Sri Lanka 2015: a new era for human rights?

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Post-war Sri Lanka: an assessment

It has been five and a half years since the gruesome 30 year long civil war between the Sri Lankan Government and the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka came to an end, causing death to approximately more than 100.000 people. In the end, the Sinhala-Tamil conflict is a product of modern politics[1] and the Sri Lankan experience teaches that the induction of ethnic chauvinism into the strife for votes led to the acclimatization of dismissive, majoritarian populism[2] that was met with reactive nationalism by Tamil leadership.[3]

The former High Commissioner for Human Rights, Ms. Navanethem Pillay, made an honest and accessible assessment of post-war Sri Lanka in her concluding report[4] after visiting Sri Lanka in August 2013.

While she acknowledged the achievements made by the government in the fields of resettlement, rehabilitation and demining, furthermore underscoring the value of the election to the Northern Provincial Council in September 2013[5], she expressed her grave concern regarding -*inter alia*- the ongoing lack of accountability for alleged war crimes, the erosion of the rule of law, the shrinking space for civil society, the curtailment of freedom of speech, press and assembly and finally the uprising of Buddhist extremism in Sri Lanka.[6] Her critique of the previous government's failures on post-war accountability was especially strong: in her report, she found no evidence of government efforts to carry out credible and independent investigations of reported war crimes. She attacked the previous government for not implementing the recommendations of the Lessons and Learnt Reconciliation Commission (LLRC).[7] She highlighted that one of the points made by the LLRC, the separation of the police from the Ministry of Defence, remained unmet as the police was placed under the command of a former army officer.[8]

In October 2014, the UN Human Rights Committee (UN HR Committee) had to consider the fifth periodic state report of Sri Lanka[9]. In its concluding observations[10], the committee also welcomed legislative and institutional steps to advance human rights, namely -*inter alia*- the adoption of the National Plan of Action for the Promotion and Protection of Human Rights or the ratification of the Convention on the Rights of Persons with Disabilities in 2007[11].

The UN HR Committee, then again, deplored -*inter alia*- the excavation of the Sri Lankan Constitution[12] and the retention of emergency regulations[13], the restrictions on the freedom of minorities[14] and poor women's rights.[15] In addition, the Asian Forum for Human Rights and Development also noted the misuse of the Prevention of Terrorism Act (PTA) to silence dissenters and also highlighted the military structure overruling the local administrative structures.[16]

Indeed, the human rights situation in Sri Lanka is of an appalling character and of a deplorable record: intimidation of the press, dismantlement of democracy and the impediment of the independent NGOs.[17] Finally, the tacit state support for growing extremist nationalist elements amongst the Sinhala-Buddhist majority against minorities has to be noted.[18]

Against this dreadful background, the United Nations Human Rights Council (UN HR Council) decided to set up an investigation into the unsettled war crimes allegations, which also the UN Secretary General's Panel of Experts on Accountability had asserted.[19] The government under the previous President Rajapakse tried to encounter this move by the UN HR Council by referring to the significant reduction of the army's presence in the country's north and the normalization of the situation.[20]

In any case: during the Rajapakse regime, undercover intelligence agents from the Central Investigation Division (CID) had infiltrated the north aiming to intimidate the local population and refrain the discussion of the war or any other past or present abuses.[21] But surveillance was also increased in other parts of the country: journalists asserted that people interviewed are increasingly requesting protection of anonymity. Members of the opposition and people who have been labeled as dissenters were particular targets.[22]

This state of surveillance needs to be assessed and monitored carefully and the new government must address this issue resolutely.

A climate of fear

Minority members from the Tamil and Muslim communities had repeatedly echoed their concern that the agenda of the previous Rajapakse government was to establish a sole Sinhala Buddhist hegemonic state.[23] In fact, the most prominent view of the national past of Sri Lanka is that Buddha bestowed upon the Sinhala people the obligation to shelter his teaching.[24] The communities fear the so-called slow Sinhalization of the island and the vanishing process of their cultural, linguistic and religious identity from the surface on the island.[25] They saw the victory of the former government as mainly as a victory of the Sinhala people over the Tamil and other minorities, reclaiming their special call to be the sole guardian of the Buddhist tradition on Sri Lanka, which, according to the Mahavamsa Chronicles -a mythical document of the Sinhala population considered to be the island's national chronicle, written by Buddhist monks in the ancient Pali language from the 6th century AD onwards - is closely intertwined with the island.[26] The Mahavamsa is of great importance to the Sinhala population and its interpretation of the colonial past, since it is a vital factor in the interpretation and justification of the language used by the nationalists. With the proliferation of Sinhala Buddhist symbols, the Mahavamsa Chronicles were only reaffirmed and nationalism perpetuated.[27]

