

# GENDER AND TRANSFORMATIVE JUSTICE IN SRI LANKA

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The idea of ‘transformative justice’ has emerged from criticisms that conventional transitional justice mechanisms have led to static institutions and the prioritisation of elite interests instead of tangible remedies for the people who are most in need – including women.<sup>1</sup> This working paper focuses on Sri Lanka’s reconciliation and reform processes, and the crucial task of bringing genuine transformation to the women affected by the country’s near three decade war and recurring conflicts. The authors urge decision-makers to ensure full inclusion of women and include gendered experiences in planned reform processes, aiming at genuine transformation of societal circumstances so that conflict-affected women can achieve empowerment, dignity and equality.

The United Nations (UN) Women, Peace and Security (WPS) agenda recognises that conflict affects women in different ways, and that women have been historically left out of peace negotiations and post-conflict work, including transitional justice. Although transitional justice is described by the UN as efforts “to ensure accountability, serve justice and achieve reconciliation”,<sup>2</sup> traditional concepts and practices of transitional justice have tended to fall short of providing effective responses to the complex harms suffered by conflict-affected women. Transitional justice has been recognised in the WPS framework and academic discourse as an area in which improving the approach to gender is a crucial part of achieving better outcomes. This was initially established in key UN Resolutions which recognised

the complex but crucial task of addressing women’s unique experiences in post-conflict contexts,<sup>3</sup> and the importance of engaging with sexual violence issues in conflict and transitional justice.<sup>4</sup>

The WPS focus on women in transitional justice is relevant to Sri Lanka’s post-war processes. A large body of work has emerged from Sri Lanka demonstrating that women have experienced a range of serious gendered harms during the country’s period of conflict and its aftermath.<sup>5</sup> This aligns with WPS commentary, work by the UN and other scholarship exploring how gender sensitivity can greatly improve peacebuilding, reconciliation and transitional justice outcomes.<sup>6</sup>

The necessary next step in fulfilling the

task of including women in Sri Lanka’s post-war and post-conflict processes is to examine how transitional justice can bring about meaningful and sustainable change to those who need it most. The idea of ‘transformative justice’ has emerged as a pathway for improving transitional justice outcomes, particularly regarding the inclusion of women and women’s needs.<sup>7</sup> The application of transformative justice to women in Sri Lanka is the focus of this working paper. This also serves as an exploration of how transformative principles have the potential to signal an important development in the WPS approach to transitional justice.

Transformative justice has developed as a framework for targeting some of the observed shortcomings of accepted



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also constitute human rights violations. Addressing this range of abuses requires the integration of traditional transitional justice mechanisms with broader public policy and social justice initiatives.

This working paper specifically explores what genuine transformation for women may look like in the work of the Office on Missing Persons and Office for Reparations, the first two of Sri Lanka's planned transitional justice mechanisms, and in the context of potential constitutional and legal reforms.

## DEVELOPMENTS AND DEBATES AROUND TRANSITIONAL JUSTICE

In post-war and post-conflict contexts, women often continue to experience a range of human rights violations, yet there is a danger that many of the harms they suffer will not be adequately redressed if transitional justice processes go ahead without a critical evaluation of traditional practices, and consideration of gender-specific needs.

A key 'transformative' development in transitional justice is the inclusion of an expanded range of rights violations. Transitional justice has historically focused on violations of civil and political rights, overlooking violations of economic, social and cultural rights. For example, women who are left economically disempowered after war are unable to achieve the adequate standard of living to which they are entitled.<sup>10</sup> Such a rights violation is unlikely to be addressed through a traditional transitional justice approach where judicial responses and reparations are only available for specific rights abuses that occurred during war. Further, many of the rights abuses which affect women in post-war contexts are underpinned by a comprehensive failure to ensure the right to equality and non-discrimination, a fundamental principle of international human rights law. However,

transitional justice mechanisms, such as structural inequality and persistent conflict-related injustices. While transition often takes place "at the top" through elite discourse and institutional mechanisms, transformation can be understood as a "wide-reaching change throughout society".<sup>8</sup> Key principles of transformative justice include prioritisation of victim-centredness,<sup>9</sup> acknowledgement and facilitation of grassroots and community-based transitional justice initiatives, and a holistic approach to justice. Each of these principles accommodates the needs of women and improves upon issues identified within traditional transitional justice.

Sri Lanka is experiencing its own transitional justice journey. Ambitious reforms were promised by the Sri Lankan government in 2015, including a new constitution and a comprehensive transitional justice process, meant to address the root causes of the conflict and prevent recurrence, with the hope of genuine transformation. There is a wealth of global experience and discourse for Sri Lanka to draw upon in planned processes, including the development of transformative principles, particularly those aimed at inclusion of conflict-affected women. In the Sri Lankan context, genuine transformation for women will require an expansion of the aims of transitional justice and a sustained focus on the importance of gender justice within all processes. A holistic approach encompasses all kinds of violence – not only political violence and armed conflict, but also the interpersonal and structural violence that

