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Women's Testimony and Justice  
in Post-War Sri Lanka**

Neloufer de Mel

INTERNATIONAL  
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## Acronyms and Abbreviations

Committee on the Elimination of Discrimination against Women	CEDAW
Government of Sri Lanka	GOSL
International Committee of Red Cross	ICRC
Internally Displaced Persons	IDPs
Janatha Vimukthi Peramuna	JVP
Justice of Peace	JP
Lessons Learnt and Reconciliation Commission	LLRC
Liberation Tigers of Tamil Eelam	LTTE
Non-Governmental Organisations	NGOs
Parliamentary Select Committee	PSC
People's Alliance	PA
Truth and Reconciliation Commission	TRC
United National Party	UNP

## **ICES Research Papers:**

1. Krishnan, Sonny Inbaraj (2012), *Transition to Civilian Life of Teenage Girls and Young Women Ex-Combatants: A Case Study from Batticaloa*, ICES Research Paper 1, June. 2012.
2. Wickramasinghe, Nira (2012), *Producing the Present: History as Heritage in Post-War Patriotic Sri Lanka*, ICES Research Paper 2, July. 2012.
3. Rambukwella, Harshana (2012) *Reconciling What? History, Realims and the Problem of an Inclusive Sri Lanka indentity*, ICES Research Paper 3, August 2012.

## **The Promise of the LLRC: Women's Testimony and Justice in Post-War Sri Lanka<sup>1</sup>**

*Justice is ultimately connected with the way people's lives go, and not merely with the nature of the institutions surrounding them.*

Amartya Sen, *The Idea of Justice* (2009:p.x)

### **Introduction**

This essay raises some issues about justice in post-war Sri Lanka in relation to the Lessons Learnt and Reconciliation Commission (LLRC) and selected women who testified before the commission. It contextualises the LLRC within two dominant schools of thought on justice, and takes into account several factors that shaped its formation and functioning. It also speaks to a paradox: of why the LLRC attracted hundreds of witnesses from within Sri Lanka and approximately 5,000 written submissions when its very legitimacy was in question by both international and local actors, and in some cases by the witnesses who came forward themselves.

Did this overwhelming response to the LLRC simply point to the (by now) common understanding that victims of violence must, of necessity, give public witness to atrocity in order to record, shame, voice grievance, assert dignity, celebrate the exceptionality of their survival, and cope with their daily lives (Agamben 2002; Hayner 2001: 145-62; Jelin 2003: 60-75)? While the beneficial effects of the above (typically garnered at Truth and Reconciliation Commissions (TRCs), memorialisations and community forums that are mechanisms of transitional justice) have been contested on the grounds that some victim-survivors can also be re-traumatised and left with feelings of desolation, shame and helplessness after these events, there is still wide consensus that TRCs are necessary as post-conflict community and nation-building exercises (Salih & Samarasinghe 2005: 33-42). But if the witnesses who gave evidence before the LLRC did not come simply to record their experiences of the war, what other benefits did they hope to gain by appearing before it, particularly in a context where there are fears that witness protection may be compromised due to continuing militarisation of the former war zones and a politicised judicial system (Pinto-Jayawardena 2010: 138-40)? In other words, why did they take the *risk*? By discussing, in particular, what some female witnesses hoped to gain from the LLRC, this essay explores what the commission meant for these women survivors of war, and by extension, the gendering of post-war justice itself.

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<sup>1</sup> This essay was commissioned as a 'thought piece' and is, therefore, a work in progress towards a larger research project on cultures of justice in Sri Lanka. It draws on all of the female witness transcripts available on the LLRC website, as well as the final LLRC report, and op-ed pieces and feature articles on the LLRC in the print media. It also draws on in-depth interviews with a small focus group of 5 women who live in a formerly LTTE controlled area in the Batticaloa district and who went before the LLRC, as well as members of Batticaloa civil society. I am grateful to Chulani Kodikara, Kumuduni Samuel, Prashanthi Mahindaratne and Jayadeva Uyangoda for their comments on an earlier draft of this essay, as well as discussants at a seminar on 'The LLRC: From Recommendations to Action' at ICES, Colombo, June 2012.

Towards such an exploration of the LLRC, as well as its interrogators and female witnesses (who are in effect its interlocutors), I draw on Amartya Sen's (2009) book *The Idea of Justice*. I am particularly interested in Sen's historical and spatial mapping of different approaches to the question of justice. This is because the arguments that dominated the discourse around the LLRC fell into two distinct lines of thought on justice. The first articulated a desire for a perfect justice that guarantees the rights and entitlements of victim-survivors of war and inducts accountability as a means of ending a culture of impunity. The second argued for holding onto such a desire, but given the ground conditions, giving up the romance of institutionalising it in a perfect organisational structure.

In other words, the debates around the LLRC highlight an axis which, at one end, holds up the demand for a holistic justice grounded in rights and entitlements, and on the other, forwards an argument about a pragmatic, albeit compromised, justice which enables war survivors to get on with their daily lives. Several questions arise from this. At what points on this axis do local cultures of justice and mechanisms for reconciliation exist and intervene? Where and how do ethical and political wills and action shape its path? And how is it gendered? In order to parse these questions the essay highlights the voices, accounts and narrative strategies of witnesses, particularly the women who came before the LLRC. By locating their testimonies in terms of the LLRC's evidentiary *promise*, the essay also looks to these women's statements for intimations on how women survivors define justice, of what constitutes for them post-war 'settlement' or other ways of being in history at a given moment in time which ultimately go beyond the commission itself.

