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Justice in divided societies: the role of competing narratives in Sri Lanka's transitional justice landscape¹

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This paper explores the contested nature of truth and memory in Sri Lanka's transitional justice debate. It delves into the predominant Sinhalese and Tamil narratives that present opposing demands for justice in the aftermath of the armed conflict. It maps how Sinhalese and Tamils have come to view criminal justice and truth commissions as mutually exclusive mechanisms based on their respective understandings on the history of the ethnic conflict and ending of the armed struggle. An exploration of competing narratives is important in search for appropriate mechanisms of transitional justice in the heavily polarised Sri Lankan society. The paper argues that truth should be established objectively to the furthest possible extent by exploring a multitude of existing narratives. It concludes that addressing these competing narratives is central to any meaningful process of transitional justice in Sri Lanka. The paper also proposes a combination of mechanisms of retributive and restorative justice. It emphasises the timing factor of criminal justice: given the sensitivity of the situation, it cannot be the first mechanism to apply, but should not be delayed for too long either. Most importantly, the paper calls for a societal reckoning with its criminal past by opening up one-sided ethno-national narratives.

Sri Lanka is an island nation off the southern coast of the Indian sub-continent, which is now emerging out of a three decades long corrosive conflict. Despite the ending of armed hostilities in May 2009, the country is still grappling with difficult legacies pertaining to the prolonged conflict. Specifically, at stake is the relationship between criminal justice,

¹ This article is drawn from the Master's thesis *Politics of truth: memory, transitional justice and victimhood in Sri Lanka* available at the Central European University's electronic repository (available online: <http://goya.ceu.hu/record=b1198585>, accessed 24 May 2017).

truth and democratic transition. In the aftermath of the armed conflict between the two principal ethnic groups in the country i.e. Sinhalese and Tamils, truth and justice appear as contested concepts. This is related to conflicting narratives about the past that follow both from what the two groups experienced during the conflict, as well as from their contemporary interpretations of this past.

This paper explores the workings of competing narratives among the two principal ethnic groups in the country i.e. the Sinhalese and Tamils and how they seem to render justice and reconciliation impossible ends to achieve. For the purpose of this paper, truth is understood as an objective perception of reality, while memory is understood as a special type of knowledge possessed by individuals and groups that mediates the past into the present and future. Thus, memory of the past may not necessarily correspond to what actually happened.

Being a qualitative study, this paper used both secondary and primary methods of data collection including books, journal articles, resolutions, reports and interviews. It progresses in four parts. First, it gives a brief account of the aftermath of the Sri Lankan armed conflict including the political dynamics that followed the conclusion of armed hostilities. Next, it presents the conceptual framework of the paper in that it discusses the ideas of memory, truth and their relationship to Transitional Justice. Thirdly, it focuses on the competing narratives of the two major ethnic groups of the country. Finally, it analyses the [im]possibility of transitional justice against a background of competing narratives in Sri Lanka.

After the conflict: changing political dynamics in Sri Lanka since May 2009

The three decades long armed conflict between the Government of Sri Lanka (GoSL) and the Liberation Tigers of Tamil Eelam (LTTE) witnessed many attempts at negotiations, all of which ultimately proved to be unsuccessful. However, in 2002 a Norway brokered Ceasefire Agreement (CFA) came into effect between the LTTE and the GoSL. These talks showed signs of failure in the following year. Nonetheless, due to the 2004 Indian Ocean Tsunami and the massive losses incurred by all parties to the conflict, the agreement, however fragile it was, was upheld by both the LTTE and the GoSL. In 2005, the LTTE once again attempted to provoke the GoSL by violating the truce and launching an offensive, with a view to winning the sympathy of the international community.² The Sri Lankan Monitoring Mission (SLMM) led by Norway reported over 4000 violations of the CFA that included targeted killings and other violence and intimidation against civilians between 1 February 2002 and 31 December 2006 ('Return to War: Human Rights Under Siege: II. Background' 2016). Most of it was committed by the LTTE.³ In 2006 the GoSL

² For a complete account of violence instigated by the LTTE during the ceasefire agreement between 2002-2005 see Høglund (2005). For violations committed by both parties see 'Return to War: Human Rights Under Siege: II. Background' (2016).

³ Ibid.

launched a major military offensive that ended in 2009 with the military defeat of the LTTE. The final phase of the war is blighted with controversy and many human rights organisations claim that it resulted in approximately 40000 deaths and over 280000 internally displaced persons.⁴

It is important to shed light on the changing political landscape of the country in order to understand the political dynamics that followed the ending of the war. In 2005, Ranil Wickramasinghe of the governing UNP lost the Presidential race to Mahinda Rajapaksa of SLFP who campaigned on an anti-LTTE platform, with the support of hardliner Sinhala nationalist groups (JVP, People's Liberation Front; JHU, National Heritage Party) (Bajoria 2009). The UNP was becoming increasingly unpopular due to its right-wing economic policies and its inability to curb the growing threat of the LTTE. With his electoral victory backed by nationalist elements, Mahinda Rajapaksa was able to launch an offensive in 2006 to uproot the LTTE.

