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The Tangled Politics of Postwar Justice in Sri Lanka

Window of opportunity?

When does a ‘post-war’ period begin and when does it end? The victory of the Sri Lankan military over the LTTE in May 2009 was widely celebrated in the south of the country as it was seen to signify the end of the civil war. Yet, in the years that followed the government appeared desperate to maintain the sense of a country at permanent war, expanding the role of the military in many areas of public life and consolidating its occupation of the north and east. For this reason, many felt that the war did not properly end until Maithripala Sirisena’s unexpected defeat of Mahinda Rajapaksa in the January 2015 presidential election, which was seen as either the beginning of, or a critical turning point in, Sri Lanka’s post-war transition. This election, which involved a coalition of Sri Lanka’s two largest parties, the United National Party (UNP) and the Sri Lanka Freedom Party (SLFP), appeared to open up an historic opportunity to bring about a lasting and just peace – reversing the trend towards ‘soft authoritarianism’ and dismantling the victor’s peace imposed by the previous regime.

Parliamentary elections of August 2015 confirmed the mandate of Sirisena’s new ‘*yahapalanaya*’ or ‘good governance’ coalition - a capacious term that had broad based appeal amongst the Sinhalese and minority communities. Many hoped it signified a new and cleaner politics, which involved the rooting out of corruption and nepotism associated with the old regime. Others saw it as being linked to an ambitious project of democratization, state reform and transitional justice – bringing about a just and inclusive settlement to the ‘ethnic question’. And there were others who saw *yahapalanaya* as a necessary antidote to the economic populism and growing indebtedness associated with the previous government.

Sirisena’s key presidential election pledges included a promise to abolish the executive presidency and reform the electoral system. Although not explicitly part of his election campaign, the President also promised a reorientation of international relations including a reengagement with western countries, and signalled a renewed commitment to human rights and transitional justice. This ambitious reformist agenda – mirroring the previous Norwegian-backed experiment in liberal peacebuilding in its assumption that ‘all good things come together’ -- generated high expectations and initial enthusiasm, both domestically and amongst western states, who had been side-lined by the previous government.

The National Unity government, capitalizing on the new energies and widespread support generated by the campaign, began to follow through on its election promises. The 19th amendment to the constitution was passed in April 2015, and restored key checks and balances on the President that had been removed by Rajapaksa. Its unanimous passing in Parliament reinforced the sense that the new government represented a different, more consensual way of doing politics, founded on the close co-operation of two mainstream parties that had been traditional rivals.

The government was committed to a wide-ranging state reform agenda, which was built on President Sirisena’s campaign pledges to abolish Sri Lanka’s powerful executive presidency

and reform the existing electoral system by introducing a mixed member proportional system. The UNF coalition added to this already ambitious agenda by campaigning in the August 2015 elections for a new fundamental rights charter and the maximum possible devolution of power within a unitary state. The replacement of pro-Rajapaksa, military governors in the north and east with civilian officials also raised hopes that this would be a first step in the de-securitization of the war-affected regions.

In the area of transitional justice, a clear sign of the government's new position was its co-sponsorship in October 2015 of the UN Human Rights Council (UNHRC) resolution on promoting reconciliation, human rights and accountability in Sri Lanka. This was seen as a significant shift from the previous regime, and evidence that the National Unity government had taken 'ownership' over transitional justice (TJ), whilst also acknowledging that there was a role for international actors in the form of a hybrid court – as recommended by the UN Panel of Experts Report of 2011. This was after six years in which there had been strong domestic resistance to any international interference on questions of justice and accountability. An OHCHR investigation on Sri Lanka had found 'horrific levels of violations and abuse' between 2002 and 2011. The Rajapaksa government's response to international and Tamil diaspora pressure had been to create the Lessons Learned and Reconciliation Commission, which critics saw as largely a mechanism to play for time and evade questions of accountability –out of 189 LLRC recommendations only 19 were fully implemented. The official government discourse was to stress reconciliation rather than accountability, and development rather dwelling on the past; whilst at the same time celebrating and memorializing the sacrifice made by patriotic war heroes in defeating the LTTE.