- 1 Paul Gready and Simon Robins, "From Transitional to Transformative Justice: A New Agenda for Practice", *International Journal of Transitional Justice* 3 (2014), 15.
- 2 *Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, S/2004/616, 23 August 2004, 8.
- 3 UN Security Council Resolution 2122 (2013), S/RES/2122 (2013), preamble and article 2.
- 4 UN Security Council Resolution 2106 (2013), S/RES/2106, articles 4 and 12.
- 5 See, for example, *Final Report of the Consultation Task Force on Reconciliation Mechanisms (Vol 1)* (Colombo: Consultation Task Force on Reconciliation Mechanisms, 17 November 2016), <http://www.scrm.gov.lk/documents-reports>; Vasuki Jayasankar and Savini Ganahewa, *Making Ends Meet: Women's Livelihoods in Post-War Sri Lanka* (Colombo: International Centre for Ethnic Studies, 2017); Yolanda Foster, "Women Demand Better Access to Truth, Justice and Reparations in Sri Lanka", *LSE Women, Peace and Security*, accessed 18 June 2018, <http://blogs.lse.ac.uk/wps/2017/10/22/women-demand-better-access-to-truth-justice-and-reparations-in-sri-lanka/>
- 6 For example, see Maria Martin de Almagro, "Transitional Justice and Women, Peace and Security: A Critical Reading of the EU Framework", *LSE Women, Peace and Security Working Paper Series* 5 (2017), <http://www.lse.ac.uk/women-peace-security/assets/documents/2017/wps5Almagro.pdf>
- 7 UNWomen, *Preventing Conflict, Transforming Justice, Securing the Peace: A Global Study on the Implementation of the United Nations Security Council Resolution 1325* (New York, NY: UNWomen, 2015), [http://wps.unwomen.org/pdf/en/GlobalStudy\\_EN\\_Web.pdf](http://wps.unwomen.org/pdf/en/GlobalStudy_EN_Web.pdf)
- 8 Matthew Evans, "Structural Violence, Socioeconomic Rights, and Transformative Justice", *Journal of Human Rights* 15 (1) (2016), 7.
- 9 For more information, see Bhavani Fonseka and Joanna Naples-Mitchell, *Victim-Centred Transitional Justice in Sri Lanka: What Does It Really Mean?* (Colombo: Centre for Policy Alternatives, 2017), <http://www.cpalanka.org/victim-centred-transitional-justice-in-sri-lanka-what-does-it-really-mean/>
- 10 *International Covenant on Economic, Social and Cultural Rights* (ICESCR), opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), article 11.

further work is required to ensure that this principle, and the full range of other rights, are fully integrated into transitional justice.

Transitional justice aimed only at selected violations of civil and political rights fails to provide support for those who have experienced the war differently,<sup>11</sup> which includes a vast number of women still experiencing injustice in post-war contexts such as Sri Lanka. Acknowledging that the effects of conflict include a range of economic and social injustices, and that these, too, are rights violations under international law, expands the narrative of transitional justice to more accurately reflect the varied experiences of all affected persons. Recognising that economic and social abuse can be addressed as rights violations positions social justice at the core of transitional justice aims. Dealing with the social injustice that affects victims on an ongoing, daily basis is thus a crucial element in effectively remedying conflict-related harms.

It is not a new idea that transitional justice should address persistent post-war and post-conflict vulnerabilities such as economic disempowerment, access to land, and social stigma. In practice, transitional justice has not historically been successful at addressing victims' immediate needs, but this is changing. Contemporary transitional justice discourse prioritises placing victims at the core of transitional justice design and implementation, a matter which has been discussed by actors in Sri Lanka and recognised as a "well-established norm" by Juan Mendez<sup>12</sup> and by the United Nations Human Rights Council (UNHRC).<sup>13</sup> Transitional justice that prioritises the rights, needs, interests and participation of victims is crucial to achieve genuine transformation.<sup>14</sup> For example, in the Sri Lankan context, the Centre for Policy Alternatives (CPA) has noted that it is important to define victimhood in a way that encompasses

the diversity of people affected by the war and conflicts. This necessarily goes beyond the targets of direct physical violence and civil and political rights abuses, to broader suffering such as that of female family members of those targeted and sexual and gender-based violence (SGBV) victims.<sup>15</sup>

The relationship between victim-centredness, non-recurrence of abuses and social transformation lies in the idea that transitional justice should be about "rebalancing power relations".<sup>16</sup> Involving victims in a way that recognises their citizenship and autonomy and deals with harms broader than the conflict will assist greatly in this rebalancing process. Restoring social equality and empowerment is a precondition for meaningful justice and reliable guarantees of non-recurrence. It follows that responding to the specific needs and desires of female victims will lead to better prospects of genuine transformation for those women.

Social injustice and rights abuses which affect victims on a daily basis are also closely linked to the underlying causes of conflict, so dealing with them is an important element of ensuring non-recurrence. Expanding the transitional justice narrative to encompass social and redistributive justice is linked to examining the deeper dynamics of conflict. As Louise Arbour explains, genuine guarantees of non-recurrence require addressing "sources of legitimate grievances that, if unaddressed, are likely to fuel the next conflagration."<sup>17</sup> The sources of these grievances can often be articulated as human rights violations, including cultural discrimination,<sup>18</sup> denial of the right to work<sup>19</sup> or to enjoy an adequate standard of living.<sup>20</sup> Thus, a broader approach to transitional justice not only encompasses tangible remedies to address immediate needs, but also, ideally, transforms the conditions from which conflict arose.