Rajapaksa secured another sweeping electoral victory in 2010 after the conclusion of the armed struggle. The majority of his constituency comprised Sinhalese factions. However, the political compromise that was expected to accompany the conclusion of military activities never saw the light of day. Rajapaksa was becoming increasingly authoritarian. For minorities, the situation was even more daunting than for the Sinhalese. The culture of impunity, which was a salient feature of the Rajapaksa rule, coupled with violent mobs led by hardliner Buddhist monks, enforced disappearances, corruption and nepotism, all contributed to an increasingly violent attitude towards moderate Tamil demands for a political settlement.

Rajapaksa's electoral defeat at the January 2015 presidential elections bore testimony to the fact that minorities, particularly Tamils, were disappointed with the workings of his regime. Despite faring well in the South, he lost due to his poor performance in the North and East, in particular, and in minority dominated areas in other parts of the country:

Mahinda Rajapaksa was defeated at the last presidential election primarily because of his policy on the national question. Of course, all the other issues raised by the opposition might have contributed to Maithripala Sirisena's electoral victory. He put the so-called state security over every other issue, particularly over human security. (Liyanage 2015)⁵

The Tamil community was left feeling continuously victimised. In the last stages of the war, they suffered heavy losses of life and property. After the war ended, no serious efforts were made to consider their grievances and re-integrate them to the democratic

⁴ See 'Crisis in Sri Lanka' (2016).

⁵ While a mono-causal explanation does not sufficiently capture the causes behind Rajapaksa's electoral defeat (which Liyanage himself has acknowledged) Liyanage's article summarises the minority aspect of the defeat quite well. He points out clearly how Rajapaksa's inability to respond to the Tamil question affected voter turnout in the North and Eastern parts of the country. See Liyanage (2015).

process. Celebration of Victory days, excessive glorification of the military, construction of Sinhala-Buddhist monuments in Tamil areas coupled with heavy militarisation⁶ of the country's Northern Province led to further frustration among the Tamil community. This led to mistrust towards any bona-fide initiative of the government and Sinhala community.⁷

Rajapaksa's defeat in 2015 not only constituted the much awaited end of semi-authoritarianism, but also the beginning of a dual transition of the country i.e. from ethnic antagonism to peace, and from authoritarianism to democratic rule (Lecamwasam 2016). However, unless all parties to the conflict are satisfied with the outcome of a solution that would render peace sustainable, this transition would likely yield little fruit. Against this backdrop, the following sections briefly describe the concepts of memory, truth, and transitional justice, and outline how they matter in the Sri Lankan context.

Memory and truth in the context of transitional justice

Transitional justice is understood as 'the conception of justice associated with periods of political change, characterised by legal responses to confront the wrongdoings of repressive predecessor regimes' (Teitel 2003: 69). Depending on their nature, transitional justice mechanisms are either perpetrator - or victim-oriented. While the former includes retributive justice elements such as criminal trials, the latter focuses more on truth seeking and reparatory justice with compensations for victims.

The persistence and political relevance of legacies of the past cannot be undermined in any discussion concerning transitional justice. For the purposes of this paper, legacies are understood as elements of the past – actors, institutions, values, memories, attitudes - that in different ways remain present after the change of the regime. Despite efforts made at normalising society, legacies of past abuses and injustices will not easily disappear, as they tend to stay in the minds of people, threatening democratic normalisation.⁸ Especially in polarised societies, these remnants of the past can mean different things to different groups that until recently were engaged in violent conflict.

⁶ Militarisation of the Northern Province in the immediate aftermath of the armed conflict is a contested issue. While Tamils continuously rejected this action as one taken to intimidate the Tamil community, GoSL considered this to be an important step from a security perspective.

⁷ For instance, the rehabilitation programme launched by the government for ex-LTTE cadres, despite its many flaws, was commendable as an initiative taken to bring forth normalcy into the lives of these former combatants rather than punishing them. However, due to the government's unpopularity such actions too were viewed negatively by the Tamil community. For both compliments and critiques of the rehabilitation programme see 'Sri Lanka News | Ministry of Defence, Public Security, Law & Order' (2016), 'Sri Lanka's Rehabilitation of the Liberation Tigers of Tamil Eelam: A Programme of Physical and Mental Pacification' (2014) and Hettiarachchi (2013; 2015).

⁸ If wrongdoers are not punished and victims not compensated, these legacies will come to haunt societies and threaten a relapse in to the old order. See Domingo (2012) for the complexities encountered in tailoring transitional justice mechanisms that could deal with past legacies and Teitel (2006) for a detailed account on the connection between transitional justice and post-war legacies.

Many scholars have attempted to define the concept, types, and functions of memory.⁹ While there is no precise definition of the concept, it can be argued that memory in general entails recollections of the past. It is therefore a construction of the past according to our perceptions. Memory, therefore, is a particular type of knowledge, which preserves and (re-) evaluates the past, and which is focused on the integration of thus mediated past into the present. Typically, the knowledge thus appropriated serves to explain and justify our lives, and to help us make decisions and undertake actions the relevance of which extends into our future.¹⁰ Due to the changing nature of perceptions, memory too is not static and especially in the context of collective memory is largely determined by social interactions.