Led by Sri Lanka's new Foreign Minister, Mangala Samaraweera, there appeared to be some momentum behind, and support for TJ. Expertise was brought in from those involved with South Africa's Truth and Reconciliation Commission. A new strategy was developed involving four key strands; a truth commission; reparations; an Office for Missing Persons; and most controversially an independent special court for war crimes with participation of foreign judges. Steps were taken to operationalize this strategy on a number of fronts; a Secretariat for Coordination of Conciliation Mechanisms (SCRM) was established, and legislation was passed to establish an Office for Missing Peoples. A Consultation Task Force widely consulted civil society and produced a final report in February 2017.

Therefore election promises did translate into reforming efforts by the new government on several fronts. However, over time, it became evident that these efforts were meeting strong resistance, both within and outside the coalition. Increasingly the 'new politics' was beginning to look very similar to the old politics of patronage, horse trading and compromise. This has led to growing public dissatisfaction, opening up new spaces for the old guard and their nationalist support base to mobilise.

Push back and the return of 'normal politics'

For a government whose legitimacy rested on being seen as a clean break with the past, and a promise to clean up politics by pushing through an ambitious reform agenda, there was always potential for a large gap to emerge between rhetoric and reality. First, the National Unity government is composed of a diverse coalition whose main point of unity was a

common interest in defeating the Rajapaksas. Whilst inclusivity was the key to winning elections, it did not provide a strong foundation for decisive and reform-minded government. The President, Maithripala Sirisena and the Prime Minister, Ranil Wickremasinghe, came from very different political and social backgrounds and two distinct centres of power quickly emerged within the regime.

Second, the elections were less transformative than first appeared, and the continuities between the ‘old’ and the ‘new’ orders have become more apparent over time. The coalition contained many defectors from Mahinda’s faction, whose loyalties could not be assured. The shadow of the Rajapakas – which quickly materialized in the form of a Joint Opposition - limits the room for manoeuvre of the President, and amplifies the political distance between him and the Prime minister. Whereas Wickramasinghe is comfortable with neoliberal economic policies and international discourses on transitional justice, such policies are anathema to Sirisena’s Sinhalese support base. The other element of the old elite that has significant ‘holding power’ and can therefore block reforms that threaten their interests is the military. The political and economic potency of the defence establishment was significantly inflated during the civil war and during the final years of the Rajapaksa regime. Their role in relation to the question of war crimes and accountability is particularly significant and this is one of the reasons why the President has repeatedly resisted the idea of a hybrid court, which could potentially involve foreign judges passing judgement on war criminals, previously seen by many as ‘war heroes’.

Third, the economic legacies of the Rajapaksa period have placed further constraints on the new government. While conflict-affected regions have experienced sustained and rapid economic growth since 2009, much of this growth was driven by infrastructure investment, which drove up foreign debt and forced the government to agree an IMF rescue package in 2016. Development at the margins has been fuelled by flows of international or Colombo-based capital, often with the close involvement of key figures from the previous regime or the military. These patterns of post-war development have created new collaborations between capital, elites and ethno-nationalist ideology, and have helped to drive new forms of societal conflict by undermining the security of low-income groups across the country.

Fourth, Sirisena’s electoral victory came overburdened with expectations that the new government could address the wide range of issues that had grown up under the previous government. As well as the promises to introduce a new constitution, devolve power, abolish the presidency and initiate transitional justice mechanisms, the government was also committed to tackling corruption, introducing a new electoral system, and staving off a looming foreign debt crisis. The early optimism about a ‘Colombo spring’ (Spencer, 2016) has been replaced with a rather more pessimistic outlook, as the government’s approach to a range of issues has grown increasingly hesitant. Some see a worrying re-emergence of the anti-democratic tendencies that grew up during Rajapaksa’s period in office, for example in the seemingly politically-motivated compromises with the Rajapaksa camp over corruption and war crimes investigations.