11 Louise Arbour, "Economic and Social Justice for Societies in Transition", *NYU Journal of International Law and Politics* 40 (1) (2007), 19.

12 Fonseka and Naples-Mitchell, *Victim-Centred Transitional Justice in Sri Lanka*, 11.

13 UN Human Rights Council Resolution 21/15, A/HRC/RES/21/15, 11 October 2012.

14 Fonseka and Naples-Mitchell, *Victim-Centred Transitional Justice in Sri Lanka*.

15 *Ibid.*, 10.

16 *Ibid.*, 21.

17 Arbour, "Economic and Social Justice for Societies in Transition", 8.

18 *ICESCR*, article 2.

19 *ICESCR*, article 6.

20 *ICESCR*, article 11.

## GENUINE TRANSFORMATION FOR WOMEN IN SRI LANKA

Between 1983 and 2009, Sri Lanka experienced an ethnic war between the Government of Sri Lanka (GoSL) and the Liberation Tigers of Tamil Eelam. There have since been “credible allegations” of human rights abuses linked to both parties during the war, particularly the final stage of the war.<sup>21</sup> However, the harms go far beyond the brutalities of the final stage, especially those suffered by women. Continuing ethno-religious conflicts, and societal, cultural, and patriarchal norms have affected women in different ways in post-war Sri Lanka. Many Sri Lankan women continue to experience a range of conflict-related human rights violations. For example, SGBV was documented during the war but continues as a society-wide problem in post-war Sri Lanka.<sup>22</sup> The ongoing emotional, social and economic hardship suffered by relatives of persons who were disappeared or killed during the war is another key issue. There is a danger that many of the harms they suffer will not be adequately redressed if transitional justice processes go ahead without critical evaluation of traditional practices, and consideration of gender-specific needs.

The UN has recognised in key WPS sources that SGBV must be a central focus of transitional justice initiatives which seek to address women’s vulnerabilities.<sup>23</sup> Sri Lanka is no exception – SGBV is a key post-war issue, with many barriers to effective justice within transitional justice processes and in Sri Lanka’s regular criminal justice system. Delays with investigations and prosecutions, lack of resources and gender-sensitive expertise, bureaucracy, and gaps in protection are some of the reasons that have contributed to many cases where truth and justice continue to be elusive for victims. It is important that these harms are addressed (with requisite sensitivity) not only within the

context of direct sexual violence during periods of conflict, but also in the context of SGBV that persists in regions which still feel the effects of the civil war. Further, SGBV is symptomatic of a culture which facilitates violence against women in all contexts, so it is crucial that Sri Lanka’s transitional justice process aims to deal with the broader inequalities and structural violence at the root of SGBV.

Sri Lanka’s transitional justice planning must also dedicate attention and resources to the harms suffered by women with relatives who were disappeared or killed during the conflict. There is a high number of female-headed households in Sri Lanka, with approximately 90,000 women widowed in the North and East and 58,121 female-headed households in the Northern Province alone.<sup>24</sup> The vulnerabilities they face have increased in the post-war period with added pressure to their livelihoods, safety, security, and reproductive health and rights.<sup>25</sup> Research has shown that female-headed households manage by running small-scale businesses, engaging in agricultural labour, and undertaking fishing-related activities.<sup>26</sup> In most instances, women who have adopted the head-of-household role post-war also suffer the profound psychological trauma of losing loved ones and numerous other practical difficulties, including denial of rights to land, poverty, indebtedness and heightened economic responsibilities, militarised context, and severe social stigma.<sup>27</sup> As with SGBV, these problems arise as a direct result of conflict, but persist due to structural, cultural and socioeconomic factors. Issues that stem from structural violence and discrimination against women amount to human rights abuses and violations of international law. To achieve genuine transformation for women, Sri Lanka’s transitional justice must encompass not only accountability and courtroom justice for crimes, but also sustainable solutions to broader underlying issues.

21 *Report of the Secretary General’s Panel of Experts on Accountability in Sri Lanka*, 31 March 2011, 20-47.

22 Kumari Jayawardena and Kishali Pinto Jayawardena, ed. *The Search for Justice: The Sri Lanka Papers* (Delhi: Zubaan, 2016).

23 UN Security Council Resolution 2106 (2013), S/RES/2106, articles 4 and 12; UN Security Council Resolution 2122 (2013), S/RES/2122, preamble and article 2.

24 United Nations Sri Lanka, *Mapping of Socio-Economic Support Services to Female Headed Households in the Northern Province of Sri Lanka*, (Colombo: United Nations Sri Lanka, 2015), <http://srilanka.unfpa.org/sites/default/files/pub-pdf/FemaleHeadedHouseholds.pdf>

25 United Nations Sri Lanka, *UN Round Table Discussion on Empowering Female Headed Households in Sri Lanka*, (Colombo: United Nations Sri Lanka, 3 March 2016), <https://lk.one.un.org/news/un-round-table-discussion-on-empowering-female-headed-households-in-sri-lanka/>

26 *Ibid.*

27 *Ibid.*

## GENDER JUSTICE AND ENDING IMPUNITY

To bring justice to women, Sri Lanka must commit to combatting the culture of impunity, weak laws, inefficient processes, unprofessional conduct, stigma and distrust<sup>28</sup> that hinder the justice system. Credible attempts to fix these issues will help to deal with cases of SGBV including rape, sexual harassment and exploitation, which were widespread during the ethnic conflict and have continued since.<sup>29</sup>

