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Legal Empowerment at the Post-Conflict Crossroads in Sri Lanka

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Editor's Note

In Sri Lanka's post-war years, the meaning of law and of justice has assumed complex and oftentimes contradictory hues for all ethnicities. At a rarified level, the arbitrary impeachment of a sitting Chief Justice and the denial of basic norms of equity and fairness by a politicized process has culminated in the head of the judiciary being virtually thrown out of office in recent months. At a more basic level, we see every-day occurrences of politicians (from parliamentary to pradeshiya sabha level) being afforded impunity from the reach of the law in regard to serious crimes such as murder, rape and assault.

On the other hand, the marginalization of justice to ordinary people ranges from deprivations of basic civil and political rights as well as socio-economic rights. Immediate examples include the grievances of internally displaced persons deprived of their lands and the continuing phenomenon of the endemic and brutal use of torture in law enforcement against all ethnicities. These occurrences emphasize the profound deterioration in our legal processes. And in a society where the stability of the law and the independence of the judiciary cannot be taken for granted any longer, the credibility of legal institutions that administer the law, is inevitably affected.

This paper contributed by *Mary Ann Manja Bayang* of the Human Rights in Conflict Programme of the Law & Society Trust has been written on the premise that post-war reconciliation imperatives need to be envisioned from a framework of empowerment in general and legal empowerment in particular. As the writer emphasizes, such imperatives should address questions of deprivation of justice of minority communities in particular. While legal empowerment is a hoary phrase often misinterpreted to mean legal aid, its actual import is far wider. Legal empowerment is not just about poverty alleviation but also about accountability, justice and reconciliation, as she rightly observes. Her paper looks at the relevance of this to the concept of the Rule of Law and more specifically, its uses in post-war situations. It also looks at the impact of the report of the Lessons Learnt and Reconciliation Commission (LLRC) as well as mainstream legal aid programmes in this context and most interestingly discusses a work-in-progress conducted by the HRC Programme in regard to working with 'barefoot lawyers' in the North and East.

We have much to learn in this regard from this region itself. For example, despite the considerable problems that the Indian legal system faces, we see the continuation of a vigorous social justice constituency including socially conscious lawyers, committed public interest groups, a boldly investigative press and an interested public. Legal empowerment of marginalized communities such as Dalit groups, under-trial prisoners and victims of state violence was a prominent part of this growth.

Though a political co-opting of these protest movements was evidenced in some instances, this did not affect the vitality or the legitimacy of the growth process which, in many cases, was led by self-reliant village communities rather than by elite city-based organizations. The flowering of India's Right to Information movement is one strikingly inspiring indicator of this fact. There are many other such examples.

The challenge for Sri Lanka's legal empowerment groups is to similarly transform themselves from being donor-driven partnerships or politically aligned pressure groups to vibrantly self-relying community groups that will critique and force change in arbitrary state policies which deny justice to people. This is the ideal. Admittedly we are yet a long way from that ideal. And in a context where public confidence in the law and the legal process has been seriously affected with state overreach destroying even existing liberties, these are challenging tasks indeed. Yet if the integrity and confidence in Sri Lanka's legal system is to be recovered even decades down the line, there seems to be few options left.

In the final result, it must be said that theoretical debates will play only a peripheral part in this recovery. Instead, the demand for justice has to be driven by people who have suffered at the frontlines of injustice rather than purely by theoreticians. For this to happen, the empowerment of people, in terms of increased knowledge of the relevance and fundamental importance of the law as applied to every aspect of their lives is certainly critical. The contents of this Issue are a contribution towards those debates.

Kishali Pinto-Jayawardena

Towards Justice, Peace and Development in Sri Lanka: Legal Empowerment at the Post-Conflict Crossroads*

*And when the shadow fades and is no more, the light that lingers
becomes a shadow to another light.
And thus your freedom when it loses its fetters becomes itself the fetter
of a greater freedom. (Kahlil Gibran)*

1 Introduction

Sri Lanka stands at the crossroads of post-conflict reconstruction. The goal is to emerge from years of armed systemic conflict the effects of which continue to tear apart the fabric of the collective Sri Lankan identity.¹ The problems faced are not mutually exclusive. The issues are not merely about pursuing accountability for past mass atrocities or human rights violations from either side. The effort requires too, the resolution of historical injustices or systemic abuses across ethnic affiliations and the simultaneous reconciliation, development, and betterment of the people of Sri Lanka as one. The ultimate challenge is the reformation of political and social structures to lead the country towards a post-conflict peaceful and just society.

Atrocities and injustices committed by both parties to the conflict did not automatically end or become irrelevant when the Sri Lankan Government defeated the Liberation Tigers of Tamil Eelam (LTTE) in 2009. Rather, the urgency of redressing such war-time abuses became even more pronounced. As we can see, the conflict of the past continues to affect all of the present. There are certain principles that are commonly accepted. Discrimination must not be practiced against citizens on the grounds of ethnicity. Peace, justice, development, and reconciliation are for all. The idea is to erase the problematic concepts of “we” versus “the others” that were fomented during the conflict years.

Certainly post-conflict intervention in Sri Lanka will have to be far-reaching and inclusive, using a range of mechanisms in that respect. The processes are expectedly hard and protracted. Resistance is inevitable. The realization of peace, justice, development, and reconciliation will be a long-drawn-out struggle. There are no short term solutions. Instead, arduous tasks lie ahead for the communities and for the decision-makers from both sides of the conflict. Indeed, if one were to compare the processes of post-conflict reconstruction, these processes are similar to the thoughts contained in Kahlil Gibran’s *shadows*, *freedom* and *fetters* quoted above. This is so specially where ethnic differences fomented by colonial history were later aided and abetted by leaders of both sides, with the resulting embers used to spark the fires of division and violence in the community.²

* Paper contributed by Mary Ann Manja Bayang, Attorney-at-Law, Human Rights in Conflict Programme, Law & Society Trust.

¹ Colleen McGinn, “Conflict Resolution and Transitional Justice in Sri Lanka: International Experiences and Application,” 18 *Ethnic Studies Report* (July 2000).

² *Supra*.

Sri Lanka's post-conflict issues emerged from the ravages of three decades of internal conflict. These issues are two-pronged. For one, the need for justice in nascent democracies is often juxtaposed against the need for reconciliation at both the national and personal level. The realization of justice in post-conflict situations covers a "full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses."³ The goal is to institutionalize accountability and serve justice, and in the same processes, achieve reconciliation.⁴

The processes are both judicial and non-judicial.⁵ They include prosecution initiatives, measures in respect of the right to truth, delivering reparations, institutional reforms, and national consultations.⁶ Among the evolving mechanisms to tackle histories of brutality and violence, it is important to address the different levels and varying effects of the societal and personal wounds of conflict.

This is particularly true in Sri Lanka where the root cause of enmity was driven by competing ethnic identities, aided and abetted by the decision-makers of each side. Societal and personal wounds were inflicted that continue to fester. It is said that post-conflict mechanisms are decided by political constraints.⁷ But in Sri Lanka, it is not only about constraints but power absolutely resting on one side of the accountability equation, which is the Government headed by majority representation. And a powerful weapon – if used effectively – in redressing this power balance is the use of the law and of the ideal of justice which prescribes equality and equity towards communities regardless of ethnic and race differences. In that context, vigilant legal empowerment becomes a fundamental part of effective post-conflict reform. This is particularly so in regard to the fact that development is an essential requisite to the attainment of justice. Most communities ravaged by conflicts are plagued by "severely underdeveloped economic and social institutions, widespread scarcity of resources, and myriad competing needs."⁸ Post-conflict measures must engage not only violations of civil and political rights, but economic, social, and cultural rights, and economic crimes, simultaneously, and if not immediately, at least progressively.⁹

The measures will have to serve "individual and collective reparations, property restitution, rehabilitation, and reintegrating victims and perpetrators."¹⁰ They must also alleviate "marginalization, exclusion, and vulnerability" through the integration of the people into the economy, their recognition and empowerment as citizens, and the generation of economic activities.¹¹ Evidently, these efforts may succeed only when there is "social stability; safety, security, and access to justice; conflict prevention; and social and economic justice."¹² The

³ United Nations Rule of Law, http://www.unrol.org/article.aspx?article_id=29 accessed on 29 March 2013.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Colleen McGinn, *supra*

⁸ R. Duthie, "Introduction," in *Transitional Justice and Development: Making Connections*, International Center for Transitional Justice, Pablo De Greiff and Roger Duthie eds. 2009, New York.

⁹ R. Duthie, *supra*.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

liberation from economic oppression is an essential part of post-conflict remedial measures.¹³ The issues of peace, justice, development, and reconciliation must of course be correlated with the ethnic origins of the civil war and its effects that spurred further ethnic divisions.

2 A Framework of Legal Empowerment

Justice and reconciliation, together with societal and personal reconstruction and development go hand in hand in addressing post-conflict issues; one cannot be disengaged from the other. The key approach is the empowerment of the people and their communities more than the consolidation of the State and its agencies. It is believed that this proposition is keenly relevant in Sri Lanka because the State itself may be unwilling or at least leaden-footed in moving forward with these goals in the euphoria of its post-war jubilation.

Empowerment Defined

Empowerment, in its broad sense, is the bolstering of human agency.¹⁴ In greater theoretical detail, as explained by Narayan, it means the “expansion of freedom of choice and action to shape one’s life” which entails “control over resources and decisions” that will lead to “autonomy, self-direction, self-confidence and self-worth.”¹⁵ Clearly, for empowerment to flourish, as a means to address issues relating to post-conflict reconstruction, the focus should be on the people and their communities.