There appears to have been a drift from reformism to political normalisation, erasing the distinction between this regime and the previous one. Unstable coalition politics are leading to inertia, delaying tactics and dissimulation. These political dynamics at the centre reverberate in complex ways with political mobilisation and claim making in the periphery.

In the North, the Tamil National Alliance (TNA) leadership face a series of dilemmas about how to engage with the central government, heightened by pressures from its own constituency. Should they prioritise accountability or constitutional reform? At the time of writing, the TNA appears to have prioritised the latter, though this may change as the government's commitment to the constitution wavers. Tamil leaders have also sought to balance nationalist demands for autonomy and a more pragmatic engagement with the government to gain access to economic resources and patronage. In both respects they are being challenged by a resurgent Tamil nationalism led by rival political parties such as the Tamil National People's Front (TNPF), diaspora groups, and new political formations such as the Tamil People's Council (TPC), which have pressed for a more maximalist position that aims to simultaneously address continued militarisation of the North, war crimes, and the need for a federal solution.

The return of land continues to be a central issue of public confidence in the North and East. Although the government committed to reviewing high security zones and prioritising the return of internally displaced persons by co-sponsoring the October 2015 resolution to the UNHRC, progress in this area has been slow. In 2017, government inaction prompted outspoken criticism from the TNA leadership, and a series of sustained public protests both in the North and in Colombo.

In the East, the leadership of the Sri Lanka Muslim Congress (SLMC) is being confronted by a more assertive regional identity movement called 'the Rise of the East'. In the South, anxieties over constitutional reform and TJ are heightened by maximalist demands from the Tamil polity. Therefore talk of federalism in the north, fuels an entrenched narrative of unitarianism in the South. Hambantota has continued to symbolise wider shifts in Sri Lanka's political relations. Under the Rajapaksa government, efforts to establish a new development hub in the district signalled both a re-balancing of economic and political power away from the centre, and the Rajapaksa's external strategy of forging closer ties with China. The current government's plans to develop the port and establish a new industrial zone were heavily opposed by the Joint Opposition on the grounds that the scheme provided a 99-year lease to the Chinese companies constructing the zones. Local politicians loyal to Rajapaksa were instrumental in mobilising popular protests in December 2016 against the scheme and the Sirisena government. These protests activated long-standing nationalist concerns about sovereignty and neo-colonisation, albeit with the Chinese taking the place of western colonisers.

These developments offer important clues as to the wider direction of travel of the *yahapalanaya* coalition. Although the government is a coalition of two parties of the Sinhalese majority, the success of its post-war package hinges on support from minority parties and constituencies at the margins.

The Politics of Transitional Justice

There is a strong external constituency pressing for international models of justice and accountability. But as these TJ processes 'hit the ground' they become entangled in, and interact with this complex domestic political landscape There is an increasingly sophisticated set of legal frameworks, debates, institutions and practices related to transitional justice in post-war contexts. In the majority of cases, these deal with wars that ended with a negotiated settlement rather than a military victory. Sri Lanka therefore poses particular challenges

given the military defeat of the LTTE and the political capital generated by the victors for having done so. Historically there are very few cases where the victors have voluntarily submitted themselves to a transitional justice process. In contexts where elites from the old regime retain significant power there has been a tendency for 'softer' forms of justice such as truth telling and reconciliation to be privileged over criminal accountability and punishment.

Much of the literature on transitional justice presents a series of rather technical and legalistic debates about the kinds of justice and accountability mechanisms and the sequencing of interventions. As well as a set of normatively charged and universalist positions about what 'should' be done to bring about 'justice', 'accountability', 'sustainable peace', there is a tendency to neglect the historical specificities of post-war societies, which transitional justice mechanisms are enacted upon. Post-war settings far from being a blank slates ripe for TJ reforms, are 'charismatic moments' in politics when the new rules of the game are negotiated; TJ is a resource – symbolic and material – that different actors use to mobilise support and to pursue agendas that may have very little do to with TJ. Transitional justice and peacebuilding processes provide opportunities for both the government and its critics to speak to and mobilise particular audiences, sometimes sending contrasting messages in different voices to different groups. While some of the government's measures on reconciliation, such as singing the national anthem in Tamil, have sent reassuring signals to international observers, on more contentious issues relating to accountability and justice, the government has been forced to cede to stronger pressure from the military and the Joint Opposition, which is quick to vocalise its opposition, and mobilize around perceived threats to Sri Lankan sovereignty.