Pomian (2011) distinguishes between cognitive, emotional and existential types of memory. The dimensions are related to the past, present and future respectively. Cognitive dimension is the 'faithful reproduction' (Pomian 2011) of past events. The emotional dimension is the revival of emotions born out of such events. On the existential dimension, he says: 'what differs remembered events from these that are being currently perceived or experienced in other ways is the fact that they are related to the subject that remembers them in a specific way' (Pomian 2011). Due to this inherent subjective nature of memory, it not only changes from person to person, and group to group but also changes overtime. Also, despite being socially influenced, once created, memory has a telling impact on an individual.¹¹

While memory can be both individual and collective, this paper concentrates on the latter. Commenting on collective memory, Olick (2008: 7) drawing from Halbwachs, states that 'studying memory is not a matter of reflecting on the properties of the subjective mind; rather, memory is a matter of how minds work together in society, how their operations are structured by social arrangements.' Halbwachs' argument in this context is interesting. He argues that groups of people thus acquire their memories socially and that it is impossible for the group membership to 'remember coherently outside their group context' (Halbwachs as quoted in Olick 2008: 7). This production at times helps in producing memories not directly experienced by the membership.¹²

Poole (2008), commenting on the relationship between memory, history and claims of the past, argues that apart from transmitting information from past to present, memory

⁹ For a clearer understanding of the concept and detailed accounts of memory's role in political change, reconciliation and transitional justice see Blustein (2008), Assmann and Shortt (2012), Norval (1998) and Bevernage (2012).

¹⁰ "Memory" labels a diverse set of cognitive capacities by which we retain information and reconstruct past experiences, usually for present purposes. Memory is one of the most important ways by which our histories animate our current actions and experiences.' - Sutton (2016).

¹¹ This is essentially important since the impact collective memory has on individual agency is what ultimately helps memory sustain and garner support for group projects. Unless individually felt, such support cannot be generated.

¹² Take for instance the case of second generation Diaspora Tamils who are fiercely committed to the cause of Tamil Eelam despite not experiencing injustices first hand.

also serves the function of transmitting responsibilities. Therefore, the claims made about the past based on a particular memory, inform the 'the present generation of its responsibilities to the past' (Poole2008: 149). But, group members not only have to carry the burden of shared responsibilities – they also become beneficiaries of the group-specific goods. This is the process of the formulation of shared identity:

accepting these responsibilities provides entry into a form of life that is richer, deeper and more interesting than its alternative. It is because I have the kind of consciousness that places me in the past and also in the future, that a certain range of emotions and commitments become possible; I can have deeper and more satisfying relations with others than is possible for a being who does not have that kind of consciousness. But a price for entry into this form of life is that one acquires the burden of the past, responsibilities that remain in the present. So too with collective identity and its associated memories. These provide the individual with access to emotions and powers that are not otherwise available. (Poole 2008: 162-3)

Truth is typically thought to be as a representation of reality. However, it is also important to understand that a certain amount of subjectivity cannot be avoided in any form of truth since the knowledge we derive through observations is subject to judgment by our sensory faculties. Sachs (2002) discusses four types of truth that can be important in the quest for transitional justice: microscopic truth, logical truth, experiential truth and dialogical truth. Microscopic truth is a more focused version of truth that excludes all variables except those which should be investigated thus narrowing down the focus while logical truth implies truth inferred logically by diverse mechanisms and processes. It is therefore, the end result of a logical inferential process. Experiential truth on the other hand is different from the above discussed types of truth and concerns in a way memory. Experiential truth is '... the understanding gained from being inside and part of a phenomenon' (Sachs 2002: 53). Since experiences differ from one person to another, the understanding too can differ. But the truth value lies in the objective realm of the experience in which only facts are taken into consideration rather than the subjectivities. For instance, despite denial on the German side during the Second World War, the Holocaust in fact happened. The experiential truth here is the occurrence of the Holocaust, rather than its differing subjective and group-specific perceptions. Finally, dialogical truth refers to truth that emerges out of the communication among people. It provides space for conversation in which diverse narratives can be recognised and discussed. While disagreements are part and parcel of life, a post-conflict dialogue would aim at reaching a minimum common understanding of what happened in the recent past. The claim is that without moderation that would bring competing narratives to a compromise, the society would remain bitterly divided, and peace and stability would remain highly volatile.

Truth is one of the four pillars of transitional justice and helps understand the underlying causes of serious human rights violations and is established as a right as per

legal conventions. Under International Humanitarian Law, victims of past atrocities and abuses have a right to truth i.e. to know what happened, why it happened, and who the perpetrators of crimes were.¹³ This right is an integral part of the remedial process. 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. ('Chapter 1. The Right to the Truth' 2013: 4)

Truth commission is the best-known non-judicial mechanism of truth seeking. Depending on the context, it can either complement criminal justice, or it can be established as an alternative to criminal justice. Hayner (2010: 20) outlines goals of a truth commission in the following manner:

to discover, clarify, and formally acknowledge past abuses; to address the needs of victims; to 'counter impunity' and advance individual accountability; to outline institutional responsibility and recommend reforms; and to promote reconciliation and reduce conflict over the past.

Truth commissions thus establish 'social and historical contexts of violations' and help 'establish moral or political responsibility' ('Truth Seeking: Elements of Creating an Effective Truth Commission' 2013: 10-11).