The empowerment of people and communities can be framed differently depending on the focus of the intervention. It may be political, social, economic, or cultural. Here, the intervention is through the use of laws and the legal system. It is then legal empowerment. But whatever may be the mode of intervention, the end-goals are the same – accountability, justice, reconciliation, poverty alleviation, and development.

Legal Empowerment Defined

To define legal empowerment as merely the use of laws and the legal system, while correct, is incomplete. Such a definition lacks purpose and orientation. Since empowerment must lead back to people and their communities, the definition of legal empowerment should embody this orientation. Legal empowerment must also be purposive. Here, it is to achieve accountability, justice, reconciliation, poverty alleviation, and development. These are the goals towards which the practice of law and the use of legal systems, first by legal professionals and paralegals, and later by people and communities, must be geared.

¹³ Zinaida Miller, “Effects of Invisibility: In Search of the ‘Economic’ in Transitional Justice,” *International Journal of Transitional Justice* 2, no. 3 (2008): 267–68; and Ruben Carranza, “Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?” *International Journal of Transitional Justice* 2, no. 3 (2008): 329.

¹⁴ Vivek Maru (2010). *Access to Justice and Legal Empowerment: A Review of World Bank Practice*. Hague Journal on the Rule of Law, 2, pp. 259-281 doi:10.1017/S1876404510200076.

¹⁵ “Measuring Empowerment: Cross-disciplinary perspectives”, edited by Deepa Narayan, Washington DC: World Bank c2005, pp.3-4.

Institutional definitions of legal empowerment already carry this context of people and communities. The Asia Foundation, for example, has defined legal empowerment to mean “a long-term and sustainable means of empowering communities to recognize and address their own disputes and conflicts, thereby enabling community members to contribute to peace and human security in the environments within which they live and work.”¹⁶ So does the Asian Development Bank as is made evident in the following excerpt:

“... the use of law to increase the control that disadvantaged populations exercise over their lives thus contributing to good governance, poverty reduction and other development goals. The study aims to bridge the gap between what the law is in theory and how it is actually experienced by the disadvantaged. The “disadvantaged” are described as the poor as well as those who face discrimination or abuse as a result of their gender, race, ethnic identity or other personal attributes.”¹⁷

Other authors conceptualize legal empowerment in the same way. Stephen Golub mentions that legal empowerment “is a rights based approach. It uses legal services to help the poor learn, act on, and enforce their rights in pursuit of development’s poverty alleviating goal.”¹⁸ Sumaiya Khair endorses the same thought: “‘Legal empowerment’ is distinct from other forms of empowerment in that the process involves the explicit or implicit use of the law in improving poor people’s access to legal redress.”¹⁹ The purpose is of course not just poverty alleviation and development but also accountability, justice, and reconciliation. Legal empowerment would be “more about freedom and power than it is about the law.”²⁰ This statement simply underscores the idea in legal empowerment that the law is merely the means rather than the end in and by itself.

Legal Empowerment – Diverse but Complementary with the Rule of Law Orthodoxy

Legal empowerment is distinct from the concept of the “Rule of Law.” Nonetheless, it is related to the latter as its complementary tool, or its progression, towards justice, development, and the elimination of poverty and discrimination. The Rule of Law Orthodoxy has the same salutary goals as legal empowerment.²¹ It diverges from legal empowerment when it focuses on reforms in the judicial system and the legal system, and on what it considers as the legal system’s specific mission.²² Accordingly, the mission is to uphold the Rule of Law – the idea that all persons are

¹⁶ (UNDP, ‘Access to Justice Assessments in the Asia Pacific: A Review of Experiences and Tools from the Region’ (February 2012), p. 91.

¹⁷ *Ibid*, p. 95.

¹⁸ Citing Stephen Golub. ‘Working Papers: Beyond Rule of Law Orthodoxy, The Legal Empowerment Alternative p.6 (Rule of Law Series, Democracy and Rule of Law Project 2003).

¹⁹ Evaluating Legal Empowerment: Problems of Analysis and Measurement. Hague Journal on the Rule of Law (2009), 1, pp 33-37 doi:10.1017/ S1876404509000335.

²⁰ Stephen Golub, *supra*.

²¹ Hooria Hayat & Khola Ahmed, “Legal Empowerment: An Impossible Dream,” Department for International Development (DFID), UK, <http://r4d.dfid.gov.uk/output/186973/default.aspx> accessed on March 1, 2013.

²² *Ibid*.

treated equally before the law.²³ The judicial system and all other formal actors in the legal system must fulfill this mission.²⁴ The Rule of Law is an end by itself.²⁵ Through it, according to the Rule of Law Orthodoxy, justice and development, or concretely, accountability, poverty alleviation, good governance, and reconciliation, will be achieved.²⁶

The dominant paradigm in the Rule of Law Orthodoxy takes a “top down, state centered” approach.²⁷ Proponents of this form of legal intervention align themselves with State institutions as the heart of reforms.²⁸ They promise developmental projects and anti-impunity policies from the top, in the belief that these would trickle down to the grassroots, thereby engineering change.²⁹ The spotlight, to repeat, is top-heavy – on law reform and on strengthening governmental institutions, especially the judiciary.

But the inordinate emphasis of the Rule of Law Orthodoxy on institutional development, without corresponding programs for building the capacities of people and their communities to enforce their rights, can only yield limited results. This observation applies with so much force in Sri Lanka’s situation where the State and its Government, having been victorious in the civil war, may be reluctant to initiate reforms.

In any event, it has been convincingly argued that focusing heavily and solely on the “‘supply side’ Rule of Law initiatives,” will not enhance the people’s access to the Rule of Law.³⁰ Particularly, “the training of judges and other court officials, introducing modern case management systems,” including “reforming court procedures,” and generally, “improving judicial institutions and processes, have not consistently translated into improved access to efficient and fair justice institutions for ordinary citizens, and particularly not for the poor, women, and other vulnerable groups.”³¹ To correct the imbalance, stress must likewise be laid on programs that combine such activities as “the dissemination of information on legal rights and procedures, community based trainings, legal counseling and paralegal services, community organizing, advocacy, and even efforts aimed at reforming laws and legal institutions.”³²

Some research³³ suggests that legal empowerment has helped advance poverty alleviation, good governance, reconciliation and other development goals. In addition, it has, in collaboration with

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Supra.*

³⁰ Debra Ladner, ‘The Legal Empowerment Approach (2009, In Asia at <http://asiafoundation.org/in-asia/2009/07/22/the-legal-empowerment-approach/>, February 11, 2013.

³¹ *Ibid.*

³² *Ibid.*

³³ Citing - Based on a seven nation, year-long examination of Legal Empowerment conducted by The Asia Foundation for the Asian Development Bank (p.29 of the Working Papers).

civil society, propelled community driven and rights-based development into effect by offering concrete mechanisms involving legal services, which advanced the rights of the poor.³⁴

Legal empowerment also means being involved with people and communities, directly and indirectly through civil society organizations.³⁵ Its goal is to bring change, especially by enabling under-represented, marginalized and disadvantaged groups to help themselves.³⁶ These sectors of society would then exert more control over their lives through the use of legal services and development activities.³⁷ Implicit in the notion of legal empowerment is the idea of greater accountability on the part of State institutions since civil society would have a more active role to play.³⁸ In legal empowerment, the concept of the Rule of Law, while important, is only secondary. It seeks not merely equal treatment, but substantial equality, one that entails change.³⁹ Hence, legal empowerment employs an integrated approach – it utilizes the legal system, but works with informal forums alongside other activities to advance change.⁴⁰ The endeavors include strengthening the role, capacities and power of the disadvantaged and civil society groups, selecting issues flowing directly from the needs of the poor or the vulnerable groups, rather than from a top-down approach, and broadening the focus from the legal sector to engage other forums like the media and the other informal pressure portals, domestic and international.

While the Rule of Law Orthodoxy presents a different theme from legal empowerment, both complement each other. It is useless to reform the legal system and its formal actors, such as the courts, the police, and the legal profession, where the people and the communities find no common grounds of cooperation with, and hope from, the law. At the same time, it is inutile to empower the people and their communities with legal advocacies and purpose where the State recognizes no law. The symbiotic relationship between legal empowerment and Rule of Law cannot be denied. Both legal empowerment and the Rule of Law Orthodoxy will reap substantial dividends only under these conditions: (i) the Government itself is bound by the law; (ii) every person in society is treated equally and empowered under the law; (iii) the human dignity of each individual is known to her/him and recognized and protected by law; and (iv) justice is accessible to all.⁴¹ Legal empowerment is one aspect of the totality of post-conflict mechanisms. It aspires the individual and society to achieve “autonomy, self-direction, self-confidence and self-worth.”⁴² The other aspect is the Rule of Law Orthodoxy. It advocates that structures must be built and institutions restored under the auspices of the Rule of Law.

The mutual dependency between legal empowerment and Rule of Law is exemplified in Tonya Putnam’s analysis. She states that legal empowerment in the context of imposing punishment and

³⁴ Citing Manning, Role of Legal Services Organisations.

³⁵ *Supra*.

³⁶ *Supra*.

³⁷ Citing General concept of Empowerment used by the World Bank cited by Golub at p.25 of the Working Papers.

³⁸ Hooria Hayat & Khola Ahmed, *supra*.