### **Transcendental vs. Realisable Justice**

In *The Idea of Justice*, Amartya Sen marks a distinction between transcendental justice and realisable justice, drawing on a history of ideas on jurisprudence from within Western, Middle-Eastern, African and Indian traditions. He sees an analogy of the two concepts, for instance, in *niti* and *nijaya* that derive from a Sanskrit lineage and so, is common to both India and Sri Lanka. According to Sen, the former relates 'to organizational propriety and behavioural correctness' while the latter 'is concerned with what emerges and how, and in particular the lives that people are actually able to lead' (xv). While the two concepts are related because institutions do influence and shape daily lives, the distinction is in the emphasis: the transcendental or *niti* on the institutionalisation of an *ideal* system of justice incorporating guidelines on what is proper and moral, while the realisable or *nijaya* focuses on a justice that regulates propriety, virtue, governance etc. as it can be actually achieved and experienced in the everyday.

Transcendental justice, which, in the Western tradition follows the contractual approach of Hobbes, Locke, Rousseau and Kant (Sen 2009: 5-6), can be positioned therefore as the *culmination* of a process once agreement is reached, if at all, on the nature of a just society or

the main causes of injustice upon which an ‘arrangement focused’ development of institutions, regulations and behaviours can take place (2009: 9-10). This takes time, not least because agreement on what is a just society, or what is fairness, or diagnosis of the main cause of injustice, or paring down multiple and even conflicting principles of justice to an overarching, unambiguous set of precepts on which institutions can be developed can be arbitrary and reductive (2009:4, 89-90). Importantly for Sen, as the culmination of a process, transcendental institutionalism delays a robust conclusion to the business of injustice.

The realisable approach, on the other hand, which Sen (2009: 6-7) traces in the West to Enlightenment thinkers such as Adam Smith, Bentham, Mary Wollstonecraft, John Mills etc., looks at competing principles of justice and fair-play (analogous to the Sinhala understanding of ‘yukthiya’ and ‘sadharanatvaya’) from a comparative lens. It provides a *ranking* of the available principles so that even though it may not be possible to agree on what, for instance, constitutes ‘liberty’ for each individual, it is possible to agree on the necessity to ban arbitrary incarceration (2009: 104). In the Sri Lankan context this opens up the possibility of obtaining widespread agreement, for instance, that forcible abductions are unacceptable (particularly so in a post-war context), even though it is hard to get agreement on what citizens’ overall rights and entitlements should be in relation to national security. The realisable approach is, therefore, selective and accommodative. Sen (2009: 106-13) aligns it to social choice theory<sup>2</sup> because it offers a comparative, relational assessment of justice rather than a grand vision of it; is accommodative of partial solutions with room for re-examination and expansion rather than waiting for the ultimate fix; and enables public reasoning and participatory decision making essential for making democracy more effective.

Participatory decision-making, however, does not take place in a vacuum. It is mediated by socio-political and cultural power which, for instance, is gendered. Women’s experiences of justice in Sri Lanka, whether meted out in formal courts of law, or mediation boards, or customary spaces of arbitration where community elders adjudicate as in quasi courts,<sup>3</sup> point to how the manner in which evidence is presented, corroboration sought, the offence interpreted and a remedy offered often fail to consider women as equal citizens and fall short of their basic rights and entitlements. This is so particularly in cases relating to domestic and sexual violence and land disputes (Jayasundere 2012: 19; Gomez & Gomez 1999; Pinto-Jayawardena & Guneratne 2010). The ranking of what is a just remedy, which cannot be achieved without public reasoning through which agreement is reached, is dependent therefore on the politics of participation, patriarchy and hierarchy.

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<sup>2</sup> According to Sen social choice theory first emerged as a systematic field during the French enlightenment through the work of Jean Charles de Borda and Marquis de Condorcet, and in the 20<sup>th</sup> century, via the work of Kenneth Arrow who gave the subject its name in the 1950s (Sen 2009: 91-2).

<sup>3</sup> Quasi courts operate in Muslim areas of the country. The courts are headed by judges known as quasis and deal largely with family disputes.

Yet, gender equity programmes run by various stakeholders aimed at social change, for instance, ultimately rely on public reasoning. So how can agreement on what should be prioritised towards redistributive and restorative justice be reached where there is a masculinised and male-dominated public sphere, or where groups are ethnically and politically polarised? Nishan de Mel (2010: 22) states that Sen retains his optimism on public reasoning, or ‘basic human decency’, on the grounds that the world’s religious and moral teachings have already laid the foundation for an ‘ethics of care’ materialised in a concern that goes beyond the self. Examples abound. As de Mel notes (2010: 22) Sen himself refers to the *Sutta-Nipata* in which the Buddha argued for human responsibility towards animals precisely on the grounds of the asymmetrical power humans held over other species. An ethic of putting oneself on a similar footing as others also exists in the *Ambalatthika Rabulovadasutta* of the Majjhima Nikaya (Tilakaratne 2008-09: 101); and while there is debate on whether Buddhism offers a theory of justice and human rights or not (2008-09: 94; Harris 2008-09: 137-38), one school of thought argues that compassion, a central concept in Buddhism and ‘inseparable from wisdom’, should lead Buddhists to ‘naturally honour and defend the rights of others’ (Harris 2008-09: 141).<sup>4</sup>

There is a strong ethic of justice for others within all moral economies. For example Pieris (2008-09: ii) notes that in Christianity the concept of loving one’s neighbour as oneself is about responsibility towards the wellbeing of others: ‘the love an expression of justice itself.’ This calls for transcending self-interests in a manner that is also supported by utilitarian social contractarianism. This is because a ‘shared willingness to modify our private demands in order to find a basis of justification that others also have reason to accept’ (Scanlon cited in de Mel 2010:23) is a constitutive incentive for societies to work. Both moral teachings and social utilitarianism come together, therefore, in their emphasis on the necessity of going beyond the narrow confines of self-interest. This, as de Mel argues, ‘presents a real opportunity to move forward in advancing justice’ (2010: 23).