Against this background and the post-war euphoria, minorities largely feel alienated with no meaningful and genuine reconciliation: even the most liberal members of the communities don't believe in any constitutional and governance reforms to remedy the defects of the broken system in Sri Lanka and address the roots of the conflict.[28]

Institutionalized impunity, growing nepotism and authoritarian shift

The Sri Lankan authority was concentrated in the hands of the few: the President and his brothers, Gotabhaya, Basil and Chamal Rajapakse. This power culmination was increasingly perpetuated by the ill-famous 18th Amendment: public bodies were politicized and the independent judiciary was attacked when the then-Chief Justice of the Supreme Court, Shirani Bandaranaike, was impeached in January 2013.[29] The International Commission of Jurists asserted in a report issues in 2012 that the politicization of the judiciary and the lack of judicial independence may perpetuate impunity.[30] The report also underscores that almost 40 years of emergency rule have not only eroded the criminal justice system in Sri Lanka, but also undermined human rights.[31] With the 18th Amendment to the Sri Lankan Constitution, the Presidential executive powers were massively extended- an incomparable shift in Sri Lankan history. This Amendment not only decreased democratic transparency, politicized the legal and formalist procedure of appointments, but also provided for erosion of judicial independence and impartiality.[32]

The Human Rights Commission of Sri Lanka: protective mechanism against state violations?

The Human Rights Commission of Sri Lanka, established under *Act Nº.21 of 1996*, provides that the Commission consists of five members with human rights expertise. However, the Commission's composition fails to determine the knowledge and experience of members and remains a considerable flaw, alongside other problematic aspects, namely the vague formulation for the representation of minorities or the absence of any provision regulating the gender-based approach in the nomination of members and inclusion of members from the civil society.[33] With the enactment of the 18th Amendment, the Sri Lankan President is free to nominate the members of the Commission, making the Commission a mockery for the protection of human rights, as membership is politically charged, the nomination unilateral and the independence prey to the executive power of the Sri Lankan President.[34] Also, the financial resources depend largely on the former Sri Lankan President, as allocations come from the Ministry of Finances- one of the three portfolios the former President held.[35] In any case, the national human rights institutions are supposedly meant to be independent from the

state, while they are established and financed by the state. The Paris Principles relating to the Status of National Institutions (Paris Principles) provide the blueprint, as how this independence and effectiveness must be ensured. However, the Sri Lankan Human Rights Committee is in direct contravention to these principles. Although this institution is having *suo muto* powers, it doesn't investigate politically sensitive human rights violations, but rather accidental deaths due to unprotected railway crossings.[36] Simply put: the Sri Lankan Human Rights Commission is a silent observer of human rights violations rather than a control organ to materialize and institutionalize human rights protection.

The next Asian* tiger*?

Economic development has largely focused on -expensive- infrastructure programs that have indeed generated jobs; but at the same time, schools, universities and the health system suffer from the lack of much needed financial support.[37] Critics argue that the Northern population has just emerged from a war that separated them from the rest of the country and, to a large extent, exposed them to an open market economy.

According to a CPA/Social Indicator poll, the numbers suggest that the economic situation got worse under the Rajapakse regime. Over 40% of those interviewees had stated that they compromise on the amount and quality of the food they purchase and 24% admit to not purchasing medication. The Sri Lankan population's complaint about high costs of living and economic frustration is mixed with the rising corruption on the governmental level.[38] Noteworthy is also that exogenous factors rather than internal economic developments are attributable for the improvements in employment, incomes and growth; large foreign funding of investment, consumption and high foreign indebtedness have raised serious doubts about the sustainability of an allegedly flourishing economy.