³⁹ Citing General concept of Empowerment used by the World Bank cited by Golub at p.25 of the Working Papers.

⁴⁰ *Ibid*.

⁴¹ Hooria Hayat & Khola Ahmed, *supra*.

⁴² Deepa Narayan (ed), *Measuring Empowerment: Cross-disciplinary perspectives*, (Washington DC: World Bank c2005), 3.

accountability presupposes a successful Rule of Law Orthodoxy. She explains “the existence of an entire set of functioning institutions” is necessary “to investigate, prosecute, and punish individuals who commit human rights violations. In societies emerging from civil wars, such institutions are normally weak or nonexistent, if indeed they existed beforehand.”⁴³

Many theorists also “have long emphasized the importance of rational and predictable rules and institutions for enabling economic development.”⁴⁴ Thus, the level of a community’s economic development, a function of both Rule of Law and legal empowerment, may affect reflexively the progress of these post-conflict initiatives.⁴⁵ Hence, justice and reconciliation, together with societal and personal reconstruction and development, should go hand in hand.

Indicators of Absence of Legal Empowerment

Legal empowerment does not occur naturally. It takes a purposive effort to attain it. The following indicators, singly or collectively, show the absence of legal empowerment:

- Lack of accountability on the part of government departments
- Lack of democratic values
- Vested interests of influential families
- Bureaucratic inefficiencies
- Lack of access to good education
- Vulnerability to arbitrary deprivation of property
- Widespread corruption in institutions responsible for protection of rights, such as the police, courts, and other redress mechanisms
- Lack of legal literacy
- Lack of access to affordable and competent legal services
- Absence of public confidence in court processes.⁴⁶

It must be noted that all these indicators are present in Sri Lanka’s political and legal landscape. Legal empowerment is therefore crucial. These indicators show how helpless Sri Lankans can be in asserting their human rights and ensuring their free exercise. This situation will in turn negatively impinge on attaining peace, justice, accountability, reconciliation, and development. A country cannot achieve these goals if the people are deprived of rights and freedoms. How can members of the minority community savor reconciliation when they are subjected to unequal treatment? How can they demand accountability if there is no freedom to speak their minds out or to organize? So long as the indicators of absence of legal empowerment exist, and so long as Sri

⁴³Tonya Putnam, Human Rights and Sustainable Peace, in *Ending Civil Wars: The Implementation of Peace Agreements*, ed. Stephen John Stedman, Donald Rothchild, and Elizabeth Cousens (Boulder: Lynne Rienner Publishers, 2002), 248.

⁴⁴Open Society Justice Initiative, *supra*.

⁴⁵Tricia Olsen, Leigh Payne, and Andrew Reiter, *At What Cost? A Political Economy Approach to Transitional Justice*, paper prepared for the Midwest Political Science Association Conference, Chicago, IL, April 14, 2007.

⁴⁶Hooria Hayat & Kholah Ahmed, *supra*.

Lankans do not empower themselves, the roots of the civil war will linger and continue to fester like an open wound.

Legal Empowerment in post-conflict communities

If there is to be accountability, justice, reconciliation, poverty alleviation, and development, the people and the communities should first be legally empowered. This signifies, at its simplest, that communities and individuals are able to assert autonomously their rights as such. It bears stressing that the means and the modes for achieving each of the goals of legal empowerment are different. Hence, while justice and development reinforce one another, the mechanisms and principles for attaining each vary.

i. Justice and Anti-Impunity Measures

The term used for legal empowerment to combat injustice and impunity arising from massive human rights violations is “post-conflict justice” (PCJ).⁴⁷ PCJ refers to any process initiated within five years following an armed conflict.⁴⁸ It tries to address wrongdoings which took place as part of that conflict.⁴⁹

The PCJ has several mechanisms to accomplish its purpose: trials, truth commissions, reparations, amnesties, purges, and exiles.⁵⁰ Each is explained as follows:⁵¹

- “A trial is the examination of alleged wrongdoing through judicial proceedings within a legal structure. Trials can include domestic prosecutions, international tribunals such as the International Criminal Tribunal for the former Yugoslavia, or hybrid courts such as the Special Court for Sierra Leone.”
- To gather information about past wrongdoings, truth commissions are established to investigate, establish facts, or simply air everyday stories of injustice or triumphs of justice. It is a forum to speak out. “Truth commissions are officially-sanctioned, temporary investigative bodies that focus on a pattern of abuse over a particular period of time.⁵² A commission can be both a mechanism for a country to address past wrongdoings that occurred during a conflict and a way for individuals and communities to learn what happened to relatives and friends. The number of truth commissions is growing, but most are designed to deal with long legacies of abuse and violence.”

⁴⁷ Helga Malmin Binningsbø, Cyanne E Loyle, Scott Gates and Jon Elster, *Armed conflict and post-conflict justice, 1946–2006 : A dataset* *Journal of Peace Research* 2012 49: 731 DOI: 10.1177/0022343312450886

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*, citing Hayner, 2011: 11.

- “Reparations are compensation given by the state to an individual or group who was harmed in some way during the conflict. The majority of post-conflict reparations target all parties to a conflict. Examples include the granting of pensions to widows of those killed in the 3 August 1979 *coup d’etat* in Equatorial Guinea and peace agreements emphasizing the right to return to land – or if that is impossible, fair compensation – to refugees and internally displaced persons.”
- Amnesties are “a promise (or in some cases formal legislation) on the part of the ruling party to not prosecute or punish past violators. When there have been grave violations of human rights, it seems reasonable to believe that some sort of accountability process is necessary. However, in negotiating peace settlements, leaders might choose to forgo traditional conceptions of justice to secure an end to the violence. Amnesty legislation can extend to former heads of state, government officials, and members of the military or active participants in the armed violence.”
- Purges involve the victorious party in a conflict trying “to exclude sympathizers of the defeated party from positions of influence.” Examples include “the act of removing politicians, armed forces members, judiciary or other members of society for their (alleged) collaboration with or participation in a conflict and limiting their influence accordingly.”
- “Exiles provide an opportunity for a new government to reduce the influence of past wrongdoers by removing them from the country. Exile is a period of forced or voluntary absence from one’s home country. Exile agreements can be *de facto* or *de jure*, often allowing a past wrong doer the opportunity to live out the remainder of his or her life undisturbed, but outside of the home country. An exile can also be willing when an individual chooses to leave the country because of conflict-related events.”

The particular PCJ mechanism that is adopted depends on context, especially “the political power structure following a conflict.”⁵³ There are obviously political and practical considerations to the decision to use one rather than another. But, for purposes of legal empowerment, in making the choice of PCJ mechanism to implement, it is essential to account for the principled approach – the duty to prosecute and the indispensability of criminal prosecution for the interest of “national reconciliation and social pacification.”⁵⁴

Hence, amnesties for serious human rights violations are inadmissible under the Inter-American Convention and the International Covenant on Civil and Political Rights.⁵⁵ Public emergencies, even as a constitutional doctrine that exempts State actions from legal strictures, cannot authorize

⁵³ Helga Malmin Binningsbo *et al.*, *supra*, citing Nalepa, 2010.

⁵⁴ Annual Report of the Inter-American Commission on Human Rights, 1985-1986, O E A/Ser. L/V/II.68, doc.8 rev.1, ch. 5 (1986), available at <http://www.cidh.oas.org/annualrep/85.86eng/toc.htm> accessed on 1 February 2013.

⁵⁵ Citing *Barrios Alto Case*, Inter-Am. Ct. H.R. Paras. 41-44 (2001), available at http://www.corteidh.or.cr/seriec/pdf_ing/seriec_75_ing.pdf accessed on 14 February 2013.

any compromise on the right to have serious violations of human rights punished. Prosecution underlies every program of reconciliation because:

“... the prevention of the perpetrator’s punishment for past human rights violations ‘undermines efforts to establish respect for human rights, contributes to an atmosphere of impunity...and constitutes a very serious impediment to efforts undertaken to consolidate democracy and promote respect for human rights and is thus in violation of article 2 of the [ICCPR]”

In contrast, “democratically legitimized amnesties” that provide for “an investigation of past human rights violations,” would “bring about justice rather than vengeance,’ without jeopardizing the need for reconciliation and democratic consolidation.”⁵⁶ With the exponential growth of literature and practice on PCJ, the body of knowledge known as “transitional justice” was established. Transitional justice is “that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law.”⁵⁷ Its objectives are the smorgasbord of human values – the “combination of justice, truth and social reconstruction.”⁵⁸

Transitional justice mixes and matches the principles of legal empowerment and the Rule of Law Orthodoxy as these have been discussed above. Among the first initiatives of transitional justice are the institutionalization of the rule of law as well as judicial and security reforms.⁵⁹ At the same time, transitional justice recognizes the influence of socio-economic and political factors and the local-national dimensions at play towards prosecution, reconciliation and social reconstruction.⁶⁰ The legitimacy of the transitional justice processes is critical in attaining success.⁶¹ In terms of breadth and reach, transitional justice may be “narrow.”⁶² The means are limited to “criminal accountability mechanisms, material – and non-material reparations, institutional reform, truth-seeking commissions and amnesty procedures.”⁶³ It may also be “broad.”⁶⁴ This consists of the modes under the narrow approach plus “demobilization, disarmament and reintegration (DDR) programmes for former combatants, traditional practices, searching for clandestine burial sites, identifying victims, releasing prisoners, formal apologies by the state, psycho-social support, legal reform, developing educational curricula, creating memorial sites and dealing with structural causes of the conflict.”⁶⁵

⁵⁶ Quoting the Annual report, *supra*.