### **The Politics of Reconciliation**

In *The Politics of Friendship* Derrida (2005: viii) writes, “Democracy has seldom represented itself without the possibility... of a *fraternization*. The fraternity may *include* cousins and sisters, but... including may also come to mean neutralizing. Including may dictate forgetting, for instance, with ‘the best of all intentions’”. Such tools (i.e. forgetting/amnesty) which make up our political education (particularly in post-war reconciliatory contexts) may render, as Derrida remarks, the concept of fraternity itself docile. This is because, for Derrida, a constitutive tension that animates a citizenry or fraternity is accounting for the enemy one’s friend can

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<sup>4</sup> Given the centrality of Buddhism as Sri Lanka’s state religion and its vast following in the south, proponents of the LLRC in fact strategically argued that its recommendations were in line with Buddhist thought because ‘the great Buddhist qualities of Metta, loving kindness; Karuna, or compassion for those in distress; and Mudita, joy in the success of others, are extended to all without distinction’ (Kuruppu 2012).

become. But it is precisely because the idea of a friendly citizenry exists as a strong trope in our political imagination that fratricidal war—which itself has a long and ‘immense tradition’ (2005: 148)—has necessarily been followed by the work of reconciliation and friendship.

Friendship, as Derrida emphasises, is tenuous and has to be won. Increasingly, in post-conflict situations, this work of friendship has drawn on indigenous reconciliatory cultural resources to open up channels of negotiation between warring groups with divergent opinions. This was the model followed, for instance, in the aftermath of the Rwandan genocide which drew on Gacaca courts and its mechanisms for restorative justice aimed at the healing of victims and perpetrators through confessions and plea-bargaining. Gacaca, a Kinyarwanda word meaning ‘a grassy place’, was where opposing families sat as the community mediated their dispute as impartially as possible (Breed 2008: 34). The success of the process, as with restorative justice, is measured in terms of the value of the reintegrated offender to the community, and emotional and material restitution to victims (Tiemessen 2004: 58,60). The goal of such performative community mechanisms is that in the process, individual and group interests can be broadened even partially to permit certain kinds of justice to become part of public reasoning.

According to Sen, the ‘small justices’ that emerge from such processes can have a bigger impact than grander visions of justice precisely because they are attainable and their benefits on the daily lives of citizens are tangible. It is not that institutions are unimportant. In *The Idea of Justice* Sen acknowledges that ‘institutions cannot but play a significant instrumental role in the pursuit of justice’ (2009: xii). His argument against the transcendental approach is simply that it cannot fulfil the desires of several principles of justice—all of which may be correct but rival each other (i.e. accountability at the expense of reconciliation, prosecution vs. amnesty, active memorialisation vs. forgetting etc.) at the same time (2009: 15). ‘Small’, ‘crystalised’ justices, on the other hand, stand up to public reasoning precisely by not being over-burdened by the task of achieving perfect justice.

### **The LLRC: The Institutional View**

*The characterization of perfectly just institutions has become the central exercise in the modern theories of justice...*

Amartya Sen (*The Idea of Justice*, 2009: 8)

The mandate of the LLRC, established by the Government of Sri Lanka (GOSL) on 15 May 2010, encompassed the inquiry and reporting of what led to the failure of the 2002 peace process and sequence of events until the end of the war; who was responsible for the failures and events that occurred during this period; lessons to be learnt from these events; a ‘methodology’ for restitution to those affected by the war; the institutional and administrative measures necessary for the future prevention of disaffection and armed militancy; promotion

of national unity; reconciliation of all communities; and any other recommendations accommodated within its framework.

Criticism of the mandate by both international and local advocacy groups focused on issues of procedure, accountability and witness protection. The composition and procedural fairness of the LLRC was questioned on the basis that some of its commissioners had defended the GOSL's military actions while serving as government officials during the war. The principle of impartiality was therefore at stake. Its mandate was also criticised for empowering the commission only in so far as it could recommend the investigation of war-time human rights violations but not investigate and prosecute perpetrators itself. Here, the commitment to accountability and zero tolerance on a culture of impunity was at stake. The LLRC was also charged with failing to develop a reliable witness protection programme, particularly in a context where witnesses had been killed or disappeared. Following as it did a succession of Presidential commissions that had failed to prosecute any key people for human rights violations and war crimes committed in the past, the LLRC was seen to be structurally and historically flawed (Keenan cited in Zuhair 2011). It was also criticised for failing to provide an explicit space for gender-based war crimes (Baker 2011).

The GOSL responded to these allegations by highlighting that the selection of the LLRC commissioners followed international blueprints such as the U.S. 9/11 Commission and the UK Chilcott Commission (which examined Britain's entry into the Iraq war) both of which had government civil servants as commissioners. It also drew attention to the fact that the LLRC had conducted over 200 public sessions in the north and east,<sup>5</sup> and the witness testimonies available on the LLRC's official website as proof of its commitment to process and transparency. It further pointed to the appointment of the Inter-Agency Committee tasked with implementing the LLRC's interim recommendations (submitted on 13 September 2010) as proof of its resolve on enforcement. The GOSL stressed that the LLRC's mandate therefore included four principles at the core of transitional justice: the right to know, the right to justice, the right to justice and remedy, and measures to prevent recurrence (Peiris cited in Rizvi 2011).

Of significance is that both the criticism levelled at the LLRC in terms of its scope, and the government's defense of it drew on the premises of transcendental justice, both arguing for an institution that had public legitimacy, impartiality and fairness, wide outreach, transparency and commitment to investigation and implementation. Just how much of a *promise* the LLRC held out as such a platform can be found in a maximalist programme envisioned for it (Dayasri 2011). This stated that a) the LLRC should address the legitimate grievances of the Tamils

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<sup>5</sup> These included sessions in Jaffna town, and Chavakachcheri, Kayts and Mandativu in the Jaffna district; Mullaitivu, Puttukuduiruppu, Nanthikadal in the Mullaitivu district; Vavuniya, Puliyankulam, Ornanthai and Menik Farm (where the IDPs from the final phase of the war were housed) in the Vavuniya district; Kilinochchi in the Kilinochchi district; Trincomalee, Muttur and Kuchchaveli in the Trincomalee district; Batticaloa, Vakaraï, Eravur and Kattankudy in the Batticaloa district; as well as the Boossa detention centre in the Galle district where LTTE ex-combatants are held.