It is reported that $ 6 billion- $ 8 billion are owed to China alone; correct numbers cannot be verified yet, as the government doesn't reveal the correct and transparent economic statistics. It is true that unemployment is on low level and the GDP is on its rise. At the same time, tourism flourishes: just two months after the war in 2009, the Sri Lanka Tourism Development Authority (TDA) recorded a 28% increase in tourists stays compared with the same month a year earlier. By 2013, the official count had topped 1.27m.

According to the Director of the distinguished Centre for Policy Alternatives, Dr. Paikasothy Saravanamuthu, *"(...) Mahinda Rajapakse (had) literally turned it (i.e. Sri Lanka) into a more East-Asian model – a populist authoritarian model and over prioritization of economic development (...)*".

A crucial step towards accountability: The Human Rights Council Resolution 25/1

With the Resolution 25/1 of March 2014[39], the UN HR Council requested the Office of the High Commissioner for Human Rights (OHCHR) to monitor the human rights situation in Sri Lanka and "*undertake a comprehensive investigation into alleged serious violations and abuses of human rights and related crimes*"[40] by Sri Lankan government forces and the LTTE. With its latest report on the human rights situation in Sri Lanka, Amnesty International stressed that an international role in human rights investigation and monitoring is crucial to achieve endurable peace, accountability and reconciliation in Sri Lanka.[41]

The Sri Lankan rebuttal

Sri Lanka has consistently rejected an international role in human rights monitoring and accountability and has declared its refusal to cooperate with the OHCHR-led investigation.

This human rights advocacy and action on the international plane was recently met with resistance and rebuttals from Sri Lankan diplomats. Prasad Kariyawasam saw the criticism as unjust. He refers in a letter to the editor of the NYT that

> (...) *we held the first election to the Northern Provincial Council, delayed by more than two decades because of the refusal of the Liberation Tigers of Tamil Eelam to politically empower people in the North. Now, the Tamil National Alliance is in control of provincial administration. To compare Sri Lanka to human rights and humanitarian emergencies elsewhere in the world is unjust.* And further more: "(...) *We reject the United Nations investigation because its intrusive nature exceeds its mandate. It challenges the sovereignty of our country; violates basic principles of international law; vitiates the*

> *atmosphere needed for reconciliation (…).*[42]

More recently, the UN High Commissioner for Human Rights, Prince Zeid Ra'ad Al Hussein, deplored and condemned the Sri Lankan government's continued attacks against the investigations carried out by the OHCHR into allegations of human rights violations and "*creating a wall of fear to prevent people from providing evidence*."[43]

This statement, however, was met with a rebuff by the Sri Lankan Permanent Representative to the United Nations in Geneva, Ravinatha Aryasinha, who wrote

> (…) *It is a matter of deep concern to note that you, as a high official of the UN system, have resorted to the use of intemperate language to attack and vilify a sovereign member of the United Nations. Further, you have chosen to cast aspersions and denigrate a democratically elected Government*.

This language illustrates the common strategy the former Sri Lankan government had chosen: a strategy based on denialism and state sovereignty, latter invoked through art 2.7 of the *UN Charter*. Noteworthy in this concert of diplomatic action is Professor Anthony Anghie's view[44]: international human rights law became the central policy of the United Nations, through which people from Third World countries in particular could seek protection.[45] However, in his view, international human rights law became a tool for the intrusion in internal affairs of states, a justification for the intervention of the West in Third World countries, especially after the end of the Cold War.[46]

Human rights discourse, compliance and realization through UN human rights machinery

Is it fair to assess that human rights pressure does not show any effects? Is there any persistent power of human rights protection? According to Giorgio Agamben, human rights discourse is the *sujet* of politics and has an element of sanctity, as it urges for moral dissemination of the international forum.[47] But, at the same time, institutions within the UN system are relatively weak to enforce the obligations. This, in turn, shifts the duty to protect human rights onto states.[48]

In the Sri Lankan case, the former government tried to deflect international pressure by lifting the Emergency Regulations in 2011, the setup of the LLRC in 2010 and the release of its report in 2011 and, finally, holding the Northern Provincial Council elections (2013). But Sri Lanka understood that the naming and shaming procedure on the international plane, such as forums like the UN HR Council, can be managed as long as its bilateral ties with key countries do not deteriorate completely.

