SOME CONSTITUTIONAL ASPECTS OF SRI LANKA’S POST-WAR RECONCILIATION DEBATE: THE LLRC REPORT AND THE TNA RESPONSE

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The Lessons Learnt and Reconciliation Commission (LLRC), appointed by the Sri Lankan government to recommend measures for post-war reconciliation, published its much-anticipated report in December 2011.\footnote{The Report of the Commission of Inquiry on Lessons Learnt and Reconciliation (2011), available at: \url{http://groundviews.org/wp-content/uploads/2011/12/FINAL-LLRC-REPORT.pdf}} The nature of the Commission's mandate, composition, and the legal framework of its operation, as well as the hopeless record of similar bodies in the past, had led some to dismiss the LLRC as inadequate to its historic task.\footnote{For e.g., see the joint letter of Amnesty International, Human Rights Watch, and the International Crisis Group to the LLRC outlining their decision not to testify before it, available at: \url{http://www.hrw.org/sites/default/files/related_material/LLRC%20joint%20letter%20FINAL%2013%20Oct%202010.pdf}} It is apparent upon reading the report that at least some of these reservations were justified. For the LLRC’s recommendations in relation to the allegations of serious violations of international humanitarian and human rights law, against both the Sri Lankan military and the Liberation Tigers of Tamil Eelam (LTTE), do not set out clear measures to ensure the criminal accountability of perpetrators. Yet what surprised many were the LLRC's observations about democracy, citizenship, fundamental rights, the rule of law, good governance, creeping militarisation, and government-sanctioned criminal activity. At least with regard to those observations, the robustness of the Commission's recommendations was not widely expected, even if neither its analyses nor the recommendations themselves are beyond informed critique. The report accordingly
received a cautious welcome from local civil society and the international community.\(^3\) While they were disappointed that the LLRC had not been sufficiently rigorous and forceful in regard to criminal accountability, and while aware of policy alternatives that the LLRC chose not to adopt, these responses rightly stressed that the success of the reconciliation process would depend significantly on the government’s sincerity and seriousness of purpose in implementing the LLRC’s recommendations in full.\(^4\)

The official response of the Tamil National Alliance (TNA)\(^6\), published in January, adopted an appreciably more critical tone, focussing on the shortcomings of the LLRC’s treatment of the factual circumstances at the closing stages of the war and its misapplication of relevant norms of international law.\(^7\) The TNA did not engage at any length with those LLRC recommendations that address the political and constitutional dimensions of the conflict, except to dismiss certain recommendations (such as the proposal for a second chamber in the central legislature to represent the provinces) as

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\(^4\)Underscoring this concern, President Mahinda Rajapaksa made no mention of the LLRC report in his Independence Day address on 4th February 2012, his first major speech since the release of the report. In fact, he demurred with the LLRC’s endorsement of the need for territorial devolution when he observed that, “Ethnic communities have no separate regions.” For the full text of the President’s speech and commentary, see A. Kadirgamar (2012) *A Quick Analysis of the Independence Day Speech by President Rajapaksa*, available at: [http://kafila.org/2012/02/04/a-quick-analysis-of-the-independence-day-speech-by-president-rajapaksa/](http://kafila.org/2012/02/04/a-quick-analysis-of-the-independence-day-speech-by-president-rajapaksa/)

\(^6\)The Tamil National Alliance (TNA) is the main alliance of Sri Lankan Tamil nationalist political parties, representing the majority of parliamentary seats in the north and east of the island.

inadequate and inappropriate, while noting, with reservations, that it would welcome other more general measures to strengthen democracy, if properly implemented. While the TNA is entirely within its rights to critique what is the weakest element of the LLRC report, it is the TNA’s presentation of legalistic arguments and analysis in isolation that is perhaps problematic. It has thus arguably missed an opportunity to engage with some of the deeper political and historical concerns that pertain to reconciliation, and in particular, to the constitutional dimensions of the post-war state dispensation apropos of minorities and pluralism.