TJ involves difficult trade-offs. The assumption that all good things come together and that state reform, democratisation and TJ are mutually reinforcing ignores the complex and messy compromises involved. Clear morality tales about victims and perpetrators, the innocent and guilty, simplify the moral ambiguities and political complexities of how most societies have sought to build peace and come to terms with the past. Calculations about political feasibility, sequencing and prioritisation have underpinned the dilemmas facing the government, opposition parties and civil society actors.

There is also a complex temporality to TJ processes. How far back does one go to address the crimes of the past? Since independence there have been repeated incidents of collective violence and atrocities, yet there have been few cases where the perpetrators have been brought to justice. Time in one sense provides a space for societal healing and compromise to be reached. But it also provides tactical opportunities for the actors involved. The Sirisena government's faltering progress on transitional justice illustrates how strategies of delay can provide space for compromises and tensions to be papered over and managed. For example, the government fulfilled one of its commitments to the UN Human Rights Council in August 2016 by rapidly pushing through legislation to establish an Office of Missing Persons. But at the time of writing (March 2017), the law was still to be operationalised.

Therefore contemporary debates about the timing and sequencing of peacebuilding and transitional justice measures in Sri Lanka do not occur in a vacuum and instead sit within deeper historical cleavages, antagonisms and coalitions of interest. What may appear to be novel debates, can be old ones that reappear in a different form; for example there is a long-

standing debate in Sri Lankan politics about whether to prioritise political stability and economic growth, or to privilege rule of law and political reform. There may be a high level of path dependency, with the legacy of past failures to reform (in 1994 and 2002-3), shaping public expectations and limiting the room for manoeuvre of political elites at both the centre and the margins.

Although the defeat of Rajapaksa and the emergence of a ‘national unity’ government committed to reform appeared to present an opportune moment for pushing forward an ambitious transitional justice agenda, in practice the government has been heavily constrained by a set of compromises or tensions that have hampered its capacity to implement a coherent agenda.

The President from the outset has had to stave off attacks from his own SLFP MPs, many of whom remain loyal to Rajapaksa. The former President has acted as the figurehead for the ‘Joint Opposition’ against the government, and been vocal in his opposition of many of its policies. The looming threat of an SLFP split has limited the President’s appetite for backing bold reforms, or challenging the military establishment. Furthermore, the President and the Prime Minister, Ranil Wickramasinghe, have different priorities with regards to state reform and accountability. Sirisena has publicly contradicted the Prime Minister at times, for example, by denying the need for international involvement in a justice mechanism. These tensions are also linked to the differing expectations of domestic and international audiences. The government’s approach has been to prioritise constitutional reform over measures to address post-war justice and accountability. But this approach is in tension with international mechanisms such as the UNHRC and EU’s Generalised System of Preferences (GSP+) scheme, both of which set out specific targets for tackling issues relating to human rights, justice and accountability. TJ has become a bargaining chip in a high-stakes game; if for example, the Tamil parties do not push too hard on war crimes, then the government may promise constitutional reforms in return. The proponents of TJ on the other hand argue that TJ is inseparable from constitutional reforms, since there is a need to address the governance structures that perpetuate injustice in the south as well as the north east.

Despite enthusiastic championing by the Foreign Minister, there is no politically powerful group claiming ownership over and driving TJ. Transitional justice did not feature in the January or August 2015 elections and was not part of the government’s electoral mandate. It was largely driven by international concerns though the government did assume leadership of the issue when in October 2015 it co-sponsored the UNHRC resolution. The government’s primary concerns are with the economy, party politics and constitutional reform. To a large extent, TJ has been used by the government as a means of placating international opinion. Slow progress and missed deadlines, ad hoc initiatives to deflect pressure.