The relationship between memory, truth and transitional justice

The above analysis outlines the main difference between truth and memory. Unlike memory, truth does not rely on interpretative values, attitudes, and the intergenerational transfer of shared meanings. It focuses on the questions of what happened, who did it, why and how, and what kind of consequences that action produced. However, in a post-conflict context, the two categories remain closely related. The impact of memory on truth is tremendous. Brants and Klep (2013) examine the relationship between history-telling, collective memory and victim-witness in the context of transitional justice. They state that if 'the legal space that truth commissions offer for history-telling is more flexible and their report open to public debate, they may open up alternative public spaces and

¹³ See e.g. 'Promotion and Protection of Human Rights. Study on the Right to the Truth' (2006).

enable civil society to contest the master narrative'¹⁴ (Brants and Klep 2013: 37). They observe that after mass atrocities both criminal justice and truth seeking revolve around collective memory. Criminal justice is focused on the truth about perpetrators' actions, while truth commissions are largely focused on reconstructing the oppressed narrative of victims. Both mechanisms assist in the promotion of the 'development of a collective memory' (Brants and Klep 2013: 37) by publicly establishing the truth. Brants and Klep (2013: 38) further state:

Transitional justice can be understood as a mediator between different collective memories. Moreover ... this mediator embodies the voice of (legal) authority. The version of past events that courts and truth commissions produce in their verdicts and reports is an authoritative claim of truth.

Since their concern is arguing for truth commissions, the paper is more tilted towards the merits of truth commissions. However, a noteworthy point is it reinforces the importance of victim-oriented paradigms of transitional justice in the establishment of a shared moral memory (Brants and Klep 2013) that will serve as a reminder of past atrocities so as not to return to them.

*Competing narratives in Sri Lanka*¹⁵

In a world of competing narratives, truth is the first casualty. As Grassie (2012) aptly puts it:

We find ourselves in an entangled and sometimes toxic web of ideologies, religions, nationalisms and ethnicities. We generally resolve this cognitive dissonance by doubling-down on our own prejudices in opposition to those with whom we disagree. We tend to pathologize and demonize the other. We frame these conflicts as zero-sum and negative-sum competitions.

This holds true to the Sri Lankan conflict and the polarised mindset of the respective communities. The Sinhalese feel victimised as a result of colonial rule and Tamils as a result of post-colonial politics. For the Sinhalese the special privileges enjoyed by educated Tamils during colonial times, particularly at the cost of what they perceived as their 'chances', was a cause for concern and a justification for the creation of an ethnic majoritarian democracy after independence. Sinhalese nationalism was justified with reference to injustices Sinhalese suffered at the hands of the colonial powers. For the

¹⁴ This master narrative and contestations in that regard are important in the Sri Lankan context since the master narrative of the Sinhalese is what gave rise to the alternative narrative of the Tamils. Therefore, in any transitional justice mechanism proposed, both these narratives should be considered.

¹⁵ The narratives presented are a generalisation and over simplification and do not reflect the stances held by each community. These are a mere summary of the predominant narratives so as to give an understanding of the issue.

Tamils, exclusion from sharing state power in post-colonial Sri Lanka, and ultimately state sponsored pogroms against their community, were fuel for their hatred towards the Sinhalese. The prevalence of such legacies became the basis of the culture of self-victimisation for both communities, leading also to the portrayal of the 'other' as the enemy.

It can be established that these legacies are most often a matter of interpretation and the product of political manipulation, especially at the hands of politicians who try to emphasise and strengthen notions of victimhood to garner greater electoral support. In Sri Lanka, such divergent interpretations of the legacies of conflict gave rise to a culture of impunity, mainly because the dominant attitude within each group was the refusal to accept that their members committed any wrong. This contestation makes it problematic for transitional justice mechanisms to satisfy all communities concerned. Therefore, a complete road map cannot be presented to overcome past abuses. What then is required is to strike a balance between these competing narratives, which would provide incentives for both sides to 'open up' their own perspective, and gradually come to realise that the 'others' suffered as well. This appears to be the only way to bring perpetrators before the law and to address injustices and redress grievances of victims.

In Sri Lanka '... the two communities operate largely on very different foundational understandings about the conflict, its military phase, the importance of its end, etc.' (Senaratne 2016).¹⁶ However, there are certain truths that all communities should acknowledge and come to terms with, in the name of reconciliation.¹⁷ For instance, the fact that grave atrocities occurred during the last phase of the war and the LTTE is responsible for equally grave atrocities that were committed in the name of Tamils are some such objective truths that the Sri Lankan society should come to terms with.

The Sinhalese and Tamil ethnicised understandings of the past have heavily influenced their perceptions regarding the [il]legitimacy of the war fought in 2009. For the Sinhalese, it was a legitimate war fought by the GoSL against the LTTE which was considered the main obstacle for any meaningful process of negotiation due to their uncompromising demand for a separate state. Therefore the ending of the war was the culmination of the collective Sinhalese fantasy: It spelt civic and economic progress after three harrowing decades of peril. The Tamil narrative in this regard is quite the opposite: the war was a legitimate battle fought against the oppression of a disadvantaged minority, and the manner in which it concluded as well as the lack of inclination to pursue a political settlement are politically wrong and morally questionable at best.