⁵⁷ Roht-Arriaza, N., ‘The New Landscape of Transitional Justice’, in: Roht-Arriaza, N., and Mariezcurrena, J. (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, Cambridge, Cambridge University Press, 2006, p. 2.

⁵⁸ Eijkman, Quirine, *Global Jurist*. Volume 10, Issue 3, Pages –, ISSN (Online) 1934-2640, DOI: [10.2202/1934-2640.1370](https://doi.org/10.2202/1934-2640.1370), December 2010.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

The foregoing mechanisms track the critical facets of transitional post-conflict measures against impunity. They are meant to realize at least progressively the legal empowerment of people and their communities towards justice and accountability. For this reason, the United Nations has embodied these precepts of transitional justice in comprehensive legal documents, notably:

- Rome Statute of the International Criminal Court⁶⁶ creating the International Criminal Court, which has jurisdiction over persons who are accused of the “most serious crimes” of international concern.
- Human Rights Resolution: 2004/34⁶⁷ of the UN Commission on Human Rights providing for “[t]he right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms.”
- Human Rights Resolution 2005/35⁶⁸ entitled “Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law.”
- UN resolution A/RES/40/34⁶⁹ of the UN General Assembly providing the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power from 1985.
- Guide for policymakers⁷⁰ outlining UN General Assembly’s resolution of the Basic Principles of Justice for Victims of Crime and Abuse of Power, with guidance to policy makers pursuing the objectives of the resolution.
- Handbook on Justice for Victims⁷¹ sets out the victim’s right to speedy legal remedies and access to justice systems, and laying down the interpretation and application of the UN’s ‘Basic Principles of Justice for Victims of Crime and Abuse of Power from 1985.’

⁶⁶United Nations Treaty Collection, [http://untreaty.un.org/cod/icc/statute/english/rome_statute\(e\).pdf](http://untreaty.un.org/cod/icc/statute/english/rome_statute(e).pdf), accessed January 29, 2013.

⁶⁷Office of the High Commissioner for Human Rights, http://www.coc.int/v/dgh/standardsetting/victims/UN%20Res%202004_34.pdf, accessed January 30, 2013.

⁶⁸United Nations High Commission on Refugees, <http://www.unhcr.org/refworld/category,LEGAL,UNCHR,...3deb2ca54.0.html>, accessed January 30, 2013.

⁶⁹United Nations, <http://www.un.org/documents/ga/res/40/a40r034.htm>, accessed January 30, 2013.

⁷⁰United Nations Criminal Justice Information Network, <http://www.uncjin.org/Standards/policy.pdf>, accessed January 30, 2013.

⁷¹United Nations Criminal Justice Information Network, <http://www.uncjin.org/Standards/9857854.pdf>, accessed January 30, 2013.

ii. Poverty Alleviation and Development

Along with justice and accountability, legal empowerment also seeks to attain poverty alleviation and development. Defined narrowly, poverty alleviation and development entail “improving material standards of living.”⁷² Legal empowerment however involves what economist Amartya Sen argues as development’s ultimate goal – to advance people’s freedoms and capabilities.⁷³ Legal empowerment draws on this concept by measuring developmental impact not only in economic terms but also as the enhancement of freedoms and capabilities.⁷⁴

The objective of legal empowerment for poverty alleviation and development should therefore include not just the means of addressing the lack of economic resources and assets, but also the lack of power within one’s own life.⁷⁵ To combat these deficiencies, legal empowerment would have to (1) develop the role of groups within society, (2) increase their capacity and participation in governmental decisions that affect their lives along with the opportunities that are made available to them.⁷⁶

Legal empowerment is both “a process and a goal” – a process of helping people gain more control over their lives to attain the goal of actual empowerment.⁷⁷ To this end, the idea of legal empowerment depends for its success upon the involvement of civil society groups and communities. The broad range of poverty alleviation and development requires an integrated approach in the means and modes of legal empowerment.⁷⁸ Legal services are only a part of other developmental activities to prop disadvantaged groups with the opportunity to take control.⁷⁹ This is because, as mentioned above, legal empowerment encompasses both formal and informal mechanisms of dispute resolution, and would thus require more than legal services to effectively compete.⁸⁰

Culture also plays a critical role. It determines the legitimacy of whatever legal action that is taken. So does the existence of parallel or plural laws.⁸¹ Both these factors emanate locally.

⁷²Citing Stephen Golub, ‘Working Papers: Beyond Rule of Law Orthodoxy, The Legal Empowerment Alternative p.6 (Rule of Law Series, Democracy and Rule of Law Project 2003).

⁷³ Amartya Sen, ‘Development as Freedom’ (Oxford University Press, 1999).

⁷⁴ Various studies have provided frameworks for measuring empowerment: see *Legal Empowerment of the Poor: From Concepts to Assessment* (USAID, 2007) (articulating the need to develop indicators to measure aspects of legal empowerment such as rights enhancement, rights awareness, rights enablement, and rights enforcement); Ruth Alsop and Nina Henderson, *Measuring Empowerment in Practice: Structuring Analysis and Framing Indicators* (World Bank, 2005) (discussing measurable indicators of empowerment such as existence of choice, use of choice, and achievement of choice within the domains of state, market, and society); Dee Jupp, Sohel Ibn Ali, and Carlos Barahona, *Measuring Empowerment? Ask Them* (Sida Studies in Evaluation 2010) (describing an innovative method for measuring empowerment that quantifies qualitative outcomes from people’s own analysis of a social movement project in Bangladesh).

⁷⁵ Hooria Hayat & Khola Ahmed, *supra*.

⁷⁶ *Ibid.*

⁷⁷Citing Stephen Golub, ‘Working Papers: Beyond Rule of Law Orthodoxy, The Legal Empowerment Alternative p.26 (Rule of Law Series, Democracy and Rule of Law Project 2003).

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ Like alternative dispute resolutions.

⁸¹ Hooria Hayat & Khola Ahmed, *supra*.

Nonetheless, when accounted for carefully, they play a significant role in paralegal activities, legal consciousness-raising, and community-based dispute resolution strategies in the transformation of disadvantaged individuals and groups into a cohesive force for challenging social inequities.⁸²

On a larger scale, legal empowerment requires public interest litigation to influence the judiciary, other state actors and social advocacy groups, and for generating broader public sentiment against social injustices.⁸³ In their more advanced forms, legal empowerment strategies “add a participatory, demand dimension to institutional reform; as the capacity, knowledge and confidence of the poor develop, they are not only better able to resolve specific problems, but also able to challenge the regulatory role of legal and governance institutions and political dynamics of decision-making.”⁸⁴

An interesting three-tier typology summarizes the methodologies and activities for legal empowerment, poverty alleviation and development: (i) basic interventions of legal awareness; (ii) middle-order interventions that focus on problems faced by individuals and communities use a combination of formal and informal support mechanisms; and (iii) high-level strategies that focus on the policy constraints that persist, irrespective of progress in resolving individual/community cases.⁸⁵ Thus:

- First-Order Interventions include basic legal awareness raising or “legal literacy” work that educates the public about its legal rights and obligations, institutional structures of the legal system, and specific mechanisms that marginalized groups can use to advance their interests. This can include: print, broadcast and internet media; informational flyers, pamphlets and posters; radio and TV outreach; dramatic performances; and wireless/SMS tools.
- Second-Order Interventions focus on resolving legal problems and administrative challenges that are faced by marginalized groups. Interventions are community-driven and provide both formal and informal legal services, including mediation. Paralegals are a key mechanism for implementation at this level. They are able to address informal/formal divides, understand the local context, are cost-effective, and help ensure programs are in touch with communities.⁸⁶ Activities include: legal counselling and advice; mediation and dispute resolution in communities; administrative procedures such

⁸² Sumaiya Khair (2009). Evaluating Legal Empowerment: Problems of Analysis and Measurement. *Hague Journal on the Rule of Law*, 1, pp 33-37 doi:10.1017/S1876404509000335.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ Haki, White Paper, ‘The Legal Empowerment Approach to International Development’ (September 2011).

⁸⁶ For a more in depth discussion of community paralegals and their benefits, see *Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone*, Open Society Justice Initiative (2006), available at: http://www.soros.org/initiatives/justice/focus/legal_capacity/articles_publications/publications/between-law-and-society-20100310

as identification documents, land titling, and business registration; legal aid and representation in the formal system.

- Third-Order Interventions are designed to have an impact on policy constraints occurring at the highest level and systemic factors that shape the circumstances in which legal problems arise. They target persisting inequitable power relations that continually marginalize the poor. Activities include: public interest litigation; policy and law reform advocacy; legislation drafting; administrative advocacy; justice system reform; corruption monitoring.⁸⁷

The means and modes of legal empowerment will have to cut across its so-called four pillars. They are access to justice and legal rights, labor rights, property rights, and trading rights.⁸⁸ The poor and vulnerable groups must be legally empowered in each of these pillars and across them for their protection and development.⁸⁹

A Model of Legal Empowerment

The means and modes of legal empowerment are a tapestry of interconnected activities and methodologies. A model of legal empowerment may juxtapose the outlines for justice and an anti-impunity framework alongside the three-tier typology for poverty alleviation and development. But the processes, to be effective, must be done within the ambit of a democratic process as described by Robert Dahl – effective participation, voting equality, enlightened understanding, control of the agenda, and inclusion of adults.⁹⁰ The reason is simple: a democratic process increases the legitimacy of legal empowerment measures and binds everyone through consultation and inclusiveness.