with remedies the government should implement, and b) through an institution like the Criminal Justice Commission with a bench comprising three Supreme Court judges, war crimes and accountability issues should be placed on a fast track so that sovereignty not be ceded to foreign courts. It also envisioned the LLRC be a permanent body like a bureau, with units in the north and east to entertain complaints from residents in the conflict zone, forward them to relevant agencies for action and monitor their implementation. It also supported the idea that the LLRC should have a robust witness protection programme and that in the event of wrongdoers being brought to justice, any ‘investigational insufficiency or impropriety should be reportable to the LLRC’ with staff trained to handle such situations. The LLRC was to be, therefore, ‘the post box to register complaints if any made during the period of the investigation and trial’. The LLRC would also ‘give public notice of the safeguards provided to complainants and witnesses’, and if it was unable to fulfil the above functions, an alternate body be established by the government to carry them out with the proviso that the LLRC appoint its members so that it be kept independent and impartial. It also envisaged that the LLRC mandate include issues of good governance. Finally, it anticipated a recommendation by the LLRC for a Terrorism Commission that would study aspects of terrorism in Sri Lanka, report on prevention measures and bring those accountable to book.

This expansive list spoke to the needs of all parties concerned. In envisioning the LLRC as a repository of minority grievances it acknowledged the experiences of Tamils (and Muslims) in the north and east. In stressing accountability and implementation it acknowledged the need for institutional reform and political will towards justice. In spelling out the need for an indigenous process and a Terrorism Commission it rehearsed Sinhala nationalist opinion hostile to international scrutiny on Sri Lanka over human rights and war crimes. It therefore drew together a basket of views representative of public opinion on the war and the future of post-war institutions.

Each of these views has merit and involves, as Sen (2009: 3) noted in his discussion of the critiques of the Western-led armed invasion of Iraq, ‘different evaluative concerns, none of which could be readily ruled out as being irrelevant or unimportant.’ Sen (2009: 3-4) also added that ‘if it is shown ...that all sustainable criteria lead to the same diagnosis of a huge mistake, then the specific conclusion need not await the determination of the relative priorities to be attached to these criteria. Arbitrary reduction of multiple and potentially conflicting principles to one ‘solitary survivor’, as is the case in a transcendental approach, ‘is not, in fact, a prerequisite for getting useful and robust conclusions on what should be done.’ The urgency to act, which continues to underwrite the many calls in Sri Lanka for a speedy implementation of the LLRC’s recommendations, follows this line of reasoning and points to a growing consensus that justice for war survivors cannot wait, and that non-dispensation may mean a return to war.

## **Victim-Survivors and the Ghosts of Past Commissions**

But post-war justice still requires an *emphasis*. Priscilla Hayner (2001: 189-90) noted:

where simmering conflict and violence have returned in cycles over many years or generations, a root problem has sometimes been a fundamental difference in perceptions of the past.... There is never just one truth: we each carry our own memories, and they sometimes contradict each other; but ...there are some facts that are fundamental enough that broad acceptance of their truth is necessary before real reconciliation can take place.... This question should be considered from the perspective of victims, as perpetrators are more likely to assume that reconciliation has been achieved before victims feel the same.

While Hayner's emphasis on victim-survivors is pertinent, in complicated protracted wars there are invariably multiple victims who can also become competitors. The maximalist programme for the LLRC noted above was cognizant of this as it sought a balance that would not tilt purely in favour of ethnic minority victims but also take into account those from the majority Sinhala community harmed by terrorism. But even if agreement on this balance were to be obtained,<sup>6</sup> a further problem would be the issue of what would satisfy all the victims. Would the right to truthful information—of what happened to their family members and the sequence of events that led to their alleged killings, disappearances, detention, torture, abduction etc.—be enough, or would it be full accountability with the perpetrators tried in a legal process and punished?

In a situation where the LLRC was not established as part of a politically negotiated settlement with the Liberation Tigers of Tamil Eelam (LTTE), and given that any investigation of war crimes would also put its own armed forces in the dock, accountability attracted only intermittent comment from the government. It declared that, as the LLRC was established under the Commissions of Inquiry Act and its amended Act No. 16 of 2008 enabled by parliament, under Article 24, the Attorney General was empowered to institute criminal proceedings based on material collected by a commission of inquiry such as the LLRC (*The Island*, 2011). Yet the political will towards bringing perpetrators to justice has had a weak track record in Sri Lanka. The 2006 Udalagama Commission appointed to inquire into serious violations of human rights since 1 August 2005 including the deaths of seventeen aid workers in Muttur and five youth in Trincomalee is a case in point. Its report remains unpublished to date and no perpetrators have been prosecuted for the above crimes.

This was more or less the case even following the 1994 and 1998 commissions appointed by the People's Alliance (PA) government, which, emerging as it did from a period of exceptional repression as a result of the 1987-89 Janatha Vimukthi Peramuna (JVP) insurrection, was thought to be committed to 'accountability.... as a co-traveller that would help ensure the

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<sup>6</sup> This is not self-evident because equating state violence to that of non-state actors was often resisted on the grounds that the state has a duty to protect its citizens.

sustainability and reach of the new administration's commitment to democratization and demilitarization' (Keenan & Nesiah 2004: 262). The 1994 commissions were appointed in November that year to look at the involuntary removal and disappearances of persons in the Western, Southern and Sabaragamuwa provinces; Central, North Western, North Central and Uva provinces; and the Northern and Eastern provinces respectively. They dealt with the extraordinary violence of the 1987-89 JVP insurrection as well as the consequences of a 'dirty' war in the north and east. Another All-Island Commission was established in April 1998 to cover the gaps in the previous 1994 commissions and its report was made public in June 2002. All four commissions uncovered widespread human rights abuses pointing to a culture of impunity at the highest levels of the state, the police and security forces, as well as within the JVP and LTTE.