¹⁶ Kalana Senaratne, Personal Communication, Email, 13 May 2016.

¹⁷ Reconciliation is again a term with no precise definition. Put simply it could be considered as restoration of friendly relations. However, in polarised societies this is not an easy task since it entails legal, cultural, political and social restoration of good will. It involves healing, repairing and transforming. For reconciliation to be meaningful therefore, truth has to be known and acknowledged. This may later be followed either by punishment, forgiveness or both. See Hogg (2011) for a detailed report on Sri Lanka's prospects for reconciliation.

Tamils have numerous grievances related to the final phase of the war: government forces allegedly committing war crimes, heavy post-war militarisation of the Northern Province, lack of interest of the regime to investigate disappearances, denial of the existence of ethnic grievances by equating the absence of war to peace, and -most of all -blaming the alleged war crimes only on the LTTE. For instance, May 18, when the military defeat of the LTTE marked an official end to armed hostilities, is a day of victory for the Sinhalese and a day of mourning for the Tamils.

For the Sinhalese, any resolution passed at United Nations Human Rights Council (UNHRC)¹⁸ against the GoSL constitutes an international conspiracy fuelled by Diaspora Tamils to defame the hard-fought war. Government media also heavily influence this attitude. For example, the government rehabilitation programme is dubbed very successful, but it has serious issues in terms of ensuring personal security of the rehabilitated and generating jobs for them. The Tamils accordingly have a favourable disposition towards the international human rights framework, albeit with reservations about its capacity to protect them.

Additionally, the Sinhalese consider economic development as adequate, and appear quite insensitive to the political aspirations of the Tamil community. This insensitivity partly owes to the overwhelming Tamil presence in neighbouring India, a factor that makes the numerically much smaller Sinhalese very nervous. The result of all this thinking is that militarisation is considered a non-negotiable prerequisite of national security.

These divisions are reflected in the election results of August 2015, where the Tamil dominated North and East almost unanimously voted for the Tamil National Alliance (TNA), and the South for major Sinhala parties. As Senaratne (2016) points out:

It is difficult to gauge the extent to which victimhood is 'real' and 'constructed'... victimhood arises from the knowledge of one being subject to some form of discrimination and injustice. Thus, there is more of the 'real' in those who directly experience some form of injustice, and less of the 'real' in those who have not experienced such injustice ... So the element of the 'real' and the 'constructed' would come in different dimensions in different people who claim victimhood ... victimhood is, like much else, a feeling; and to separate how much of that feeling is 'real' and how much is 'constructed' is impossible. It soon becomes something that defines and shapes you and your place in the world. Over time, it could even turn into an identity which you feel reluctant to abandon. And in conflicts, no one is not a victim;

¹⁸ Three resolutions were passed against Sri Lanka in 2012 (A/HRC/RES/19/2), 2013 (A/HRC/RES/22/1) and 2014 (A/HRC/RES/25/1). The resolutions urged GoSL to implement Lessons Learnt and Reconciliation Commission's (LLRC) recommendations and to probe into human rights violations and alleged war crimes committed during the final phases of the war in 2009. LLRC is a commission appointed by the ex- Sri Lankan president Mahinda Rajapaksa to look into abuses committed during Sri Lanka's three decades long war and to give recommendations to avoid a relapse of same. In 2015 and 2017, with the change of regime UNHRC adopted two consensus resolutions (A/HRC/RES/30/1 and A/HRC/34/L.1) supported by the Sri Lankan establishment.

which is why in Sri Lanka, 'victimhood' is a feeling shared by all the main ethnic communities. It is only the source of that victimhood which may be different.

Such competing narratives form an intrinsic part of the transitional justice debate and should be carefully negotiated.

Transitional justice and competing narratives in Sri Lanka

In the following section this paper introduces the need for transitional justice and discusses what its various dimensions could be. It will take into account the relevance of competing narratives and the importance of incorporating them in investigating the truth related to the conflict so as to come to terms with the past and move forward.

Why Transitional Justice?

Transitional Justice, or the 'legal and administrative process carried out after a political transition, for the purpose of addressing the wrongdoings of the previous regime' (Elster 2003: 1), requires the new regime to 'decide what counts as wrongdoings and how to sanction the wrongdoers, and also to decide what counts as suffering caused by these wrongdoings and how to compensate the victims' (Elster 2003: 1). According to the International Center for Transitional Justice (ICTJ) 'Transitional justice is... an approach to achieving justice in times of transition from conflict and/or state repression. By trying to achieve accountability and redressing victims, transitional justice provides recognition of the rights of victims, promotes civic trust and strengthens the democratic rule of law' (ICTJ 2011). Transitional justice policy can involve the use of different mechanisms: criminal prosecutions, lustration, reparations, truth seeking, and various institutional reforms (ICTJ 2011).