Reports by researchers in Sri Lanka, UN entities, and non-governmental organisations highlight past cases of SGBV and continuing cases in the post-war context.<sup>30</sup> Despite the documentation and calls for justice, many cases are yet to go through Sri Lanka's regular criminal justice system.<sup>31</sup> The submission by a collective of women's groups at the Committee on the Elimination of Discrimination Against Women session in 2017 stated that around 1,400 rape complaints resulted in between zero and seven convictions per year (2009-2014).<sup>32</sup> Issues that result in delays with investigations and prosecutions include concerns with the integrity of the evidence, protection issues or the possibility of interference resulting in a culture of impunity and loss of confidence in the criminal justice system. Additionally, broader reforms of the criminal justice system in Sri Lanka, including of the Attorney General's department, legislation and procedures, must be examined to ensure independence and efficiency with investigations, filing indictments and prosecutions.

A notable case during the war was of the gang rape and murder of Krishanthi Kumaraswamy and subsequently the murder of her mother, brother and neighbour who went in search of her.<sup>33</sup> In this particular case, due to the pressure by civil society and others, the then President



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Chandrika Bandaranaike Kumarasinghe instituted proceedings which secured convictions of military personnel. This was a rare case where active military personnel were held to account by local courts, with most other cases either never leading to indictments or dragging on for years, sometimes decades, in the criminal justice system.<sup>34</sup> In the post-war context, military personnel were convicted in 2012 of gang rape in what has become known as the Vishvamadu case, another example where local women's groups kept up the pressure that resulted in conviction, also providing protection and support to the victim.<sup>35</sup>

The delays in justice for SGBV but also other serious violations, including extra judicial killings and torture, have contributed to a culture of impunity where many alleged perpetrators roam free with limited prospect of being held to account through the existing criminal justice system. There are problems gathering and preserving evidence, which contributes to the problem of impunity. Further issues include victims and witnesses being threatened and in some instances attacked, authorities being overwhelmed with the cases and having insufficient resources, and there being a lack of political will to investigate and prosecute sexual violence crimes in particular.

In such a context, the promise of reforms in 2015 was welcome, and these included the commitment to establish a special court and special counsel with the

28 Anne Woodworth and Bhavani Fonseka, *Accountability and Reparations for Victims of Conflict Related Sexual Violence in Sri Lanka* (Colombo: Centre for Policy Alternatives, 2016), 4, <http://www.cpalanka.org/accountability-and-reparations-for-victims-of-conflict-related-sexual-violence-in-sri-lanka/>

29 *Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka*, 10, 63.

30 For more information, see Jayawardena and Jayawardena, ed. *The Search for Justice: The Sri Lanka Papers*.

31 Ibid.

32 Sri Lanka Brief, "Sri Lanka: Collective Oral Statement by Women's Groups at CEDAW in Geneva" *Sri Lanka Brief*, accessed 3 June 2018, <http://srilankabrief.org/2017/02/sri-lanka-collective-oral-statement-by-womens-groups-at-ceadw-in-geneva/>

33 Jayawardena and Jayawardena, ed. *The Search for Justice: The Sri Lanka Papers*.

34 Ibid.

35 Women's Action Network, *Statement on Vishwamadhu Rape Case*, (Colombo: Women's Action Network, 7 October 2015).



The issues that affect women in Sri Lanka's post-war context are deeply rooted in a flawed justice system, public institutions and patriarchal culture. Creating genuinely transformative solutions will necessarily involve widespread reforms as well as targeted transitional justice initiatives.

participation of foreign personnel, victim and witness protection and necessary legal reforms. The victim and witness authority was established in 2015 but there continue to be problems with protection due to lack of independence of institutions. There also remain structural and systematic problems that have not impacted the initiation of proceedings in regular courts. As a result, victim groups and civil society have urged the authorities to take action with past cases, including initiating legal and structural reforms that can focus on SGBV cases and address the challenges compounding this issue.

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## TRANSITIONAL JUSTICE, CONSTITUTIONAL AND LEGAL REFORMS

The ambitious set of reforms promised in Sri Lanka in 2015 included the proposal of a new constitutional framework, including a new Bill of Rights and other legislative reforms as well as transitional justice promises. With more recent political upheaval across local and national government, there is concern over whether a new constitution is possible or whether incremental reforms

are more likely. This is to be seen in the coming months, dependent largely on the political negotiations and priorities of the coalition government and scope for reforms.