While particular concerns may have a significant impact on some communities but not on others, it is believed that a basic or core set of legal competence and activism should be set in place in post-conflict societies so legal empowerment can prosper.⁹¹ This means that a model of legal empowerment must respond to:⁹²

- Gender-based violations that occur as a result of conflict; specific issues that affect women in particular during the post-conflict era must be articulated.

⁸⁷ Asian Development Bank, *Legal Empowerment for Women and Disadvantaged Groups, Final Report* (2009), p. 41 (The Asian Development Bank has supported legal empowerment pilot projects in Bangladesh, Philippines, Indonesia and Pakistan over the past decade).

⁸⁸ Regional countries discuss legal empowerment in Hanoi. (2012, Aug 27). Xinhua News Agency - CEIS. Retrieved from <http://ezproxy.library.usyd.edu.au/login?url=http://search.proquest.com/docview/1035247130?accountid=14757> accessed 15 February 2013.

⁸⁹ *Ibid.*

⁹⁰ Eijkman, Quirine, *Global Jurist*. Volume 10, Issue 3, Pages –, ISSN (Online) 1934-2640, DOI: [10.2202/1934-2640.1370](https://doi.org/10.2202/1934-2640.1370), December 2010.

⁹¹ Duthie, *supra*.

⁹² Zimbabwe Human Rights NGO Forum, *Note on Themes and the Facilitating Countries*, International Transitional Justice Conference, Harare, Zimbabwe. October 2012.

- Justice processes that are inclusive of the public sector, private sector and non-governmental organizations even as they are at cross-purposes.
- Jurisprudence and legality that mediate between justice and reconciliation, traditional or indigenous and formal legal processes, and between the underprivileged and privileged.
- Culture of impunity and accountability so as to end the cycle of violence and achieve authentic national reconciliation within a nation.
- Asset recovery and economic re-structuring as a deterrent to economic rights violations as well as civil and political abuses.
- Catalyzing and engaging community struggles and linking them into networks towards the emergence of a national constituency of defenders and activists.

Legal empowerment may extend beyond these core post-conflict faculties. But the latter serve as the standards upon which a successful post-conflict society is started and cultivated. They embody the essence of legal empowerment, which promotes the ability of the people to pursue justice, accountability, poverty alleviation and development through the Rule of Law. The correlative for such capacity building is the State's awareness of its obligations towards the people. The State justifies its existence only as long as the people can effectively assert their rights and make necessary demands upon it to perform its duties – often referred to as the “rights-based approach to development.”⁹³ Legal empowerment will not be possible where the State monopolizes power though theoretically legal institutions may be in place. The laws should themselves be the source of empowerment of the individual and the community.

Any meaningful conceptualization of legal empowerment treats justice, peace, and development as inseparable initiatives.⁹⁴ As articulated above, post-conflict scenarios cannot compartmentalize justice from reconciliation,⁹⁵ societal from personal, and development from the civil and political. They are conjoined and cannot exist independently of each other. “You take away one, you take away the others. Deny food, deny livelihood, deny shelter and you deny liberty, freedom, and ultimately the right to life and all that goes with life.”⁹⁶

In post-conflict communities, thus, legal empowerment takes the dual role of normalization and entrenchment of best practices. It takes care of the past history of brutality and violence as well as the present endeavor of dealing with them. It looks forward to an era where the past will not be re-lived, and plots the present and the future towards human progress and opportunities. This

⁹³ Duthie, *supra*.

⁹⁴ Zimbabwe Human Rights NGO Forum, *A People's Guide to Transitional Justice: An Introduction* (2009) Harare, Zimbabwe.

⁹⁵ Mobek, Eirin, *Transitional Justice in Post conflict Societies: Approaches to Reconciliation*, available at http://www.bmlv.gv.at/pdf_pool/publikationen/10_wg12_psm_100.pdf, accessed on January 30, 2013.

⁹⁶ H. Suresh, “Socio-Economic Rights and the Supreme Court” at www.escri-net.org/usr_doc/suresh_article.doc, last accessed on April 26, 2013.

understanding of legal empowerment resists offering only “short-term measures of justice in transition contexts.”⁹⁷

Only through legal empowerment will there be continuity, predictability and equality in the conceptualization and implementation of post-conflict policies. This is because the objective of legal empowerment is to “help people find concrete solutions to their daily justice problems, to demonstrate, case by case, that even in an environment marked by arbitrariness and unfairness, justice is possible.”⁹⁸ It enables people to find and effect change through the otherwise opaque and intricate legal system.

3 Sri Lanka: Choosing the Correct Path at the Crossroads

Several factors will determine if Sri Lanka’s future trajectory of development will either exacerbate post-conflict woes or bring about post-conflict hope. As mentioned previously, moving forward in post-conflict reconstruction is a challenging task. Every Sri Lankan would of course want justice and accountability as well as poverty alleviation and development. Reconciliation is desired. The key is to view it from the right perspective.

Ethnic conflicts are “particularly fierce and divisive.”⁹⁹ They are characterized by “‘siege mentality’ on all sides – demonisation of other groups and the perception that one’s own security is firmly tied to that of one’s communal group often at the expense of others.”¹⁰⁰ It would be most profitable for the Sri Lankan Government to take the lead. It can communicate to the Sinhala community in more forceful terms that it is in their best interests to embrace justice, accountability, development, and reconciliation. A top-down approach under the Rule of Law Orthodoxy will be desirable as a starting point at least to put a stop to the siege mentality and demonisation of the ‘other’ and to stress that these notions are already things of the past.

At the same time, legal empowerment among communities and people instills in them the value of human rights without fear of reprisal and hope of equal treatment from State actors. This would have been the ideal scenario. We have yet to see its materialization.

Recalling Blood and Deprivation

Understanding the nature and role of post-conflict mechanisms in Sri Lanka requires some knowledge of historical concepts of conflict and enmity. The civil war in Sri Lanka was not an all-out clash between the ethnic communities of the Sinhalese and the Tamils. Communal violence has always been episodic and never unrelenting. Until the arrival of the British colonialists, the communities co-existed with one another according to their own cultures. When

⁹⁷ M. Lenzen, *Roads Less Travelled: Conceptual Pathways (and Stumbling Blocks) for Development and Transitional Justice*, in *Transitional Justice and Development: Making Connections*, International Center for Transitional Justice, Pablo De Greiff and Roger Duthie eds, 2009, New York.

⁹⁸ Open Society Justice Initiative, *Legal Empowerment: An Integrated Approach to Law and Development*, draft working paper, March 2012.

⁹⁹ Colleen McGinn, *supra*.

¹⁰⁰ *Ibid.*

the British colonized Sri Lanka and established a colonial government however, the colonizers began a divide-and-rule strategy. By appointing Tamils in inordinate numbers to positions of power and privilege over the Sinhalese, the rivalry between the communities tragically commenced.¹⁰¹

Consequently, following a smooth transition to independence, there was a resurgence of separate identities. The Tamils became nostalgic in recalling their ancient kingdoms in the north and east of Sri Lanka to justify their claim to an ancestral homeland. Nostalgia also gripped the Sinhalese who took pride in the glorious era of their pre-colonial Buddhist kings. On both sides of these divide were the politicians who were nationalists but in a sense that is exclusive only to their race, their religion and themselves. Independence of Sri Lanka from British colonial rule merely underscored divisive questions of language, religion, minority representation in Government, access to higher education, civil service appointments, and citizenship rights for the Indian Tamils. Key turning points from rivalry to violent competition were the adoption of Sinhala as the only official language and the State's support for Buddhism as the official religion. Hostilities between the Tamils and the Sinhalese broke out in 1958.¹⁰²

The hitherto silent grievance of the Tamils graduated into a well-organized armed struggle by the Liberation Tigers of Tamil Eelam (LTTE) in 1972. The struggle became a full-scale civil war when the Tamils were particularly targeted for attacks in July 1983 by Sinhalese mobs acting with government complicity. Broadly categorized, the reasons for unrest eventually evolving into a full-scale war included discriminatory legislation,¹⁰³ "economic stagnation, and perceptions of discrimination due to the introduction of standardization in education/employment, non-implementation of language policy, devolution and the failure to confer a substantial degree of political autonomy to the Northern and Eastern Provinces to conduct their own affairs."¹⁰⁴

The civil war in Sri Lanka could have gone either way. It was a bitterly fought and hardly contested war. It was, for these reasons, devastating. Between the mid-1990s and 2006, the LTTE already controlled nearly a quarter of the country's territory.¹⁰⁵ The separatists' armed forces had by then graduated from guerrilla fronts to a regular military force.¹⁰⁶ They had presence on land, sea and air.¹⁰⁷ The LTTE was efficient in raising funds for its fledgling State. It capably engaged in state-building enterprises. It creatively nurtured Tamil cultural mores.¹⁰⁸ But in 2009, the tide turned against the LTTE.¹⁰⁹ Its armed forces were carefully and utterly decimated.¹¹⁰

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ World Movement for Democracy, *A Short History of the Conflict in Sri Lanka and the Involvement of NGOs in the Peace Process*, <http://www.wmd.org/resources/whats-being-done/ngo-participation-peace-negotiations/history-conflict-sri-lanka> accessed on February 13, 2013.

¹⁰⁴ Report of the Commission on Lessons Learnt and Reconciliation, November 2011, page 12.

