accountability should be sought from both state officials and non-state actors who have allegedly committed offences to prevent TJ mechanisms from being lopsided and ineffective.²⁸

Victims and TJ Mechanisms

The major points of contention in the Sri Lankan dialogue on human rights and democracy have arisen due to the lack of semantic clarity concerning human rights, democracy and TJ. Often, the discussions portray TJ as being premised on the victims’ need for retribution.²⁹ This approach is fundamentally flawed as it precludes the possibility of considering whether some of the alleged ‘perpetrators’ are in fact victims of circumstances who had been placed under duress with threats to life while being forced to commit crimes. The objective assessment of such practical realities is significant in uplifting democracy. This proposition finds support in the works of historians and legal scholars where it has been argued that an approach which denies amnesties to ‘perpetrators’ who have succumbed to pressure under trying circumstances, undermines the human rights process.³⁰

An inquiry into the definitional boundaries of ‘victims,’ could perhaps be rejected as a semantic debate. Nevertheless, if TJ is to cater to contextual requirements, clear definitions and categorizations should be adopted. The capacity to ensure the protection of rights, prevention of further victimization, and achievement of reconciliation is dependent on the availability or non-availability of specific definitions and categorizations.

Truth and Amnesty

²³ *Id* at 134

²⁴ *Id.* at xxvii, 155

²⁵ *Id.* at 3, 102; *see also*, LLRC REPORT, *supra* note 4, at 155; *see generally*, OISL Report *supra* note 8.

²⁶ *See* LLRC REPORT, *supra* note 4, at 162; OISL Report, *supra* note 8, at 233.

²⁷ LLRC REPORT, *supra* note 4, at 356.

²⁸ PARANAGAMA REPORT, *supra* note 5, 140.

²⁹ CTF REPORT, *supra* note 6, at 166.

³⁰ *See generally*, Samuel Moyn, *Anti-impunity as Deflection of Argument*, in ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA 15 (Karen Engle et al. eds., Cambridge University Press 2016).

The Paranagama Commission assesses whether the incorporation of amnesties would hinder the process of guaranteeing accountability and justice to victims.³¹ It notes that the legal landscape has radically changed since the South African TRC's admission of amnesties and the recognition that amnesties are no longer permissible for certain crimes.³² The CTF Report lists four common reasons that the proponents of amnesties cite: (1) the need to provide an incentive to participate in proceedings and reveal the whole truth, (2) to promote reconciliation, (3) victims' families wishing to pardon perpetrators, and (4) the belief that punishment and retributive justice could deter or prevent the occurrence of violations in the future.³³ However, the CTF Report has not considered the fact that some of the perpetrators may also be victims of circumstances who have to be dealt with within the human rights framework so as to not victimize them through a rigid application of law which leaves no room for the admission of any defenses so long as the offence does not constitute a grave breach of law. While one may correctly posit that amnesties should not be made available for grave breaches of human rights, it should be noted that there is no absolute prohibition against amnesties in the international law³⁴ and especially none that prevent the possibility of granting amnesties to those who may have acquiesced to committing certain offences under mitigatory circumstances.

Promoting TJ in Sri Lanka

Advocates of TJ in Sri Lanka should be mindful of the conflicts that may arise if rigid procedures untailed to the specific contexts of Sri Lanka are adopted. An 'imported' TJ mechanism, which has functioned successfully within a completely different context, may not meet the demands of Sri Lanka. Hence, it is essential to consider the specific issues that Sri Lanka is grappling with in relation to the political instabilities, semantic debates, and the debate on amnesties in using TJ for ensuring peace, reconciliation and accountability. This balance, though a delicate one, should nonetheless be struck!

³¹ PARANAGAMA REPORT, *supra* note 5, at 145.

³² *Id.* at 145.

³³ CTF REPORT, *supra* note 6, at 166.

³⁴ LOUISE MALLINDER, AMNESTY, HUMAN RIGHTS AND POLITICAL TRANSITIONS: BRIDGING THE PEACE AND JUSTICE DIVIDE 9 (2008); *see also* PARANAGAMA REPORT, *supra* note 5, at 145.