Sri Lanka has also demonstrated willingness to engage with international human rights and legal bodies, such as treaty bodies and the Universal Periodic Review (UPR) system, which have the potential to encourage and assist in achieving genuine progress in important areas.<sup>36</sup> Though Sri Lanka has ratified key treaties which deal with conflict, peace and women, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), continued cooperation across a range of areas and genuine action that has tangible impact is crucial. As of July 2018, it is unclear when Sri Lanka will formulate a National Action Plan for implementing its commitments under the UN Security Council's WPS resolutions and other relevant agreements, an important next step for Sri Lanka's WPS engagement.<sup>37</sup> These are just some elements of the larger system of international engagement that is targeted at bringing change to conflict-affected women and creates a framework which has the potential to positively influence domestic reform processes.<sup>38</sup>

In considering reforms broadly, it is critical that attention is paid to ensuring gender sensitivity at every level. Reforms must have the overarching priority of addressing discrimination and marginalisation with the aim of genuine social transformation for women.<sup>39</sup> There is a strong body of official commitments, action plans and deadlines that can guide decision-makers, such as the broad plans for human rights education and gender sensitivity training in the National Human Rights Action Plan.<sup>40</sup> It is hoped that if the process of constitutional reform is to be realised, this will result in a new Bill of Rights that is "progressive and robust"

36 See Centre for Policy Alternatives, *Human Rights Commitments made by the Government of Sri Lanka and Ways Forward*, (Colombo: Centre for Policy Alternatives, 2018), <http://www.cpalanka.org/human-rights-commitments-made-by-the-government-of-sri-lanka-and-ways-forward/>

37 UNWomen, "National Action Plans," *UN Women Asia and the Pacific*, accessed 18 June 2018, <http://asiapacific.unwomen.org/en/focus-areas/peace-and-security/national-action-plans>

38 UNWomen, *Conflict-related Sexual Violence in Asia-Pacific: Putting Victims/Survivors First* (UNWomen, 2017), <http://asiapacific.unwomen.org/en/digital-library/publications/2017/06/conflict-related-sexual-violence-in-asia-pacific-putting-victims-survivors-first>

39 Fonseka and Naples-Mitchell, *Victim-Centred Transitional Justice in Sri Lanka*, 7.

40 Centre for Policy Alternatives, *Human Rights Commitments made by the Government of Sri Lanka and Ways Forward*, (Colombo: Centre for Policy Alternatives, 2018), <http://www.cpalanka.org/human-rights-commitments-made-by-the-government-of-sri-lanka-and-ways-forward/>

in its protection of rights, though there has been much debate about whether it will include protections for economic, social and cultural rights which will be justiciable in a court of law.<sup>41</sup>

Proposed legislative reforms to address discriminatory laws in the areas of SGBV, land, language and gender equality are also important to achieve genuine justice for women. This goes hand in hand with broad reform of legal and public institutions to strengthen confidence in the authorities and ensure professional and independent treatment of everyone accessing these institutions.

It remains to be seen to what extent governmental decision makers will progress and implement these reforms. Doing so is an important step towards genuine transformation as it will anchor gender equality in the law, creating the basic conditions required for social transformation.

These legislative and constitutional reforms must be complemented by targeted and effective transitional justice initiatives. The first two major transitional justice mechanisms promised by the GoSL are the Office on Missing Persons (OMP) and the Office of Reparations, which will be discussed below.

## Office on Missing Persons

Sri Lanka has had numerous commissions of inquiry and other state initiatives appointed by successive governments to investigate and inquire into a significant caseload of enforced disappearances and missing persons from across Sri Lanka. Women have been significantly affected by disappearances and missing persons cases, becoming the sole bread winners but also having to deal with the trauma of loss and social pressures.<sup>42</sup>

It was also mostly women who went before previous state initiatives, in

some instances having to travel long distances, face harassment and threats and humiliation. The risks were taken and hardships endured in the sheer desperation to search for disappeared and missing loved ones. With the failures of previous initiatives and with growing calls for answers and justice, there was a need to provide for a different entity to what was done previously. The OMP was operationalised in 2018, the first permanent and independent office to investigate thousands of disappearances and missing persons cases in Sri Lanka and to take necessary action on such cases. Its main task is to investigate disappearances and missing persons cases and provide answers, but it is also the starting point for a broader project of addressing the needs of affected families and communities,<sup>43</sup> including issuing certificates of absence to families, making recommendations to authorities and identifying avenues of redress. As noted above, the majority of those who approach the OMP will likely be women, who have “disproportionately borne the burden of searching for the disappeared”.<sup>44</sup>

The investigative function of the OMP is both practically and symbolically important. Recognition of enforced disappearances and acknowledgement of truth is crucial. This has been a rallying call by victims for decades and continues to be seen as a key call from victims from across Sri Lanka. Importantly, the OMP has the mandate to forward information to relevant authorities on action on justice and reparations, ensuring that the door to these are not shut.

In addition, the OMP will be confronted by other issues including recognising the range of harms suffered by the families of the missing and disappeared. Sensitivity to emotional, psychosocial and economic harms must be considered both in the operation of the OMP as well as in its suggestions for reparations and ways

41 Mario Gomez, Conor Hartnett, and Dinesha Samararatne, *Centre for Policy Alternatives Working Papers on Constitutional Reform No. 7: Constitutionalising Economic and Social Rights in Sri Lanka* (Colombo: Centre for Policy Alternatives, 2016).

42 Neloufer de Mel, *The Promise of the LLRC: Women's Testimony and Justice in Post-War Sri Lanka* (Colombo: International Centre for Ethnic Studies, 2013).

43 *Final Report of the Consultation Task Force on Reconciliation Mechanisms* (Vol 1).

44 *Final Report of the Consultation Task Force on Reconciliation Mechanisms* (Vol 1), 176.

forward. The many vulnerabilities faced by victims including socioeconomic, security and psychosocial require attention. Considering the thousands of victims across Sri Lanka and outside, the task ahead of the OMP is significant.