As these commissions, particularly those which looked at the JVP insurrection-related violence, were inquiring about a previous United National Party (UNP) regime, a significant feature which differentiates them from the LLRC is that witnesses took them into confidence to name UNP politicians involved in the violence (All-Island Commission report cited in Keenan & Nesiah 2004: 264). The LLRC, on the other hand, was appointed by an incumbent government not only to inquire into the failed peace process of a previous regime but also possible abuses under its own watch, including the conduct of the final phase of the war. While many witnesses gave evidence in camera, there were others reluctant to come forward particularly in the absence of a robust witness protection programme. It is therefore to the credit of the LLRC that despite this drawback, it drew on whatever witness testimony it had to explicitly point, in its final report (Chapter 5: 172-74), to culprits, including Tamil groups which are in coalition with the current government, that engaged in armed activity and violence in the north and east.

As noted before, however, the track record on criminal prosecutions following successive Sri Lankan commissions is weak (Pinto-Jayawardena 2010: 97-102). Despite the evidence gathered by the 1998 All-Island Commission on perpetrators of violence, and despite its 'imposing list of recommendations' regarding prosecutions, legal reform and systemic abuse of state power, Keenan and Nesiah (2004: 267) state that the PA government clearly failed to go far enough in their housecleaning.<sup>7</sup> According to Keenan and Nesiah, the lack of political will to prosecute has its correlative not only in weak civil society human rights activism (2004: 268), but also in how accountability itself is often framed within dominant human rights discourse. The framework emphasises a narrow basket of violations such as extra-judicial killings, abductions and torture, puts the onus on individual victims and perpetrators, and values a methodology of legal investigation into abuses of state power (2004: 273). Pointing to how the way one frames the accountability question shapes the outcome, Keenan and Nesiah draw attention to how,

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<sup>7</sup> The trial at Bar and prosecution of the perpetrators of the Krishanthi Kumaraswamy rape case, affirmed by the Supreme Court in February 2004, remains an exception, pointing to the early political will of the PA government to 'clean up' the security forces.

within accountability discourse, the focus on individuals for instance is based on an abstraction from the social groups or forces that legitimise violence in the name of nationhood, ethnicity, law and order etc. (2004: 274). It thereby absolves the larger structural forces that shape the ideological and material contexts in which the violence takes place. Similarly the legal, 'forensic', case-by-case methodology called for in investigating and prosecuting violations can lead to a narrative of individualised indiscipline within the armed forces rather than an understanding of its violence as a systematic tool targeting specific groups (2004: 277).

In the case of the LLRC, however, because its mandate incorporated the promotion of national unity and reconciliation, it was broader in scope than the 1994 and 1998 commissions which were constituted in terms of disappearances and involuntary removal. Although these commissions did include comment on the structural forces that led to the forced disappearances of the 1980s and 1990s, the LLRC mandate allowed for a greater consideration of the ideological and material factors contributing to the war. This was reflected in its final report which makes recommendations on macro issues of language, economic development in the north and east, access to and ownership of land, education, housing, psychosocial services, rehabilitation and resettlement etc. It was in line with this non-punitive, non-legalistic approach to unity and reconciliation that the President of Sri Lanka noted "The past is past; you don't dig into the wounds. We must think positively, not negatively" (President Rajapaksa cited in Ram 2010). This approach was echoed by Sri Lankan diplomats (Jayatilleke 2011) who stated that "From the Spanish civil war to the Philippines and Indonesia, the post conflict reconciliation process did not involve accountability probes. These were regarded as dangerously lacerating and polarizing... accountability was not understood as a precondition for reconciliation but as a potential threat, and it was often a choice of reconciliation OR accountability". However, other officials spoke of how transitional justice mechanisms typically required 'a mix and match' of retributive and reconciliatory justice (Peiris cited in Rizvi 2011).

Competing interests and emphases are evident here, pointing to how the state does not always speak in one voice. Therefore, to effect a perfect institution that would form the bedrock of post-conflict governance with equal emphasis on each of the components transitional justice demands is no easy task and may, in fact, be impossible. Nor is it easy, in such a competing field, to zoom in on one, or a predominant set of overarching principles to be enshrined and delivered through an ideal institution. As Katherine Francke (2005) notes, transitional justice is underwritten by various tools such as truth and reconciliation commissions, public memorials and apologies, prosecutions, opening up archives such as police and military records, compensation and amnesty etc. "In most cases", she notes, "justice demands the deployment of a number of these tools, given that no one of them can adequately address and repair the injuries of the past nor chart a fully just future. Transitional justice will always be both incomplete and messy".

### The LLRC: Timeliness

Our entire community was eager to go before the Commission because as the war is over we think this time the detainees will be released (Focus group of 5 women living in an area formerly controlled by the LTTE in the Batticoloa district, November 2011).

There were problems regarding witness protection. But it was easier to give evidence this time because the Commission is happening after the war, so there are less influences at play. That is—even though there may be government influences there are no paramilitaries or the LTTE influencing what we can say or not. So the number of people who censor what we say has been cut down. This makes it more open. That is why I am optimistic that this commission can get at the truth (Chairperson of a NGO consortium and JP, Batticoloa town, November 2011).

In both statements cited above there is an understanding that the LLRC came at an opportune time. For the witnesses, whether launched hurriedly as a ‘home-grown’ mechanism of transitional justice or not, the LLRC, which sat from 11 August 2010 to January 2011 and received written submissions until June 2011, was the outcome of a strategic, political *agreement* that injustices had occurred during the war, with the promise that some remedies could be speedily dispensed. The Batticoloa women interviewed for this essay understood the LLRC as such a mechanism through which the state would discharge its obligations to the extent of acknowledging that they were victims of war with stories to tell, and with the right to know what happened to their family members who were abducted, disappeared, tortured and/or killed, and with a right to compensation. As the war was over they felt this was their best chance of getting their detained loved ones back. Grounded in a pragmatic approach to justice they seemed satisfied with partial solutions. The women noted “we are not interested in punishment—we just want to know what happened and for the return of our men”.