The TNA has described the LLRC’s observations with regard to constitutional reform as “exceedingly vague” and “mostly rhetorical.”\(^8\) This needs to be understood in the light of two factors. First, the LLRC was not expected to produce a comprehensive blueprint for a post-war constitutional settlement, and neither would it have been desirable or appropriate for it to have done so. The broad and general manner in which it has articulated the principles that ought to inform the constitutional accommodation of ethnic, religious, and cultural pluralism in post-war Sri Lanka is therefore methodologically appropriate. Second, it is surprising that the TNA has not used the opportunity to set out a serious critique of the overarching constitutional vision for post-war Sri Lanka advanced by the LLRC. This vision is that of a very conventional model of nation-state that addresses unity in diversity through guarantees of citizenship rights.

To elaborate upon this further, it is in the LLRC’s heavy reliance on the pre-independence Soulbury Commission’s understandings of such key concepts as nation, state, ethnicity, pluralism, and citizenship that we see how the LLRC imagines what the

\(^8\) Ibid, chapter 2, paragraph 4.
post-war state should look like.9 The LLRC has followed the lead of the Soulbury Commission insofar as the LLRC likewise embraces the conventional Westphalian model of the nation-state, wherein the nation was defined by reference to bounded territory, the state was the juridical form and repository of the sovereign rights and obligations of the nation, and solidarity and cohesion were achieved by the common enjoyment by individuals of the rights and entitlements of citizenship. The idea that language, religion, culture, or other ascriptive associations might be more important to Sri Lankans in articulating their sense of collective identity than are abstract concepts like social contract, citizenship, and civil and political rights was addressed by the Soulbury Commission only through specific constitutional mechanisms designed to prohibit legislative discrimination. 10 Presumably, it was hoped that nation-building and political development would lead to the construction of an inclusive, modern, civic Sri Lankan national identity, and render the pre-modern linguistic, religious, and cultural communalisms redundant.11

The postcolonial history of mismanaged ethnic pluralism and violent conflict in Ceylon/Sri Lanka immediately demonstrates the glaring inadequacies of this model of statehood. Despite the model's well-intentioned commitments to democratic pluralism, to

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9 The Royal Commission appointed by the British government to report on constitutional reforms in Ceylon in the period 1943-45, is better known as the Soulbury Commission, after its chair, the Viscount Soulbury. It recommended the proposals under which a new constitution was granted for Ceylon in 1946, and in 1948, led to the independence of Ceylon as a self-governing Dominion of the British Commonwealth. See *Ceylon: Report of the Commission on Constitutional Reform* (1945), Cmd. 6677 (London: HMSO); for commentary see, R. Edrisinha, M. Gomez, V.T. Thamilmaran & A. Welikala (Eds.) (2008) *Power-sharing in Sri Lanka: Constitutional and Political Documents, 1926-2008* (Colombo: CPA); Ch.6.


11 This was the governing assumption of postcolonial state and nation-building thinking of the period, exemplified in the work of scholars such as Daniel Lerner and Karl Deutsch. For an example of how this theoretical approach has been applied in relation to early postcolonial Sri Lanka, see R. Kearney, ‘Nationalism, Modernisation and Political Mobilisation in a Plural Society’, in M. Roberts (Ed.) (1979) *Collective Identities, Nationalisms and Protest in a Plural Society* (Colombo: Marga Institute): pp.440-461
the rights of minorities, and to counter-majoritarian safeguards, the model was singularly ill-equipped to address the constitutional requirements of a polity such as Sri Lanka, in which there is more than one ethnic community that sees itself as a nation, but in which one such ethno-religious nation, namely the Sinhala-Buddhists, enjoys an overwhelming numerical superiority as well as an emotionally charged historiography that lays claim to the exclusive ownership of the state and its territory. Procedural democracy in the context of such dominant nationalism all but becomes ethnicised majoritarianism and hegemony, and the consequences have been violent, palpable, and tragic.12