The GoSL-appointed Consultation Task Force (CTF) on Reconciliation Mechanisms released a report in 2017 with detailed transitional justice recommendations, including a range of suggestions regarding gender sensitivity in Sri Lanka's OMP. These include ensuring that members and processes are based on an understanding of the diversity of the people and circumstances that the OMP will deal with, including, crucially, gender sensitivity and representation of women in all parts of the Office. This should stem from comprehensive participation of families of the disappeared, at all stages of planning and implementation, to ensure that their voices are heard. There must be comprehensive victim and witness protections in place, with a focus on confidentiality. Critically, the conclusions reached by the OMP must lead to assistance where it is needed so that there can be resolution of the issues prioritised by victims, such as access to land and widows' benefits through the issuing of Certificates of Absence.

Three main priorities can be identified when considering how best to bring justice to women through the OMP:

### **1. Include women**

The appointment of three women out of seven members to the OMP, including a victim/ survivor from the conflict-affected area in Sri Lanka, is both important and significant, but this must be followed by more steps for inclusion of women in different aspects of the working of the OMP.

There must be a focus on gender equality and women's inclusion in the OMP from the outset. The ongoing policy design of

the OMP should include comprehensive gender-sensitive guidelines and provision for women's needs, including an overarching gender strategy and steps to ensure women's participation. It is also important that the OMP's design sufficiently reflects the diversity and complexity of harms suffered by a range of victims.<sup>45</sup> The OMP has been encouraged to have offices in the North and East, which witnessed significant numbers of enforced disappearances. These offices too should have trained staff to address different areas that will require attention, including gender-sensitive approaches. The OMP office(s) should also have gender-sensitive spaces, with steps taken to make them conducive for victim-survivors to visit, such as childcare services and assistance with travel needs.<sup>46</sup>

### **2. Protect women**

Victim and witness protection is a key factor in ensuring that women can access truth and justice through the OMP. This will involve suggesting legislative reforms to provide for comprehensive victim and witness protection across Sri Lanka's criminal law. This includes a special chamber focused on such cases where judges and other court personnel have the necessary expertise.<sup>47</sup> There is also a call for a female prosecutor who is gender-sensitive,<sup>48</sup> as well as for robust victim and witness protection and spaces which provide for confidential testimony.

There must be protection policies implemented within the OMP and their effectiveness should be monitored on an ongoing basis. These will include gender sensitivity measures such as female personnel, as well as provisions for anonymity and witness protection where necessary.

### **3. Provide effective redress to women**

The OMP, as well as other initiatives including a future entity looking at reparations (discussed below), must

45 Raquel Saavedra and Shreen Saroor, *A Gendered Approach to Transitional Justice in Sri Lanka* (Colombo: South Asian Centre for Legal Studies, 2017), 41.

46 *Final Report of the Consultation Task Force on Reconciliation Mechanisms* (Vol 1).

47 Woodworth and Fonseka, *Accountability and Reparations for Victims of Conflict Related Sexual Violence in Sri Lanka*, 6.

48 Ibid.

provide for effective redress for women. This must start with recognition of the impact the war has had on women, including victim-survivors. They have faced trauma, threats and, in some instances, attacks while looking for their loved ones and in the search for truth and justice. Reports also indicate that there are security issues faced by female heads of households, and bribery and sexual exploitation by authorities.<sup>49</sup> These harms must be adequately addressed in the OMP's suggestions of avenues for redress and should also be taken up by other authorities, including a future office looking at reparations.

### Office of Reparations

News reports indicate that the Office of Reparations is to be the next major transitional justice mechanism that will be considered in Sri Lanka following the implementation of the OMP. At the time of writing, the Office for Reparations Bill was before the Sri Lankan Parliament, with concerns raised by civil society on key aspects of the Bill.<sup>50</sup> As noted elsewhere,<sup>51</sup> attention needs to be paid to the mandate of such an office and the need for a strong and comprehensive policy to guide the process.

Following on from the above discussion, a broader transformative approach to reparations is required to bring tangible justice to women. It is important to note that reparations must go beyond a "narrow transaction"<sup>52</sup> for civil and political violations in the final stage of the war, instead looking to broader circumstances and social change. The international discourse on reparations has also explored a broader transformative approach.<sup>53</sup>

Suggestions have been previously made for guidelines for comprehensive reparations for victims of SGBV, and these also apply more broadly when considering how to bring effective



**A broader transformative approach to reparations is required to bring tangible justice to women. It is important to note that reparations must go beyond a "narrow transaction" for civil and political violations in the final stage of the war, instead looking to broader circumstances and social change.**

justice to all conflict-affected women.<sup>54</sup> Reparations can include restitution and compensation with a specific focus on restoring pre-violation quality of life; such compensation will be available for "economically assessable damage" but should be provided in a sustainable way, such as periodic payments and skills training.<sup>55</sup> Beyond this, potential reparation avenues include rehabilitation and health services, symbolic reparations, and guarantees of non-recurrence, including institutional reform and strong policies. Where broad policy change is required to remedy identified issues, transitional justice actors have an important role in pushing governmental actors to consider adopting policies and strategies that tie into long-term development.<sup>56</sup>