An inevitable complexity of criminal prosecution is the large number of agents involved in crimes to be dealt with. These agents also typically include military and political leadership, not all of whom can be prosecuted (Lecamwasam 2016). Criminal justice, therefore, concerns the difficult problem of selecting those who will be brought to the court (Mendez 1997). However carefully and 'legitimately' done, this process still leaves two issues unaddressed; first, responsibility sometimes falls beyond the purview of law, where wrongdoings occur in a manner that is not captured by criminal law. Secondly, victims cannot be fully compensated in relation to what they have endured as a consequence of the conflict. Hence transitional justice needs to be supplemented with additional mechanisms that are determined by the character of conflict, the types of harm and suffering, and the character of the post-conflict situation (Lecamwasam 2016). While the next section will deliberate on the choice of such mechanisms, this section will only identify them.

Lustration refers to a form of institutional purging whereby officials of the regime that perpetrated crimes are held accountable for past misdeeds (David 2011). Reparations are

initiatives undertaken by governments to compensate victims. These include both material and symbolic aspects with material being provided in the form of money or services, while symbolic compensation constitutes of special commemorative events/days for the acknowledgement of suffering caused due to the repression of the regime in question (Vandeginste 2003). The most important mechanism of truth seeking is truth commissions. These bodies aim to investigate and report human rights abuses and causes underlying such abuses. Their goal is to both understand a situation and make available the truth to society at large so as not to repeat past mistakes (Hayner 2010). Institutional reforms form a core element of structural adjustments aimed at dismantling unjust institutions, or purging democratic institutions from those responsible for crimes.

If different mechanisms are used in concert, we talk about a holistic approach to transitional justice. Today, it is accepted that this combination of mechanisms is essential for a transition to democracy, especially when dealing with the complexities of a post-conflict society.

After two decades of practice, experience suggests that to be effective transitional justice should include several measures that complement one another. For no single measure is as effective on its own as when combined with the others. Without any truth-telling or reparation efforts, for example, punishing a small number of perpetrators can be viewed as a form of political revenge. Truth-telling, in isolation from efforts to punish abusers and to make institutional reforms, can be viewed as nothing more than words. Reparations that are not linked to prosecutions or truth-telling may be perceived as 'blood money'—an attempt to buy the silence or acquiescence of victims. Similarly, reforming institutions without any attempt to satisfy victims' legitimate expectations of justice, truth and reparation is not only ineffective from the standpoint of accountability, but unlikely to succeed in its own terms. ('What is Transitional Justice?' 2009)

Sri Lanka: choosing appropriate mechanisms of transitional justice

For societies emerging out of violent conflicts, coming to terms with the aftermath of mass violence and genocide poses an array of complex issues including but not limited to justice, reconciliation and institutional reforms. These processes are inherently political and especially in the case of internal conflicts, are handicapped by conflicting interests of the parties involved. Especially after internal ethnic conflicts, irrespective of what ethnic group one belongs to, people on both sides likely feel they have been wronged. In such post-conflict societies, a culture of denial regarding abusive state actions often continues to shape the everyday lives of citizens. However, victims of state violence expect some sort of redress for the past crimes committed and constantly live with the hope that past wrongs will be acknowledged and punished, for emotional closure as well as the need to avoid repetition of same.

Transitional justice mechanisms addressing acts of mass violence committed during internal conflicts should therefore be aimed at unearthing multiple truths, ensuring the dignity of victims, striking a delicate balance between all parties involved, ensuring the stability of the newly established democracy and most importantly bringing forth truth

and justice for the victims (Bloomfield 2003). Accountability mechanisms designed to meet these ends must be holistic and should be well coordinated.

While it may be easier to decide on these mechanisms for cases that witness a profound political transition, in certain internal conflicts it is otherwise. In such cases, accountability mechanisms should be designed with caution so as to both bring justice to victims and to ensure long term peace. A mix of approaches is especially needed for two types of cases where a transition to democracy happens either after an internal conflict or while the conflict is still going on. The first type is when a democratic change happens while the majority sentiment is against the implementation of transitional justice mechanisms, and there is a culture of denial owing to ethnic/religious/sectarian affiliations of the populace (Budak 2015). The second type is when a transition occurs while the conflict is still going on and therefore democracy is not properly established even though certain democratic principles are being adhered to (Budak 2015). More often in such cases one notices a transition more to non-violence than to democracy, and such cases are characterised by the lack of substantive democracy and therefore can be termed a 'conflicted democracy' (Budak 2015).

Sri Lanka falls under the second category. Despite the ending of armed hostilities, the ethnic conflict is still on. Mistrust, hatred and denial of crimes committed in the name of one's ethnicity, all of which characterised the conflict, are still intact. Many actors, including the United Nations, GoSL, TNA, Diaspora and civil society organisations made recommendations for a robust transitional justice mechanism in Sri Lanka¹⁹ ranging from prosecutions to truth seeking mechanisms and from institutional reforms to reparations.

The competing narratives accommodated by the Sinhalese and Tamils regarding the ending of the war have come to dominate the transitional justice discourse of Sri Lanka. While the predominant Tamil demand is for accountability related to an array of issues regarding the final phase of the war, Sinhalese voices demand a transitional justice framework based on truth seeking and restorative justice.²⁰ Their argument is that the armed forces cannot and should not be punished for any action they took to rid the country of terrorism.