¹⁰⁵ Neil Devotta, *The Liberation Tigers of Tamil Eelam and the Lost Quest for Separatism in Sri Lanka*, *Asian Survey* Vol. 9, No. 26 (November/December 2009), pp. 1021-1050.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

The war took 27 years to incubate and fester in Sri Lanka's consciousness. Human lives were the first casualties of the war. Gotabhaya Rajapaksa, the defense secretary and brother of the President, estimated human losses in just three years of fighting at 6,261 soldiers dead and 29,551 wounded.¹¹¹ According to these chilling statistics, a total of 23,000 troops had died since the first casualties in October 1981. This was when the LTTE's leader, Velupillai Prabhakaran, sprang off a bicycle, and shot two soldiers who were running errands in the northern town of Jaffna.¹¹² Prabhakaran is now dead. Much of the army he built has been annihilated.¹¹³ The LTTE made no disclosures on their losses. The Sri Lankan Army commander, General Sarath Fonseka, volunteered estimates: 22,000 in the past three years and 9,000 surrendered.¹¹⁴

The United Nations (UN) reckoned the fatalities for the entire 27-year-war at 80,000 to 100,000.¹¹⁵ Internally displaced persons (IDPs), or hordes of people driven out of their homes and communities, reached 300,000 to 330,000 according to the Government's record in 2009.¹¹⁶ The National Peace Council shared an earth-shaking figure. It reported 1,017,000 IDPs from 1983 to 1996.¹¹⁷ As of January 2012, the United Nations High Commission for Refugees (UNCHR) recorded 430,594 "population of concern" in Sri Lanka.¹¹⁸ The returned IDPs totaled 144,577. Actual IDPs are at 138,401.¹¹⁹ Refugees who have left Sri Lanka reached 136,617.¹²⁰

The massive internal displacement has left people homeless with little or no access to food, housing, water, and sanitation. The number of female-headed families skyrocketed to 30,000. Further, the riots in 1983 led to widespread unemployment as factories and plantations closed. The unemployment rate was extremely high at the height of the civil war. The tourism industry was decimated. There was a sharp decline in economic growth in the affected areas which led to further job losses. At the end of the civil war, "almost a million" were left homeless.¹²¹

¹¹⁰ *Ibid.*

¹¹¹ The Economist, *Too many heroes: human cost of Sri Lanka's war* (June 4, 2009), <http://www.economist.com/node/13794780> accessed on February 8, 2013.

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ ABC News, *Up to 100,000 killed in Sri Lanka's civil war: UN* (May 21, 2009), <http://www.abc.net.au/news/2009-05-20/up-to-100000-killed-in-sri-lankas-civil-war-un/1689524> accessed on February 8, 2013.

¹¹⁶ Report of the Secretary General's Internal Review Panel on United Nations Action in Sri Lanka (November 2012), http://www.un.org/News/dh/infocus/Sri_Lanka/The_Internal_Review_Panel_report_on_Sri_Lanka.pdf accessed on February 11, 2013.

¹¹⁷ National Peace Council, *The Cost of War*, Paper presented at the Convention for National Peace Delegates, Colombo, Sri Lanka, January 4, 1998.

¹¹⁸ UNHCR, *2013 UNHCR Regional Operations Profile - South Asia*, <http://www.unhcr.org/pages/49e4878e6.html> accessed February 11, 2013.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ National Library Singapore, <http://libguides.nl.sg/content.php?pid=109756&sid=827174> accessed on March 6, 2013.

Rebuilding Sri Lanka and Promising a New Beginning

The catastrophic human losses of the war have required shifting humanitarian interventions from mere relief to return-and-reintegration activities.¹²² The goals of justice, accountability, poverty alleviation, development, and reconciliation continue to be crucial links in Sri Lanka's post-conflict emergence. These goals must be assessed and attained together to bring normalcy, within the context of post-conflict objectives, back to the lives of the war-weary populace. How these goals are to be accomplished remains problematic. As mentioned, the Government in power has made no pretensions that it is pro-Sinhalese. Its President was once quoted as saying, "There is no ethnic problem, only a terrorist one."¹²³ Evidently, justice, accountability, reconciliation and development efforts should be initiated by the government in order to show commitment to resolve festering ethnic grievances.

This was the intention behind the Lessons Learnt and Reconciliation Commission (LLRC). But was this just a sleight of hand and a verbal maneuver to attract local and international goodwill but with no intention to implement its promises?

i. The Lessons Learnt and Reconciliation Commission

In May 2010 the Sri Lankan President appointed the LLRC. Its mandate was promising. The LLRC's vision was the promotion of national unity and reconciliation under a regime of dignity and freedom irrespective of ethnicity or religion.¹²⁴ It defined a framework of values that underpinned this vision and constituted not just the concept of reconciliation in Sri Lanka, but significantly the foundation for all communities to come together in a shared Sri Lankan identity. Thus:¹²⁵

- First, the collective acknowledgement of guilt and contrition for the suffering we have caused each other;
- Second, the call for a fundamental reorientation of attitude on the part of all parties that would promote mutual trust and understanding;
- Third, the emphasis on an inclusive process of governance in which all ethnic groups enjoy full equality of citizenship; and

¹²²*Ibid.* UNHCR. 2013 *UNHCR Regional Operations Profile – South Asia*, <http://www.unhcr.org/pages/49e4878e6.html> accessed February 11, 2013.

¹²³ Colleen McGinn. *supra*.

¹²⁴ Lessons Learnt and Reconciliation Commission, *About Us*, http://www.llrc.lk/index.php?option=com_content&view=article&id=18&Itemid=2 accessed on February 5, 2013.

¹²⁵ 'Post-war Accountability and Reconciliation: Creating an Inclusive Sri Lankan Identity', Seminar Report (February 9, 2012), Marga Institute, Sri Lanka.

- Fourth, a system of government in which there is an equitable sharing of power and the people are empowered from the grassroots level upwards in a fully accountable participatory democracy.

The LLRC's mission objectives included documenting the causes of war and its effects on the people towards reconciliation, and tackling the reparations and indemnification for victims of the war.¹²⁶ Its report, submitted in November 2011, recommended the following:¹²⁷

- 1) Providing comprehensive human rights education programs;
- 2) Rehabilitating child soldiers, reuniting them with their families, and providing them with education assistance;
- 3) Establishing an Inter-Agency Task Force mandated to address in a comprehensive manner the needs of women, children, elderly and other vulnerable groups such as the disabled affected by conflict, and provide necessary relief;
- 4) For the IDPs:
 - i) Granting legal ownership of lands in resettlement areas;
 - ii) Creating awareness among the IDPs about policies on resettlement and options available to them;
 - iii) Enabling the IDPs who went to India to return to Sri Lanka;
 - iv) Facilitating the return of Muslim IDPs to Sri Lanka's North and rebuilding mosques; and
 - v) Institutionalizing and securing the right of unhampered access to places of worship.
- 5) On land and properties:
 - i) Conducting surveys to ascertain the extent of damage to properties during the period of conflict;
 - ii) Ensuring the people's right "to acquire land in any part of the country, in accordance with its laws and regulations, and reside in any area of his/her choice without any restrictions or limitations;" and

¹²⁶ *Ibid.*

¹²⁷ National Plan of Action to Implement the Recommendations of the LLRC, http://www.priu.gov.lk/news_update/Current_Affairs/ca201207/20120726national_plan_action.htm#top accessed on March 4, 2013.

iii) Distributing State land pursuant to the Constitution under these principles:

- (a) Private lands would not be utilized for settlements by any Government agency; and
 - (b) The involvement of the Security Forces in civilian activities and the use of private lands by the Security Forces would be phased out within reasonable timelines, and the use of private lands for national security would be compensated.
- 6) Deciding on compensation benefits in cases of death and injury
- 7) Establishing a grievance mechanism for redress of any complaint against any State officer or employee; and
- 8) Encouraging the free movement of persons to ensure greater participation in the economic, social and cultural activities.

A national plan of action¹²⁸ was drawn up by the Government for the implementation of the recommendations made in the LLRC. The thematic foci of this plan of action were: 1) International Humanitarian Laws; 2) Human Rights; 3) Land, Return and Resettlement; 4) Restitution/Compensatory Relief; and 4) Reconciliation. The LLRC could have been an effective post-conflict mechanism. It was a template of transitional justice that addressed not only legal empowerment, but also the Rule of Law, from the grassroots to the highest echelons of government. Peace, justice, accountability, reconciliation, and development were on top of the LLRC's agenda. It embodied every positive feature to achieve these goals.

Regrettably however, the LLRC was adjudged "another failed domestic mechanism"¹²⁹ in attaining justice, accountability, reconciliation, and development for the people of Sri Lanka. It could have been a step forward in resolving post-conflict issues through legal empowerment and the Rule of Law. It was meant to promote and protect human rights through legal mechanisms. But the LLRC recommendations did not take off the ground. They were blueprints which led nowhere. The national plan of action was also met with criticism and skepticism. The Friday Forum commented that the plan's "contents and substance do not convince us that the Government is serious about substantial implementation of the LLRC's recommendations which will rectify the lapses of the past and promote justice and dignity for the victims of war and the minorities leading to reconciliation and national integration."¹³⁰ The Centre for Policy

¹²⁸ National Plan of Action to Implement Recommendations of the LLRC, http://www.priu.gov.lk/news_update/Current_Affairs/ca201207/20120726national_plan_action.htm accessed on March 4, 2013.