Collective reparations are also important and can be targeted at affected communities. Interim reparations can be issued where there is an urgent need for psychological support, health services and payment of compensation.<sup>57</sup> Collective reparations have great potential in remedying socioeconomic issues and can be a practical solution where paying individual reparations would be unaffordable. Internationally, South Africa, Guatemala and Bosnia and Herzegovina have all variously included housing and property restitution programmes, land reform, health care and educational reforms in response to needs and violations suffered by the people in those situations.<sup>58</sup> Further, the Moroccan Truth and Reconciliation

49 Fokus Women, *Sexual Exploitation of Female Heads of Households Affected by War in the North of Sri Lanka* (Colombo: Fokus Women, 2016), [http://www.fokuswomen.lk/reports/sexual\\_exploitation/E\\_Briefing\\_paper.pdf](http://www.fokuswomen.lk/reports/sexual_exploitation/E_Briefing_paper.pdf)

50 Centre for Policy Alternatives, *Civil Society Raises Concerns with the Office for Reparations Bill* (Colombo: Centre for Policy Alternatives, 2018), <http://www.cpalanka.org/civil-society-raises-concerns-with-the-office-for-reparations-bill/>

51 Bhavani Fonseka, *Making the Case for an Office for Reparations* (Colombo: Centre for Policy Alternatives 2018), <http://www.cpalanka.org/making-the-case-for-an-office-for-reparations/>; Anne Woodworth and Bhavani Fonseka, *Accountability and Reparations for Victims of Conflict Related Sexual Violence in Sri Lanka* (Colombo: Centre for Policy Alternatives 2016) 4, <http://www.cpalanka.org/accountability-and-reparations-for-victims-of-conflict-related-sexual-violence-in-sri-lanka/>

52 Zinaida Miller, "Effects of Invisibility: In Search of the 'Economic' in Transitional Justice" *The International Journal of Transitional Justice* 2 (2008), 266.

53 Ruth Rubio-Marín, ed. *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (Cambridge: Cambridge University Press 2009).

54 Woodworth and Fonseka, *Accountability and Reparations for Victims of Conflict Related Sexual Violence in Sri Lanka*, 6; Saavedra and Saroor, *A Gendered Approach to Transitional Justice in Sri Lanka*.

55 Woodworth and Fonseka, *Accountability and Reparations for Victims of Conflict Related Sexual Violence in Sri Lanka*, 20.

56 Arbour, "Economic and Social Justice for Societies in Transition", 20.

57 Woodworth and Fonseka, *Accountability and Reparations for Victims of Conflict Related Sexual Violence in Sri Lanka*.

58 Arbour, "Economic and Social Justice for Societies in Transition", 23-25.

Commission (TRC) recommended communal reparations “to strengthen the economic and social development of specific regions that were particularly affected by political violence and were marginalised and excluded”.<sup>59</sup> These approaches will to some extent address some of the grievances of women who suffer from economic disempowerment and societal discrimination following the war, as well as for addressing specific wartime violations that involve displacement, damage to health, or loss of educational opportunities. Sri Lanka’s reparations programme must address these wartime violations but also be broader in terms of looking at issues around ongoing conflicts, with a comprehensive approach and ensuring issues such as equity and equality are addressed.

Effective gender-sensitive reparations must include provision of goods and services, economic and psychosocial support, and collective and community-level initiatives with a broader view to social transformation. Even though socioeconomic reparations as identified above may not be capable of inherently creating structural change, they can trigger important changes, particularly in providing symbolic satisfaction and increasing trust in authorities. The transformative power of well-designed reparations programmes lies in their ability to lead to empowerment (particularly socioeconomic empowerment), which in turn increases access to rights.

In addition, it is important to ensure that reparations are not prioritised over other elements of transitional justice such as truth and accountability. Further, the CTF pointed out in its report that reparations must not be used to thwart justice and accountability, nor should they be offered as an alternative; victims must be able to understand and trust in this.<sup>60</sup> Thus, a well-planned, rights-based,

comprehensive reparations programme linked with other transitional justice initiatives can help to address grievances, empower communities, build civic trust, and have a transformative impact.

## FURTHER CONSIDERATIONS

Sri Lanka’s progress towards genuine transformation has many dimensions that go beyond what has been highlighted here. This paper has briefly examined two mechanisms, one already established and the other reported to be imminent, and other reforms such as constitutional and legal reforms with implications for gender (in)equality. This is not exhaustive in terms of the reforms promised and areas requiring attention, however. In terms of Sri Lanka’s transitional justice commitments, the government has promised a hybrid accountability mechanism comprising a special court and special counsel, a truth, justice and reconciliation commission, security sector reforms and confidence-building measures such as land releases. There has been very limited progress with most of the commitments made in 2015. The anger, frustration and disillusionment is captured by numerous protests and strikes occurring across Sri Lanka, with notable mention of the protests happening in several areas in the North where victim-survivors of the disappeared have been protesting for over a year in search of truth and justice for their disappeared loved ones.<sup>61</sup>

Linked with gender and transformation, though beyond the scope of this paper, is the economic dimension faced by women. In the North there is increasing reporting of poverty and indebtedness faced by communities affected by the war.<sup>62</sup> Recent droughts in parts of Sri Lanka have also impacted a significant number of farmers and others whose livelihoods have been affected, creating severe hardships and exacerbating

59 Ibid, 19.

60 *Final Report of the Consultation Task Force on Reconciliation Mechanisms* (Vol 1).