Can international pressure compel Sri Lanka to change its human rights performance? When will human rights violations and institutionalized impunity have such an appalling character that the international community will urge Sri Lanka to act more decisively?

In their groundbreaking book *The Persistent Power of Human Rights*, Sikkink and Risse lay out a theoretical framework to achieve compliance, which consists of three phases of socialization: 1. Adaptation and strategic bargaining 2. Moral consciousness-raising, argumentation and persuasion, and finally 3. Institutionalization and habitualization.[49]

There is not a single theory of human rights change, but different types of human rights issues and target actors require different approaches in theory and policy.[50]

It is self-explanatory that a state's duty depends largely on its capacity. Furthermore, the UN human rights machinery's aim to achieve compliance with the human rights treaties must take into account the specific national settings it deals with. International human rights law has its flaws and cannot remedy all issues on this planet. Weak enforcement mechanisms and poor funding are impeding the effectiveness of the international human rights machinery so far. However, human rights education is of utmost importance: a serious and systematic process of research and engagement with target actors on the ground is indispensable to empower the civil society and enable them to make changes in the domestic setting.

The Presidential elections: a chance for catharsis?

In 2014, with the announcement of fresh elections by the former President Rajapakse and the candidacy of Mr. Sirisena, democratic space was generated and genuine competition seemed possible.[51] Until his announcement to run for presidential elections, Mr. Sirisena served as Health Minister in the Sri Lankan government and as General-Secretary of the Sri Lanka Freedom Party (SLFP), the party Rajapaksa headed and which led the ruling United Peoples Freedom Alliance (UPFA). Mr. Sirisena's political switch on November 21st and nomination as the joint opposition candidate took the government by surprise. Mr. Sirisena entered the election with "*a clean slate and is seen as a person of integrity,*" says Lasanda Kurukulasuriya, a Colombo-based political commentator. And both, the new President Mr. Sirisena and his predecessor Mr. Rajapakse, appealed to the same electorate: nationalists among the island's ethnic majority, the Sinhalese-Buddhists.

However, the opposition lacked clarity in strategy and coherence in ideology: the combining factor was solely to remove Mr. Rajapakse from power.[52] The amalgam of the oppositional United National Party (UNP), the Jathika Hela Urumaya (JVP), Tamil National Alliance (TNA) and Sri Lanka Muslim Congress (SLMC) needed to find a common strategy, which they apparently did with the outing of Mr. Rajapakse.

It was a historic, decisive election. It was the first time an incumbent office holder sought a third term. President Rajapaksa's victory could have consolidated an authoritarian populism as the form of government and political culture. The President's family was highly concerned to lose power for several reasons: firstly, family members had been appointed as ambassadors to key countries, heads of banks, and government corporations. Secondly, fifty-six percent of Sri Lanka's budget allocation went to ministries and departments controlled by the Rajapakse family. Thirdly, with a defeat in the election, the loss of immunity may come-immunity that shielded him and his relatives from international criminal prosecution for alleged war crimes. Former President Rajapakse had access to state resources and control such as Election Commission, the media, intelligence agencies, police, and other bodies indeed give him the upper hand to possibly manipulate elections. A vocal group of Sri Lankans depicted and highlighted his human rights record, authoritarian style of governance, nepotism, and widespread corruption. The spiraling cost of living[53] under Mr. Rajapakse rule worried Sri Lankans. To reflect this dissatisfaction: the past two elections for two provincial council elections in March 2014 showed reduced margins for the governmental alliance and in September 2014, the results from the Uva Provincial Council elections cautiously indicated the end for the government under the former President Rajapakse: the ruling alliance's dropped from 72.39 % in the 2009 to 51.25 %.[54] Against this background a Sri Lankan diplomat, who asked for anonymity, stated: "I am concerned about the Rajapakse family. If cornered, they could do anything."[55]

A victory of President Rajapakse may have meant the crackdown of the opposition and the civil society, militarization and Sinhalization of the north and east, political observers indicate.[56] However, it came differently. The victory of Mr. Sirisena now poses significant challenges and expectations: he must aim to abolish executive presidency and restore the rule of law, strengthening minority rights, fighting corruption and reduction of the size of the military. Last but not least, the genuine engagement with the United Nations human rights machinery to address the human rights violations of the past, especially achieving accountability for alleged war crimes.[57]