¹²⁹ Amnesty International, *When will they get justice? Failures of Sri Lanka's Lessons Learnt and Reconciliation Commission*, http://www.amnesty.org.uk/uploads/documents/doc_21824.pdf accessed on February 13, 2013.

¹³⁰ Jayantha Dhanapala and Manouri Muttetuwegama, "The Friday Forum Comments on the National Plan of Action: Need to Implement LLRC", Daily Mirror (December 31, 2012),

Alternatives (CPA) lamented that the action plan lacked clarity and was itself a source of confusion since most of the actions intended to be done did not correspond to the recommendations.¹³¹ The CPA rued the lack of monitoring mechanisms and feared that the action plan will only exacerbate instead of alleviate problems because of its failure to address the fundamental problems on the ground.¹³²

The complaints were not without basis. The implementation of the LLRC recommendations appeared exceedingly complex and overly ambitious. The LLRC agenda was wide-ranging and societal in character. It could not be implemented piecemeal. It had to be adopted as an integrated whole. True, the approach was in accord with the accepted approaches for promoting sustainable human development -- approaches that insist on simultaneous progression of social, economic and political aspects of development.¹³³

But the different parts the of the LLRC agenda required different methodologies with different time constraints.¹³⁴ As they were all interdependent, they needed to be sequenced to move forward at the same time.¹³⁵ The LLRC required a well designed institutional framework within which responsibilities and tasks of various agencies were clearly identified and assigned.¹³⁶ Yet, there was none. The main cause of the dissatisfaction with the implementation of the LLRC report was this lack of an integrated institutional framework and an action plan.¹³⁷ There was no genuinely participatory process for its execution.¹³⁸ Nothing was on the table for stakeholders to understand the process. Beyond the rhetoric, no community sympathy for both the needs and the constraints was generated. The LLRC was therefore a great moment forged, that was lost.

ii. Mainstream Legal Aid Programs

The Government implements two legal aid programs through its agencies. One is the Legal Aid Commission (LAC) created in 1978 under the Ministry of Justice, and two, the Law Reforms and the Community Legal Aid Program (CLAP) also under the Ministry of Justice. The objective of the LAC is to provide legal aid to indigent, needy or qualified Sri Lankans. Legal aid consists of legal advice, funds to conduct legal and other proceedings on behalf of its clients, services of attorneys-at-law to represent them, and any other assistance necessary to provide legal assistance. The LAC also fostered programs towards legal awareness, training and reform. A parallel initiative, the Community Legal Aid Program (CLAP), also a creation of the Ministry of Justice,

<http://www.dailymirror.lk/opinion/172-opinion/24616-the-friday-forum-comments-on-the-national-plan-of-action--need-to-implement-llrc.html> accessed on March 5, 2013.

¹³¹ Fonseka, Ganeshathasan & Raheem, "Commentary on the National Plan of Action to Implement the Recommendations of the Lessons Learnt and Reconciliation Commission", Centre for Policy Studies (August 2012), <http://www.scribd.com/doc/103800519/CPA-Commentary-on-LLRC-Action-Plan> accessed on March 5, 2013.

¹³² *Ibid.*

¹³³ 'Post-war Accountability and Reconciliation: Creating an Inclusive Sri Lankan Identity', Seminar Report (February 9, 2012), Marga Institute, Sri Lanka.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

was designed to function alongside the LAC in transforming Sri Lanka's "legal culture." CLAP's vision is to engender an "ideal of a social order based on equality through the facilitation of easier access to justice."

Another access-to-justice program was the institution of *de officio* lawyers or duty counsel who in particular instances would be appointed by the courts. For this and other purposes, the Consortium of Legal Aid Organizations (CLAO), facilitated by the Asia Foundation compiled a framework to bring together organizations "providing legal aid and carrying out human rights and legal rights awareness activities to network and share information, coordinate resources, avoid duplication and engage in activities that are beneficial to themselves and the people they serve." This was to establish a network of lawyers willing and able to serve the people of Sri Lanka.

Mainstream legal aid programs demonstrate one drawback. Akin with other Government-sponsored legal empowerment activities, these programs have not been geared to focus on post-conflict needs. This is rather disturbing. Sri Lanka has emerged from a violent past. Even with this background, mainstream legal aid has been narrowly conceptualized to cater to the populace irrespective of post-conflict issues. No doubt, legal aid for everyone is laudable. However, a subset of legal aid programs specifically dealing with war-related issues ought to be established. The latter requires a different consciousness, expertise and resources from those involved in mainstream legal aid as presently defined. With this, mainstream legal aid would be seen as adequate, relevant, and far-reaching as the country's historical, social and political contexts demand.

Nonetheless, mainstream legal aid would do even for the limited purpose of affording access to legal services that is equally available to everyone without regard to ethnicity. This is especially relevant to members of the minority communities such as Tamils and Muslims in order to obtain representation and empowerment before the formal justice system. Even minimally, it would give them a voice that would otherwise be denied to them if no such programs were in place.

iii. Holistic Legal Empowerment; Programs at the Grassroots

Mainstream legal aid is complemented by projects of other institutions. The question remains: Will it solve the ethnic divide? Will it empower the minorities to confront the social and political issues that beset them?

The United Nations High Commission for Refugees (UNHCR) ventured on "monitoring and advocating for the rights of persons of concern, conducting targeted protection interventions and focusing on supporting the issuance of civil-status documentation." This means, among others, addressing the needs of asylum seekers and refugees for resettlement. The UNCHR's advocacy was also "to uphold land and property rights, and to improve returnees' self-reliance and ability to

prevent and respond to sexual and gender-based violence (SGBV) through awareness raising and training.”¹³⁹

There were international agreements to resolve contentious positions brought about by the civil war. These were all under the United Nation’s (UN) auspices, the outcome of UN Secretary General Ban ki-moon’s visit in 2009.¹⁴⁰ Mandates were issued for long-term socio-economic development: install the aspirations and resolve grievances of all communities; give the IDPs access to humanitarian agencies, basic civil infrastructure and means of livelihood; rehabilitate and reintegrate child soldiers; and pursue a “National Framework for the Reintegration of Ex-Combatants into Civilian Lives.”¹⁴¹

The Sri Lankan Government has yet to comply in full with the international agreements. A Panel of Experts was created in 2010 by the UN Secretary- General to compel satisfaction of these agreements. The idea was to devise “modalities, applicable international standards and comparative experience relevant to an accountability process.”¹⁴² The scrutiny referred to the “nature and scope of alleged violations of international humanitarian and human rights law during the final stages of the armed conflict in Sri Lanka.”¹⁴³

Other examples of legal empowerment are Sri Lanka’s Human Rights Commission (HRC) on “National Protection and Durable Solution for Internally Displaced Persons.” The HRC also initiated the “Joint Program on Human Rights” with the United Nations Development Program (UNDP), and the “Increase Confidence of Communities in Reporting and Responding to Violations of Children’s Rights,” which the United Nations Children’s Fund (UNICEF) backstopped.

Note that the foregoing projects, including those mentioned below, are not exclusively focused on the law and the legal system. But they have legal components. More importantly, they provide for the effective assertion of rights through an analysis of social, political and cultural contexts. Certainly, law does not operate in a vacuum. The projects combined law and its contexts to address the varied goals of legal empowerment -- justice, accountability, poverty alleviation, and development. The question remains: Would they address the ethnic issues that precipitated the civil war in today’s context where the majority holds the reins of Government? An examination of the projects below shows that some of them do.

¹³⁹ UNHCR, *2013 UNHCR Regional Operations Profile – South Asia*, <http://www.unhcr.org/pages/49e4878e6.html> accessed February 11, 2013.

¹⁴⁰ UN Secretary General, *Joint Statement by UN Secretary General- Government of Sri Lanka* (2009), <http://www.un.org/News/Press/docs/2009/sg2151.doc.htm>, accessed on February 11, 2013.

¹⁴¹ *Ibid.*

¹⁴² United Nations, *Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka* (March 31, 2011), http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf accessed February 11, 2013.

¹⁴³ *Ibid.*

The following initiatives planned and executed by international and local non-governmental organizations (NGOs), also advance this idea of legal empowerment as steps towards resolving post-conflict issues in Sri Lanka:

➤ International Non-Government Organizations:

- 1) The United States Institute of Peace (USIP) has peace building projects that:
 - i) Help Sri Lanka achieve sustainable peace through supporting political reconciliation processes that try to correct the root causes of Sri Lanka's conflict.
 - ii) Support a coordinated international effort to assist Sri Lanka in its period of transition out of war and into sustained peace.
 - iii) Support inter-communal reconciliation by strengthening relationships and mutual understanding between Sri Lanka's diverse ethnic and religious communities.¹⁴⁴
- 2) The Action for Technical Cooperation and Development (ACTED) sponsored the "Community Driven Development and Pro-Poor Economic Growth for Conflict-Affected Populations in Northern and Eastern Sri Lanka." The goal is to "address the reintegration needs of communities in the Northern and Eastern Provinces through sustainable rehabilitation and reconstruction assistance and the improvement of public services." Fifteen community-based organizations (600 members) of Mullaitivu District will be trained in community development and business management. Fifteen Savings and Loans Associations will be set up. Fifteen grassroots development plans will be drawn up. These projects are meant "to implement community infrastructure or livelihood-related sub-projects, with a focus on environmental sustainability and equal opportunity."¹⁴⁵
- 3) The Institute for the Study of Human Rights (ISHR) at Colombia University developed for the Ministry of Higher Education of Sri Lanka a "Conflict Resolution Curriculum: Fostering Social Harmony in Sri Lanka." This is a comprehensive course that was tailored to respond to the people's post-conflict needs. The curriculum anchored on social psychology and social construction as a means "towards developing practical skills related to conflict resolution and peace-building, such as enhanced communication, collaborative problem solving, negotiation, and mediation skills."¹⁴⁶
- 4) UNDP-Sri Lanka is enhancing peace-building through the "Peace and Recovery" action. The framework is to assist State and civil society organizations and to facilitate the socio-economic recovery of the conflict-affected population of Sri Lanka. This initiative hosts: (a)

¹⁴⁴ USIP, <http://www.usip.org/countries-continents/sri-lanka> accessed on February 11, 2013.