61 Ruki Fernando, “366 days – Roadside Protests in Kilinochchi”, *Sunday Observer*, 25 February 2018, <http://www.sundayobserver.lk/2018/02/25/features/366-days-roadside-protests-kilinochchi>

62 Chulani Kodikara, *Doing This and That – Self-employment and Economic Survival of Women Heads of Households in Mullaitivu* (Colombo: International Centre for Ethnic Studies, 2017); Vasuki Jayasankar & Savini Ganahewa, *Making Ends Meet: Women’s Livelihoods in Post-War Sri Lanka* (Colombo: International Centre for Ethnic Studies, 2017).

poverty. As a result of pressure by local groups and others, the government has finally recognised the need to introduce some reforms, including the introduction of microfinance programmes with a specific focus on women. While these are recent attempts and their impact is yet to be assessed, this is an area that will require continued attention and support.

Much more attention must be paid to structural inequalities to address genuine transformation, which is beyond the scope of this paper. Measures to address inequalities and discriminatory practices and systems, including legislative reforms such as of the Muslim Marriage and Divorce Act, are necessary.<sup>63</sup> In addition, reforms of the Penal Code are necessary to address marital rape and violence against men.<sup>64</sup> There are also other areas that require urgent reforms, such as the criminalising of same-sex relationships between consenting adults, including in private spaces,<sup>65</sup> violence and threats faced by the lesbian, gay, bisexual, transgender, intersex and questioning (LGBTIQ) community and the legal framework relating to sex workers, sexual exploitation, sexual bribery,<sup>66</sup> criminalising of abortion and other issues.

That women are considered the only possible victims reinforces the gender binary, presenting men as only perpetrators and protectors. This binary reinforces and reproduces cycles of violence, denying females the agency of being anything other than victims.<sup>67</sup> Though not strictly part of transitional justice, these reforms are important because transitional justice is meaningless if not supported by laws that uphold equality and non-discrimination. Strong laws will also help to combat impunity and catalyse cultural change.

Consideration should also be given to raising awareness and providing information in all three languages on the need for reforms and engaging with different stakeholders. This should be



**Transitional justice is meaningless if not supported by laws that uphold equality and non-discrimination. Strong laws will also help to combat impunity and catalyse cultural change.**

focused on the need for constitutional and legal changes such as Muslim Marriage and Divorce Act reforms and joint ownership of land, as well as why gender justice and gender empowerment is necessary in post-war Sri Lanka.

## CONCLUSION

This working paper has briefly explored the idea of transformative justice as a response to shortcomings in traditional practices of transitional justice, and what this means in the post-war context for Sri Lanka's women. The UN WPS agenda has brought attention to the crucial issue of women's experiences of post-conflict processes, and Sri Lanka is a context in which innovation and attention is necessary to achieve genuine social transformation for the country's most vulnerable women. Transformative principles help to create links between transitional justice, broader reforms, and the complex needs of conflict-affected women. As such, examining transformative justice in the Sri Lankan context contributes to the broader WPS conversation regarding improving outcomes for women in situations of conflict and transitional justice.

Key gender-related developments in transitional and transformative justice include recognition of a full range of human rights abuses, going beyond conflict-based civil and political rights violations and encompassing structural and socioeconomic issues too. This paper makes the case that transformative justice processes must prioritise victim-centredness, the rebalancing of power

63 The Muslim Marriage and Divorce Act allows Muslim men to take wives who are as young as 12 years (and in some cases, younger if sanctioned by a Quazi). It also makes initiating divorce much more difficult for women than men, with men needing no official reason to divorce. For more information on Muslim person laws and the need for reform, refer to <https://mplreforms.com/>.

64 The marital rape clause denies victims legal justice unless the couple is legally separated by a judge. Section 363a of the Penal Code, as amended by Act No. 22 of 1995, states that a man is said to commit "rape" who has sexual intercourse with a woman without her consent even where such woman is his wife and she is judicially separated from the man.

65 *Penal Code of Sri Lanka*, sections 365 and 365A.

66 For more information, refer to the civil society shadow reports to the third cycle of the Universal Periodic Review that took place in October 2017, available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/LKIndex.aspx>.

67 Jelke Boesten and Polly Wilding, "Transformative Gender Justice: Setting an Agenda", *Women's Studies International Forum* 51 (2015), 8.

relations, and approaches which address the causes of conflict. In Sri Lanka, effective application of these principles will necessitate a focus on SGBV, the vulnerabilities of female-headed households, widespread constitutional and legal reform and cultural change, as well as targeted transitional justice

mechanisms. This paper has looked at the recently operationalised Office on Missing Persons and the planned Office of Reparations, noting that women and their concerns must be addressed at every stage of the respective processes. Further, consideration must be given to areas that give rise to inequality, with

steps taken at the policy and practical levels to address these and achieve positive social change in Sri Lanka. For Sri Lanka, and other countries transitioning from violence, there must be recognition that genuine transformation for women is vital if there is to be genuine peace, justice, stability and reconciliation.



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