GoSL's track record with regards to its commitment to transitional justice has witnessed numerous shifts which are essentially connected to regime changes in the island. There was a culture of impunity during President Mahinda Rajapaksa's decade long rule (2005-2015), which resulted in a complete stall of the transitional justice process of the country. A very notable obstacle to transitional justice was the regime's unwillingness to establish independent commissions of inquiry due to the possible risk

¹⁹ See 'Report of The Commission of Inquiry on Lessons Learnt and Reconciliation' (2011), 'Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka' (2011), 'Response to the Lessons Learnt and Reconciliation Commission Report- Tamil National Alliance' (2012) and 'Transitional Justice in Sri Lanka and Ways Forward' (2015).

²⁰ See Peiris (2010).

of antagonising the Sinhalese masses who did not want the issue of war crimes probed. However, due to mounting international pressure, a local commission by the name of Lessons Learnt and Reconciliation Commission (LLRC)²¹, was established in May 2010 by the government. Its members included renowned legal personalities and other bureaucrats, and it was mandated to 'draw lessons, and make recommendations based on an analysis of the course of the conflict and its causes with a view to redressing grievance' (Wickramasinghe 2011). The extent to which these recommendations have been implemented remains a hugely contentious issue.

The Centre for Policy Alternatives (CPA) in one of its most recent reports notes the repercussions this culture of impunity created by the Rajapaksa regime has for transitional justice. Among other things it attaches special importance to the regime's inability to implement recommendations of the LLRC.

The failure to fully implement the recommendations of the commission... resulted in a missed opportunity to thoroughly and independently investigate alleged violations of IHRL and IHL and to address issues of truth and justice sought by victims, affected communities and Sri Lankan Civil Society organizations ... (UNHRC) was also unable to secure the cooperation of the Rajapaksa government to establish an independent international investigation. Without a credible investigation into accountability for crimes committed by all sides at the end of the civil war, an understanding of the nature of the violations has not been achieved and, as a result, the possibility of recurrent conflict remained in January 2015 when President Maithripala Sirisena took office as Sri Lanka's sixth executive president. ('Transitional Justice in Sri Lanka and Ways Forward' 2015: 7)

Apart from the failure of the LLRC, the report also points out the failure of criminal justice, a factor that has contributed towards growing mistrust of Tamil politicians, in particular, and Tamils in general, towards the Sinhalese establishment.

With the election of Maithripala Sirisena in January 2015, through a faction comprising most of the country's mainstream political parties, there seems to be renewed hope for transitional justice in light of the new regime's pledge to further reconciliation and accountability. It has promised to pursue accountability through a domestic process

²¹ LLRC was setup as an alternative domestic mechanism to an international investigation and was a body of independent experts drawn from the bureaucracy and the legal fraternity. It was criticised by many since there was no balanced representation of sides to the conflict and the alleged impartiality of certain members of the Commission to the government (See 'When Will They Get Justice? Failures of Sri Lanka's Lessons Learnt and Reconciliation Commission' 2011). The Commission was tasked with inquiring into matters related to the ethnic conflict between 21/2/2002 (signing of the CFA) and 19/5/2009 (ending of the war) (See 'Report of The Commission of Inquiry on Lessons Learnt and Reconciliation' 2011). In its report it presented a detailed analysis of the root causes of the conflict, atrocities committed by the LTTE and made recommendations related to good governance and reconciliation. However, it was criticised for its alleged biases with regard to the issue of the final phases of the war where the Commission was accused of being 'vague' and silent on the government's conduct (See 'Release of the Lessons Learnt and Reconciliation Commission (LLRC) Report' 2012).

‘within the country’s legal framework’ (‘UNFGG, UPFA, JVP & TNA Manifestos: Parliamentary Elections 2015’ 2015: 6). The government’s promise revolves around a vaguely described ‘domestic mechanism’, coined obviously to avoid risking majority Sinhalese votes that would be lost to them if they campaigned for the much despised alternative of an international probe that would be used against the Sri Lankan armed forces who are heroes for the Sinhalese.²²

On the other hand, the TNA is emerging as more receptive to the prospect of softening its stance on transitional justice, as evidenced by their guarded welcome of the report released by the UN ‘OHCHR Investigation on Sri Lanka’ (OISL)²³ which was assessed as the ‘best possible’ consensual outcome (Lecamwasam 2016). The TNA quite unexpectedly declared that the restorative and retributive justice elements of the report would encourage Tamils to do some soul-searching of their own.²⁴ ‘In their own way both pronouncements were firsts for the Tamil community, opening up new possibilities of inter-ethnic dialogue’ (Salter 2015 as quoted in Lecamwasam 2016: 14).

While the importance of accountability cannot be overemphasised (Lecamwasam 2016), if the question is taken up in the immediate aftermath of the conflict where political and military leaders are held in high regard, there is a high risk of a relapse into violence. What then should be done? Does this mean criminal justice is not possible?