This turn to restorative, rather than retributive justice, was reiterated by other Tamil women who appeared before the LLRC. Giving evidence in camera at the sitting held at the divisional secretariat office in Chettikulum in the Vavuniya district on 14 August 2010. Witness 3 from Varikuttur, for instance, primarily pleaded for the return of her disappeared son. This was also a *necessary* emphasis because she was wary of naming the perpetrator(s) in the first place.<sup>8</sup> She pleaded with the commissioners “If only you could help me get my son back I will be really grateful to you”. The immediate demand was for information on the disappeared and return of the missing. This was a position of compromise, entailing (as social choice theory would have it) a comparative assessment, taking into account above all, the practical, functional and implementable (Sen 2009: 106). Where political and military interest vitiates accountability,

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<sup>8</sup> Witness 3 alleged at first that the army arrested her son but retracted her position in the next sentence saying “There is an army camp, but we don’t know who took him”. This points to the fine line between features of a ‘dirty war’ in which there was lack of clarity on who the perpetrators were; and the conditions under which witnesses were only comfortable at hinting at military culpability.

truth/information seeking on the missing seemed graspable to the women, particularly as the LLRC commissioners assured war survivors in preambles before each sitting that they had come to look into their grievances. This was a stand endorsed in the final report (Chapter 5: 34-38; 163-64) which stated that relatives of missing persons have a right to know their whereabouts, and a right to know the truth about what happened to these persons in order to effect closure; that it was the responsibility of the state to ensure the security and safety of people in its custody, and that the government was duty bound to “direct the law enforcement authorities to take immediate steps to ensure that these allegations are properly investigated into and perpetrators are brought to justice”.

Why did these women opt for a non-pursuit of criminal justice when the commissioners themselves demanded it? There are several reasons. To begin with, they were not to know at the time of testifying that the LLRC report would come out strongly on the need for accountability and prosecution with regard to disappearances. Second, and more importantly, the women’s emphasis on restitution points to their strategic mindfulness of having to live side by side with the military and so, a civil-military balance which favours the military particularly in former LTTE held areas and high security zones. Third, it points to gendered inequities, of the inability of most women to address issues of justice which is already low (Baker 2011).<sup>9</sup> This is particularly the case regarding sexual violence. Despite allegations of sexual violence particularly in the last phase of the war, very little firsthand testimony of rape, for instance, emerged also because of the extraordinary cultural stigma that censors sexually-abused women from providing testimony on the crime (Harrison 2012: 221). The LLRC report (182-83) illustrates this stigmatisation in its summary of the Batticaloa Disaster Management Women’s Movement’s submission that women continue to feel unsafe in militarised areas, that many of them were killed even after the war, and that “Although exact reasons for such ‘mysterious murders’ were not known, the ‘pathetic situation’ is that the accused in such cases have been released on bail”. This is short hand for incidents of forced sexual violence on women and lack of law enforcement; and marks the fact that neither the women’s organisations, nor female witnesses could bring themselves to name the crime. Nor did the LLRC, which had the power to do so, sufficiently explore allegations of sexual violence.

Fourth, the women’s emphasis on restitution points to their vulnerability as minority Tamil women. It is noteworthy that, based on witness transcripts available on the LLRC website ([www.llrc.lk](http://www.llrc.lk)), accountability was most overtly sought by a woman of the majority Sinhala community.<sup>10</sup> Fifth, the women’s reluctance or even seeming indifference to the question of accountability can be rooted in how individual survivors cope and heal according to different

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<sup>9</sup> It is for this reason that international guidelines on gender are given to Truth and Reconciliation Commissions (TRCs) which recommend gender training for the commissioners, gender trained staff including a female statement-taker, and encourages TRCs to work closely with local women’s groups.

<sup>10</sup> Witness 6 testified before the LLRC in Galle about the death of her Sri Lanka army son who, according to army sources, had committed suicide. Unconvinced of the cause of his death, the woman hinted at a cover-up and overtly demanded the investigation of a ‘high’ army official.

timelines than those demanded by truth commissions and nation-building exercises (Hamber & Wilson cited in Salih & Samarasinghe 2005: 31). Individual survivors may have different and changing priorities of what constitutes restitution at any given moment of time, so that what may be important to a survivor now may be of low priority later and vice versa. For the women interviewed for this research, to live *as though* their loved ones are not dead was also to live in hope—although, of course, they understood that a crime took place at the very moment of detention/abduction itself.

Sixth, the women's non-pursuit of retributive justice was about repair. Veena Das (2006: 62) writes of how women survivors make the toxic experience of violence of their own through the work of repair and recovery which does not entail “an ascent into transcendence but... a descent into the everyday.” This requires the careful daily management of affect and emotion, including keeping their trauma subdued, and doing little things that make them useful to family and community. These are, in effect, “complex transactions between the violence as the originary moment and the violence as it [expands] and seeps into the ongoing relationships” (2006: 62-68). Looked at this way, the refusal by many of the women who came before the LLRC to overtly ask for the perpetrators of violence to be punished is about how they “have taken these noxious signs of violation and reoccupied them through the work of domestication, ritualization and renarration” (2006: 59).<sup>11</sup>

### **Cultures of Justice**

Realisable justice must necessarily take into account multiple views on justice as well as sources of justice. Modes of justice which are deeply rooted in local cultures often complement formal judicial procedures and hold the key as to why the public demands certain types of justice, or not, from judicial commissions and/or courts of law. Disturbingly, some forms of culturally embedded justice can themselves foster extreme violence such as when victims ‘take justice into their own hands’ to mete out punishment, or dominant men offer the vulnerable protection in masculinised rituals of the vigilante, thug and the ‘chandiya’ which has cultural sanction. Shaming is another common cultural tool of justice but its value in post-conflict reconciliation efforts is when it is shaped towards confession/atonement/plea-bargaining and thereby reintegration, not ostracism. In this way culturally embedded forms of justice become part of wider public reasoning particularly, if not only, when they lead to public good.