Yet the LLRC champions this as the exemplary paradigm to which post-war Sri Lanka should aspire.13 While such a perspective contrasts refreshingly with the Sinhala-Buddhist nationalism and populist authoritarianism that characterises the present government,14 the LLRC’s model is nonetheless theoretically inadequate, constitutionally unimaginative and analytically flawed as a prescription for the fundamental politico-constitutional challenges of accommodating the ethno-national pluralism that exist within Sri Lanka. Comparative theory and practice with regard to the constitutional


13Another potentially interesting line of theoretical inquiry lies in the exploration of the traditions of pluralism of the pre-colonial state, which could usefully inform debates on the constitutional foundations of the post-war Sri Lankan state. We have no space to address this, but the representations before the LLRC alluding to the pre-British political order made by the Anunayakas (Deputy Chief Incumbents) of the Malwatte and Asgiriya Chapters, the two most venerable institutions in the hierarchy of Buddhist priesthood, perhaps requires further attention. See R. de Silva Wijeyeratne, ‘Buddhism, the Asokan Persona, and the Galactic Polity’ (2007) Social Analysis 51:1, 156-178; S.J. Tambiah (1992) Buddhism Betrayed? Religion, Politics, and Violence in Sri Lanka (Chicago: Chicago UP): pp.173-175; for a contrary position, see M. Roberts (2003) Sinhala Consciousness in the Kandyan Period 1590s to 1815 (Colombo: Vithiha Yapa Publications).

accommodation of national pluralism, in the liberal democratic West as well as in the
global South, abounds with some of the most exciting developments in contemporary
constitutional law and political theory.\textsuperscript{15} One of the central features of these
developments is the theoretical proposition that the ‘nation’ can be disaggregated from
the ‘state’, and that innovative constitutional arrangements can be devised wherein more
than one nation can be peacefully accommodated within the framework of a united,
single state. While generally obviating the need to establish separate states to satisfy the
aspirations of sub-state nations, this calls for radical forms of autonomy and
decentralisation. The LLRC has engaged with none of these developments, but has
instead resorted to the comforting familiarity of a failed constitutional orthodoxy.

It might have been expected that the TNA would have the foremost interest, at the
very least, in pointing these issues out. There is no strategic advantage for the TNA in
focussing solely only on the accountability issues to the exclusion of the constitutional
matters. Indeed, such a focus actually plays into the Rajapaksa regime's hands, in its
disingenuous attempts to conceal its own pathologically centralising and authoritarian
tendencies, and portray Tamil nationalism as fundamentally separatist. The regime can
now all the more easily continue to paint the TNA as a kind of ‘rump LTTE’ that shows
too much concern for the Tamil diaspora’s (and Western governments’) preoccupation
with accountability and international intrusions into Sri Lanka’s sovereignty, and too
little concern for the socio-economic needs and political aspirations of its Tamil
constituency within the island.

\textsuperscript{15}For e.g., see S. Tierney (2006) \textit{Constitutional Law and National Pluralism} (Oxford: OUP); S. Choudhry
(Ed.) (2008) \textit{Constitutional Design for Divided Societies: Integration or Accommodation?} (Oxford: OUP);
J. Bertrand & A. Laliberté (Eds.) (2010) \textit{Multination States in Asia: Accommodation or Resistance}
(Cambridge: CUP).
Perhaps more seriously, the TNA's refusal or inability to engage critically with the central constitutional ideas underpinning the LLRC report demonstrates its own lack of a substantive constitutional vision for the sub-state nation that it seeks to represent. This is a crisis of ideas that has afflicted Tamil nationalism since the end of the war in 2009 (if not before), and which requires urgent attention if any notion of a sub-state Tamil nation is to eventually be negotiated and expressed in a future constitutional settlement. Without conceptual clarity as to both how Tamil nationalism is politically articulated as well as the substantive constitutional claims it seeks to make, the TNA’s political strategy, in dealing especially with a recalcitrant and triumphalist regime in Colombo, risks confusion in theory and disarray in practice.