A feasible means of realising meaningful reconciliation is to ‘ease into’ the process by starting off with restorative justice mechanisms including especially Truth Commissions. The accounts of all victims and victors (if any) would be recorded and publicly presented, serving to arrive at a shared truth. Justice may then be administered based on these records. This process would only be meaningful with the acceptance of legally binding instructions about how to proceed with the legacies of crime. A society’s moral inclination to embark on this kind of journey is also crucial for the sustenance and success of such an endeavour (Lecamwasam 2016). As Dimitrijevic (2006) points out

moral responsibility is understood as a special type of relationship among the members of the group in whose name the crime was committed. Its principal point should not be condemnation, ascription of guilt, paving the way for official apologies, nor even reconciliation. It should instead be understood as the reconstruction of the motivational patterns of behaviour that in the recent past led to a massive violation of human rights and universal moral values. The evil past must be subject to moral reflection by all individuals belonging to the nation, because this past was decisively stamped by moral corruption, by the loss of the capacity to distinguish between good and evil.

²² See DeVotta (2016) and ‘Sinhala Opposition to Accountability for Tamil Suffering’ (2011).

²³ See <http://tinyurl.com/hah83cw> for the full report.

²⁴ See Jeyaraj (2015) for an analysis of the UN report which comprised accounts of the LTTE’s brutality unleashed on Tamil civilians and Sampanthan’s change of stance regarding the Tamil narrative.

A change of the collective mind-set is pivotal to the success of any transitional justice mechanism since the polarised mind-sets of the communities and the resultant political game geared towards electoral victories²⁵ has, and continues to be, the main obstacle in the path to reconciliation in Sri Lanka. As a next step, after the establishment of truth, criminal justice can be carried out because it is of utmost importance to bring perpetrators to justice. It not only sends out a warning to those who intend committing similar crimes in future but also is a reflection of a group's morality in general. As Dimitrijevic (2006) notes:

It is our duty to address the victims and their community. In doing so, we publicly admit and accept a fact which we privately know very well: that the killing was carried out in our name... Once the innocent people were killed, the lie expressed in my name ceased to be a mere lie: it has become a fact ... In short, a powerful reason for joint responsibility of all members of the group consists in the insight that the victims, even if they are not prone to collectivizing guilt, keep reminding us of the link between our collective identity and the crime.

It is therefore clear that since most victims do not 'remember coherently outside their group context' (Halbwachs as quoted in Olick 2008: 7), establishing societal responsibility especially in the case of protracted conflicts, is essential in order to fight notions of superiority or grievances that give rise to mass atrocities. Subotic (2011: 160-1) aptly summarises the crucial need for societal responsibility:

if individualizing guilt becomes successful, it offers individuals a way out, an opportunity to project the responsibility to a few select individuals and deny their own culpability for massive crimes that were committed in their name. This is how 'myths of collective innocence' are created and perpetuated ... It is only through a societal reckoning with the criminal past that the hateful ideologies that led to atrocity could be delegitimized and neutralized.

As was explained in the paper, one-sided ethno-nationalist claims geared towards creating notions of victimhood do in fact make the application of transitional justice problematic with groups holding on to their uncompromising stances. However, if

²⁵ The previous government in 2010 General Elections received 60.33% and a 2/3 majority in the parliament, and opposed inquiries into war crimes stating none occurred. Their victory was a clear indication of the overwhelming support the Sinhalese electorate gives to any party that supports the ending of the war. The then opposition is currently in power. It supported GoSL's conduct of the war and opposed any form of international inquiry into war crimes, much to the displeasure of the Tamils. TNA on the other hand enjoyed sweeping victories in the Tamil dominated North and East provinces on an electoral platform that advocated for accountability. These electoral victories show to what extent the Sri Lankan society is polarised especially on the war issue. These are products of both actual tragic circumstances and many years of political manoeuvring.

tactfully negotiated, these will lead the way to a collective shared truth that will ultimately result in societal responsibility for mass atrocities.

Conclusion

This paper has been largely informed by the concepts of truth, memory and transitional justice and has discussed how competing narratives in Sri Lanka can be situated within this framework. In doing so, it has provided the reader with perspective on the contested nature of diverse narratives of victimhood. No one group constitutes the sole victim, given the experience of victimhood and presence of victimhood ideas in both groups. However, the one-sided nature of each narrative by and large prevents them from acknowledging the suffering of the 'other', thus contributing towards their self-identification as the only victims.

The paper has further assessed the impact that the competing notions of victimhood have on transitional justice, and the choice of its mechanisms. Following the transitional justice debate in Sri Lanka, it has emphasised the need for both retributive and restorative justice mechanisms. Unlike most other scholarship, the paper has emphasised the importance of timing in relation to the sustainability of transitional justice mechanisms: while criminal justice is needed, its application should be delayed, given the sensitivity of the situation. Furthermore, it calls for societal responsibility of guilt whereby both Sinhalese and Tamils assume responsibility for the criminal past.

It also makes clear that one-sided narratives of different groups hinder transitional justice processes by making compromise difficult. However, these narratives are also central to democratic normalisation since their opening up is the only way for meaningful reconciliation. It should be noted that the concentration of the paper was on one of the most reductive forms of narratives whereby Sinhala and Tamil narratives were clubbed into two larger mutually exclusive groups. However, this was only to examine the impact these overarching narratives have on transitional justice. It is by no means a belittling of the multitude of fractured narratives within these two larger categories. Domination of any form of narrative should be tactfully negotiated so as to deconstruct one-sided ethno-nationalist politics of remembrance and attain durable peace and justice. 🙏

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