The establishment of a Consultation Task Force, which involved widespread public discussion and the release of a report in January 2017, was a potentially significant step. The report emphasised the need for more proactive public communication on the government’s transitional justice and reform efforts and supported the participation of foreign judges in war crimes courts, in line with the UNHRC resolution of October 2015. Although the consultation process was welcomed by international observers and seen as a valuable process by affected communities, the CTF has been widely dismissed by nationalist critics as an elitist vehicle for

Colombo-based NGOs. Nationalist forces both outside and inside the government have used the CTF and other aspects of the TJ process to legitimise themselves in the eyes of their supporters by playing on longstanding fears about the violation of state sovereignty and foreign interference. The President himself has dabbled in this rhetoric at times, for example stating in March 2017 that he was not ‘ready to govern the country on NGO opinions’.

In addressing issues of transitional justice, the government is bound by a variety of domestic and international timetables that often overlap, impinge on each other, and generate tensions and contradictions. On the one hand, it is responding to domestic political pressures to hold local elections and a constitutional referendum, and to public opinion in the South which it views as largely hostile to robust action on transitional justice. On the other, the government is forced to react to the externally-imposed timetables of the UNHRC and the EU, which call for more concrete and rapid progress in certain key areas. To some extent, the government has benefitted from the international uncertainty that prevails after the election of new governments in the UK and the US, and the widespread sense amongst western countries that the current government is preferable to the alternative.

Conclusions

The compromised nature of the *yahapalayana* government has led to an increasingly sclerotic and hesitant form of government policy making. This faltering approach can be observed across most policy areas - with setbacks and reversals characterising key decisions on the economy and anti-corruption efforts – but delays have been most evident with regards to constitutional reform and justice. Although a wide-ranging set of public consultations on reform and transitional justice have been held and a Parliamentary Steering Committee for the Constitutional Assembly has met nearly 50 times, it has not yet produced the draft report promised for December 2016. There is no clear sense that settled positions have been agreed on key areas to do with devolution, the electoral system, or abolition of the executive presidency. The government has failed to communicate effectively to the public what it is doing and as a result has ceded control of the political agenda to the Joint Opposition. Declining public confidence with the government’s effectiveness to tackle issues relating to corruption, the economy and state reform, are acting as a further barrier to decisive progress. As the government’s popularity dwindles, its lack of confidence in calling local elections or a constitutional referendum grows.

At the time of writing, the government’s efforts to implement the UNHRC Resolution it co-sponsored in October 2015 are under scrutiny in Geneva. The UNHRC’s latest report was highly critical of the Government of Sri Lanka, calling its progress ‘worryingly slow’ and stating that ‘the structures set up and measures have been inadequate, lacked coordination and a sense of urgency’. Nevertheless, there has been a widespread expectation that the government will be given more time to implement its commitments. An extension has been supported by leading members of the TNA, including M.A. Sumanthiran, who has argued that while establishing special courts may take time, a new constitution can and should be concluded more quickly, alongside more concerted efforts to address disappearances and the return of land. While it seems likely that the government will continue the delicate work of balancing the contrasting priorities and expectations of international and domestic audiences, perhaps the more critical challenge will be to establish a common agenda on state reform and transitional justice, and to communicate this more effectively to the public.

The ‘window of opportunity’ appears to be rapidly closing. Yet with the benefit of hindsight analysts have identified other windows in the past that have also not been grasped. It was perhaps naïve and overly optimistic to believe that regime change was the answer to a problem that has much deeper structural roots. In a sense the context is over-determined – by the legacies of war, a reform-resistant state and a fractured political elite. The post-war direction pursued by the Rajapaksa regime did not emerge in a vacuum but rather drew on pre-existing state practices and ideologies, and was sustained through complex entanglements between the state, capital, and societal forces. This does not mean that a solution (albeit partial and compromised) will not emerge as a result of the current constellation of power. But it will take time, it has to be worked out by domestic players and the justice that emerges will most likely depart from international standards of best practice.