In any case, any election is the fundamental motion to express the choice of the electorate and make possible changes in a functioning democracy and the winner of the election outcome will be equipped with a mandate to pursue the pledges he has made to the voters. In any case, the elections brought the chance to redeem democracy by holding the perpetrators of human rights violations finally accountable. A recent report of the Centre for Policy Alternatives (CPA) highlights that 44.3 % of Sri Lankans think the Constitution should limit the President's serving term.[58] In a similar vein, 24.5 % of Sri Lankans believe that Sri Lanka became more democratic after the end of the war.[59]

After independence in 1947, Sri Lanka was privileged with impetuous formal democratic functions. Now, however, these functions and the democratic institutions are under threat and are declining.[60] The hostage-taking of the rule of power by a family, allegedly aiming to create a dynastic project, poses an immense threat to democracy and civil society.[61] The close association of the previous President with the military, paired with the shrunken space for civil society and the hostile environment for Tamils and religious minorities pose a likelihood for election-related violence.[62] A genuine reconciliation process did not take place; here again, the CPA report offers a good insight: 40.8 % of Sri Lankans believe that the government did something, but not enough to address the unresolved issues in a reconciliation process.[63] Against this background, there are

"*reports of violence, threat and intimidation of voters to attend meetings, retribution against crossovers, damage to property and threats of more to come*." Fear was of prevalent character in this election.

However, the bottom line at the end is that the election impacted all citizens of Sri Lanka. The new President of Sri Lanka will affect their daily lives; he needs to address their aspirations and grievances. A non-vote will only "*(…) consolidate continuity and entrench the current dispensation.*"

Concluding remarks

Long-term stability and post-war reconciliation can only be achieved through a peaceful election resulting in a government committed to serving the interests of all Sri Lankans and preserving human rights. The commitment needs to be achieved through organic changes in the domestic setting and solutions, not by a managerial approach to deflect human rights criticism on the international plane. Mr. Sirisena must stress his attention on engaging with the United Nations, re-establish the ties to and work closely with the United Nations to promote human rights[64] rather than maintaining the *status quo* and pursuing cosmetic changes like in the past.

This commitment can be, firstly, precipitated with the empowerment of civil society and, secondly, strengthening the national human rights institution. The Sri Lankan Human Rights Commission is key here: it needs to establish the dialogue with the civil society, amend its internal policy and implement its role in accordance with the Paris Principles more efficiently. Independence, courage and objectivity will be of importance to challenge state institutions and create a climate of human rights empowerment. The emphasis must be placed on education, by which victims of human rights violations can be empowered and a human rights respecting community be built upon. Training and education interventions are and will be the most important interface for galvanizing and engaging potential and actual perpetrators.[65] Normative principles must usher in the everyday realities- taking into account the cultural dynamics to understand the beliefs and behaviour of members of the police and military, for example.[66] Sri Lanka, as a militarized society and emerging from a long period of protracted armed conflict, is still entrenched in impunity. Violence is seen as normal; therefore, it is indispensable to understand the context in any conflict-ridden society prior to a human rights engagement, learn the lived realities of state institutions and communities in the field of ethnography.[67] Domestic mobilization is the key factor for achieving compliance with human rights standards.[68] However, such change can only be envisaged if countries concerned are sufficiently liberalized as a precondition for human rights change.[69]

Thirdly and finally, a human rights culture can be promoted and protected through a strong human rights monitoring system under the aegis of the United Nations, unlike in the past. The United Nations must be ready to take its role more rigorously, as international protection of human rights is neither a measure of the cogency of human rights nor their outward rejection. Immanuel Kant asserted quite correctly in his famous *Perpetual Peace*: "*The social relations between the various Peoples of the world, in narrower or wider circles, have now advanced everywhere so far that a violation of Right in one place of the earth, is felt all over it.*"[70]

Ce billet ne lie que la ou les personne(s) l'ayant écrit. Il ne peut entraîner la responsabilité de la Clinique de droit international pénal et humanitaire, de la Faculté de droit, de l'Université Laval et de leur personnel respectif, ni des personnes qui l'ont révisé et édité. Il ne s'agit pas d'avis ou de conseil juridiques.

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