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<sup>11</sup> It is also because the work of repair shapes the narration of women's testimonies in particular ways that a gap can be discerned, for instance, between what most female survivor-witnesses sought from the LLRC and what women's rights activists demanded of the state through the commission. The spokesperson for the Batticaloa Disaster Management Women's Movement, for instance, spoke passionately of war widows and poverty in the district as issues requiring urgent attention and asked that post-war development be in line with international statutes such as CEDAW and UN Resolution 1325. This was a language markedly absent in the address of the average female witnesses who came before the LLRC. They were primarily interested in sequence: who picked up their men, what happened to them afterwards, their current whereabouts and anticipated return. Their demands were, therefore, different in emphasis although not necessarily competitive or opposed to the principles voiced by the women's organisation. This points to the plurality of discourses and the different registers of rhetoric typically heard at TRCs.

The ritualised spiritual realm also holds widespread acceptance as a source of justice. Pat Lawrence’s work (2000; 2010) on the role local goddesses play in the lives of survivors of conflict and natural disasters in the east of Sri Lanka shows that women look to them—whether *Kannaki Amman*, or after the devastation of the tsunami, the Hindu sea goddess *Kadalatci Amman*—as those who protect and deliver justice. When found to be wanting as protectors, these goddesses suffer rebuke and neglect of their shrines by devotees, pointing to the intimate presence they exude in the homes and lives of the community (Lawrence 2010: 98). Significantly, even if their divine reputation is dented (because they have been unable to protect their followers from natural disasters or war-time atrocities), these gods have the capacity, unlike the state, to *regain* their protective power precisely because of the excesses of the state. In the aftermath of significant numbers of involuntary disappearances, unable to take their problems to a government and security forces unwilling to listen, Lawrence (2000: 179) notes, for instance, that many Tamils who remained in Batticaloa “increasingly availed themselves of a different form of agency found within local Amman cult practices”.

Exactly how this ‘divine legacy’ endures in the consciousness of victim-survivors was evident in the manner in which Witness 2,<sup>12</sup> who gave evidence before the LLRC at Ariyalai on 11 November 2010, drew on her religious and cultural resources for supplication and parody, pointing also to how culture enables people to “make compelling claims for connections between supposedly distinct discourses” (Yanagisako & Delaney 1995: 19) such as the law and religion. Testifying about her disappeared son she stated:

Lots of people have told her (sic) they have seen her son at the Ooralavu Army camp (it is on the Palaly road about 6 km from here). The relief in those things are not important; I want my son back. And I am fully confident that my son is alive; all are alive. Today is a very auspicious holy day for the Hindus (Nallur temple; Murugan temple). It was in the Puranas (legends) that God Kataragama fought and destroyed evil. It was on this date that it happened. So you have come on this day.

The son of this witness was arrested by the Sri Lanka army in front of his wife and three children one night in January 2007 over an ‘identity card issue’. Prior to her narrative cited above, the witness informed the commissioners of the several places, including the ICRC and Human Rights Commission she had gone to in search of her son, and the politicians including a senior government Minister that she, together with other mothers, had approached for information on their sons. The Minister had promised to find out about the missing men but no information had been forthcoming. Her decision to narrate her lack of success and the false promises given to her as a *prelude*, and her strong welcoming of the Commission invoking a divine memory were her culturally embedded ways of stressing that she is yet again a supplicant and that the commissioners, like the gods, have a moral duty by her to locate her

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<sup>12</sup> The witness is referred to as ‘she’ by one of the commissioners and recorded as such in the transcript although the name of the witness is withheld.

son. Her religious faith is a resource Witness 2 draws on here to make an implicit rhetorical comment about power relations and exert moral pressure on the commissioners to do their duty by her even as she compliments and welcomes them to Ariyalai.

Witness No. 2's address permits us to assess the abundant availability of ethno-cultural resources in how she gives evidence, shames and judges the state, the law, and whatever 'small' reliefs (sightings of her son) are offered to her. Here she clearly ranks these sightings as inconsequential in relation to her key demand: the return of her son, alive. For this survivor of war, culture is the ground on which she mounts her interlocution; and it is through this interlocution, this narration of her story to the state that she hopes in some way to act upon it, to alter it, and by doing so change her own condition (Butler 2005: 50-51).

Exactly how the state should be altered is dependent, however, on perspective. Because retributive justice is experienced in the ritualistic, symbolic realm in which there is belief that the gods will cast out malefic influences, and through oracles name and shame perpetrators and prescribe coping mechanisms to those aggrieved; and precisely because the state's record on law and order with regard to war related violence is illegible, these women do not turn to the state for accountability. This has serious implications on the public will to strengthen formal accountability mechanisms. Even though in the context of transitional or post-war justice, there is a current endorsement on the part of the international community that commissions with a purely truth-seeking mandate do *not* damage or weaken criminal justice, and that they are a positive first step towards accountability (Hayner 2001: 92), institution-builders believe that 'acting upon the state' should bring maximum yields. For them non-judicial truth-seeking is not an alternative or replacement for criminal justice, and prosecuting serious crimes is a legal obligation of the state under both national and international law (2001:92).

### **Realisability**

As Hayner notes however, obligations alone do not ensure that prosecutions are carried out impartially in post-conflict contexts. Evidence from around the world suggests the contrary. The relationship between TRCs and prosecutions is, therefore, complex and complementary. Citing Wilder Taylor, Hayner (2001: 92) notes that pitting TRCs *against* mechanisms of accountability is in fact a false dichotomy. The LLRC can be seen as a first step, albeit partial and incomplete, which can fast track relief to survivors by a) acknowledging them as victim-survivors and b) facilitating some form of closure through information which can also become the basis for compensation, future prosecutions and a repository of collective memory on the war. If transcendental justice embodies the culmination of what a society agrees upon as truly just, realisable justice is a process that is disparate and ongoing, but can at the same time lead to the development of human capabilities which Sen has continuously argued is constitutive of freedom itself.

It is precisely because a person's capabilities are dependent on real opportunities which she leverages towards a better life for herself that the delay in implementing the LLRC recommendations (which constitute such opportunities for war survivors) has become a vexed issue. In the absence of other political mechanisms for redress, power-sharing and reconciliation, much is also expected of the LLRC which it cannot fulfil. So can it be a place from where justice can emerge? It is clear that the Commission is irreducible to either its recommendations on reparations and restorative social justice, or its approach to war crimes, accountability and criminal justice. Even those who were disappointed with its analysis of war crimes in relation to international humanitarian law, civilian casualties and witness protection etc. acknowledged the report for providing robust recommendations on reparation, right to information, governance, the return to law and order, and political settlement etc. (Pinto-Jayawardena 2012). It therefore incorporated both realisable and transcendental principles, taking into account specific human rights and security issues in the war zones, as well as macro issues of devolution, language rights, foreign policy and good governance.

Yet if we accept realisable justice *on its own terms* and make peace with its partiality, incompleteness and reliance on contingency, why does this come across as a Faustian bargain? This question leads us to look at the limits of realisable justice itself (somewhat glossed over by Sen in *The Idea of Justice*). As already noted, an important aspect of realisable justice is agreement on what is just, based on a ranking of available principles and modes of justice. According to Sen, the ranking provides for a situation in which even though all the parties concerned have their own order of priorities which may not coincide, the 'intersection' or shared beliefs held by all parties "will yield to a partial ranking, with different extents of articulation (depending on the extent of similarity between the orderings)" (2009: 104-05). While for Sen (2009: 105) the significance of such a ranking is an acceptance of the evaluative *incompleteness* of the project, and thereby a speedy enforcement of the justices that can be agreed upon because it does not chase after a utopian ideal, in a complex multi-ethnic post-war context which also includes a coalition government in Sri Lanka, what is actually agreed upon for the time being at least, may not satisfy many people.<sup>13</sup>

Many of the LLRC's 285 recommendations have been in the public domain for some time, advocated before by civil society groups and political parties as ways of solving the ethnic conflict. For the survivors as well as civil society groups the delay in implementing them signals, therefore, a lack of concerted political will to ensure that the recommendations

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<sup>13</sup> This was borne out by the time taken to establish a functioning Parliamentary Select Committee (PSC) to decide on devolution which the LLRC report stressed is of national importance, requiring political consensus and is the primary responsibility of the government (Chapter 8: 213, 305, 377). The recommendations for organising a collective act of contrition (Chapter 9: 284, 387), establishing a commemorative national day of solidarity with war victims (Chapter 9: 285, 387-88), and a dual language national anthem (Chapter 9: 277, 386) have also not yet been enacted. The publication of the LLRC report itself was a welcome change (given that many previous Presidential Commission reports remain unpublished to date and the report of the 1998 Commission took two years before it was publicly released). Yet the translations of the full LLRC report into Sinhala and Tamil were delayed, although its recommendations were translated; nor did the media serialise the report in full for the benefit of a larger public.

become part of realisable justice at work (*Friday Forum* 2011). In July 2012, a little over seven months after the LLRC submitted its final report on 15 November 2011, the cabinet endorsed the government National Plan of Action based on 91 of the LLRC's recommendations and identified specific tasks, the government agencies responsible for carrying them out, timelines (maximum of three years to finish all activities), and indicators with which to monitor progress. It also gave notice of establishing a Land Commission to look into the vexed issue of resettlement and a Task Force to monitor implementation. Yet critics have pointed to key recommendations of the LLRC overlooked in the Action Plan. One has to do with the missing and forcibly disappeared—a subject in which the women who came before the Commission are keenly invested. The LLRC made several recommendations on the missing and disappeared including a Special Commission to investigate disappearances. The Action Plan, however, relies on existing mechanisms within the Criminal Code to deliver justice on the missing despite their ineffectiveness in the past (Perera 2012).

The delays in implementation have negated the goodwill witnesses had towards the LLRC. The Batticaloa women interviewed for this essay were appreciative, for instance, that the Commission had travelled to the war-affected areas enabling more of them to give evidence without having to travel to Colombo to do so. They noted that the commissioners gave them a fair and empathetic hearing. They affirmed that the LLRC worked at being inclusive.<sup>14</sup> Yet the postponement of restitutive justice was inevitably expressed as frustration at the LLRC because it was the most public face of the state in the post-war transitional justice process. This is unfair given that the LLRC had no role in enforcement. But the Commission did hold out a promise which the women clutched at that it could not possibly keep.

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<sup>14</sup> The LLRC was flexible in admitting witnesses, permitting those who had not filled out the witness application forms distributed prior via the *Gramma Seva Niladharis* but who had gone to the hearings to enter the proceedings to voice, or handover their submissions. Most of the LLRC sessions held in the urban towns had 250 to 300 people crowding the district secretariat compounds, and on occasion cultural halls and churches at which sittings were held.

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This essay considers the issue of post-war justice in Sri Lanka through a discussion of the Lessons Learnt and Reconciliation Commission (LLRC), and the testimonies of the women who came before it. Drawing on Amartya Sen's *Idea of Justice* (2009), it contextualises the LLRC, which was established in May 2010 to look into the causes of Sri Lanka's ethnic conflict and recommend measures of restitution to victims of war as well as institutional and administrative reform to prevent further violence, within two dominant schools of thought on justice. These two schools — the transcendental and realisable — have shaped the discourse and debates on the LLRC and the implementation of its recommendations, as well as the wider issues of accountability and restorative justice in the aftermath of war. Examining the LLRC's evidentiary promise to women survivors of war who went before the Commission, the essay looks at the conditions which shaped their testimony, their narrative registers, the women's ideas on justice and the cultural resources they fall back on to elicit justice. In doing so the essay interrogates the relationality of transcendental and realisable justice itself, even as it offers a gendering of post-war justice in contemporary Sri Lanka.

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