¹⁴⁵ ACTED, <http://www.acted.org/en/community-driven-development-and-pro-poor-economic-growth-conflict-affected-populations-northern-and> accessed on February 11, 2013.

¹⁴⁶ Colombia University, *Conflict Resolution Curriculum: Fostering Social Harmony in Sri Lanka* <http://academiccommons.columbia.edu/catalog/ac%3A151312> accessed on February 11, 2013.

the “Transition Recovery Programme,” which delivers multi-faceted socio-economic support for communities directly or indirectly affected by the conflict in Northern and Eastern Sri Lanka; and (b) the “Support to Mine Action Project,” which enlists “capacity and coordination support to mine action activities in the country.” Presently, the project is sponsoring the coordination of early recovery activities at the national and district levels, the provision of technical support to policymaking on the reintegration of ex-combatants into civilian life, and an initiative for strengthening the bilingual competencies of public administration.¹⁴⁷

- 5) Asia Foundation is espousing “Access to Justice” as grassroots legal empowerment to make justice accessible to marginalized communities. It does so by strengthening institutions and processes that are the “peoples’ first point of contact with the justice system.” Its local partners are: Centre for Mediation & Mediation Training; Consortium of Humanitarian Agencies; Jaffna Bar Association; Kandurata Community Development Forum; Marga Institute; Muslim Foundation for Culture and Development; Muslim Women's Research & Action Forum; Rural Economic & Community Development Organization; Police In-service Training (Police Academy); TNS Lanka (Pvt.) Ltd. University of Peradeniya (Department of Law); Vehilihini Development Centre Viluthu - Centre for Human Resource Development.”¹⁴⁸

➤ Local NGOs:

- 1) The Karuna Centre for Peace Building began leading seminars in Sri Lanka in 1994, working throughout the country with a variety of civil society organizations, to teach the skills and practices of conflict resolution, increase mutual understanding between identity groups, foster social responsibility, and encourage communal harmony.”¹⁴⁹ Its programs are still ongoing.
- 2) The Centre for the Study of Human Rights (CSHR), University of Colombo conducts capacity building and human rights awareness programs for the academe, communities, state forces, Quazis, media personnel, and prison officers within a human rights context.¹⁵⁰
- 3) Cordaid gave out plastic sheets, kitchen items, and clothes, cared for the wounded among the IDPs, and commenced reconstruction projects. In 2011, it completed its reconstruction activities in the north and closed its office in Vavuniya.¹⁵¹

¹⁴⁷United Nations Development Program: Sri Lanka, *What we do*, http://www.undp.lk/WHAT_WE_DO/Pages/PeaceandRecovery.aspx accessed on February 11, 2013.

¹⁴⁸Asia Foundation available at <http://asiafoundation.org/project/projectsearch.php?country=sri-lanka> accessed on February 11, 2013).

¹⁴⁹Karuna Center for Peace Building, <http://www.karunacenter.org/sri-lanka.html> accessed on February 11, 2013.

¹⁵⁰Center for the Study of Human Rights. University of Colombo, http://cshr.cmb.ac.lk/?page_id=1678 accessed on February 11, 2013.

¹⁵¹Cordaid, “Emergency Aid and Reconstruction in Sri Lanka.” <http://www.cordaidbondzondernaam.nl/nl/Projects/Emergency-aid-and-reconstruction-in-Sri-Lanka.html> accessed on March 7, 2013.

- 4) The Law and Society Trust (LST) offers the *Human Rights in Conflict Programme* with the goal to “catalyze an improvement in human rights protection in Sri Lanka” combining advocacy, activism, training, research, analysis, information dissemination, and networking in order to influence decision makers.¹⁵²

As the foregoing demonstrates, the civil society sector has the capacity to initiate legal empowerment projects to meet Sri Lanka’s post-conflict reconstruction. The goals of such civil society organisations encompass the philosophy of transitional justice of attaining peace, justice, accountability, reconciliation, and development. Their advantage is that they work directly with communities and people, and because they do not have the resources to stay indefinitely with them, unlike the Government, their aim is to capacitate or empower the communities and the people to learn to do things later on their own. Further, these endeavors do not depend on responses from the Sri Lankan Government in order to be effective. The LLRC, for example, did not proceed as desired because the Sri Lankan Government apparently balked at full implementation of its recommendations. International organizations seeking to enforce binding international commitments from the Sri Lankan Government have had similar disheartening experiences. With these failures in mind, the next best option, aside from taking the “ostrich approach” of hiding one’s head in the sand, doing nothing and ignoring everything,¹⁵³ is to enable Sri Lankan communities and people towards self-reliance.

4 The LST Barefoot Lawyers’ Initiative

Entering in collaborative partnerships with community groups, in the north and east of Sri Lanka in 2011, it was soon realized that there is a need for legal empowerment of these communities. This was especially important due to the pressing demand for legal advice and services to tackle the prevalent land problems and the widespread dilemma of enforced disappearances, killings, arrests, detentions and intimidation or harassment by State forces. Hence, based on these insights gained, it was determined that the HRC Programme would specifically focus on legal empowerment of the affected communities. From 2012, LST has been pursuing the objective of legal empowerment, focusing particularly on empowering communities to utilize the law to realize their rights individually and as groups.

Pressing Issues

These efforts have focused on issues relating to socio-economic problems of post-conflict communities in the North in the districts of Jaffna, Mannar, Mullaitivu, Killinochichi and Vavuniya and in the East in Batticaloa and Trincomalee districts, populated mostly by minorities. One of the major issues that have arisen in this context is in regard to land, particularly, land grabbing and land disputes. The military, out of a desire for personal enrichment or the expansion and strengthening of military presence, has displaced communities from lands they had held for generations. Further, in the name of large scale development and road building, the State has

¹⁵²Law and Society Trust, *Human Rights in Conflict Programme*, <http://www.lawandsocietytrust.org/human-rights-in-conflict-programme.html> accessed on February 11, 2013.

¹⁵³ Colleen McGinn, *supra*.

taken away community and individually-held lands sans compensation and consent, and turned them over to investors. These instances of land grabbing have dissipated access to this resource. These in turn have fueled land disputes between different ethnic communities, and between the poor and the powerful in the same village.

Land disputes have been particularly serious in regard to internally displaced persons (IDP's). Due to war and displacement, internally displaced persons could not show documents to prove land ownership and were replaced by interlopers. Others were dispossessed because their customary rights were disregarded and violated by State officials who evicted them. Regrettably, where communities are pitted against one another, the communities in major ethnic groups would often win the land dispute over the minorities who would then be forced to accept lands of poor quality and accessibility. In regard to land disputes faced by IDPs displaced by violence in 1990, problems are particularly acute. Some of these lands in Silavathurai situated in the Musali Divisional Secretariat of the Mannar District for example were seized by the Navy in 2006 to establish a navy camp. There are about 110 families who were affected by this forced acquisition of the lands belonging to them. These people have lost their homes, livelihoods as well as their traditional homeland. Other such happenings are common. For instance, mosques, churches, temples and community centres in the hamlet called Muthusilavathurai (now known as Silavathurai) were destroyed. Though the Divisional Secretariat had provided them alternative lands outside Silavathurai in the Northern Province, these alternative lands lack livelihood resources which the displaced were formerly entitled to in their original habitats.

In some instances, the affected people are ready and willing to take their complaints before the courts. For example, land disputes faced by the IDPs who were resettled in the Mannar district have resulted in these affected people being made aware of their legal rights and steps being taken to file a civil case in the District Court to reclaim their lost properties. In yet other instances, civil administration authorities have themselves become responsible for displacement. For example, the construction housing the Public Medical Centre in the Silavathurai Town Area coming under the administration of the Musali District Secretariat has been taken over by the police. It currently functions as the Silavathurai Police Station. Steps were taken by HRC Programme's lawyers with the co-operation of the Musali People's Committee to take the matter up with the Divisional Secretariat and the District Medical officers. These discussions are ongoing.

In the Konndakacchi area in Silavathurai Division of the Musali District Secretariat, lands of the people in this area were under the control of the Army during the 2006's. There are lands of 36 families in this area. At present, the Army has permitted the owners to enter their lands for inspection and clearing with authorization from the Army before entering their lands. As the Army has been continuously using these lands to dispose solid waste and sanitary waste, the owners when accessing their lands, are exposed to health hazards from obnoxious odours emanating from these mounds of waste. They contract skin infections as a result of these pollutants, and hence are unable to engage in clearing their lands. The neighboring areas are also uninhabitable. Complaints about these problems were made to the concerned authorities many times, but there was no response. Hence steps are being taken to file action. The illegal seizure of lands of displaced people in Mullikandal district under the District Secretariat of Adampan is also currently in the process of being taken to court.

Combined with these land problems is the lack of economic opportunities for employment or livelihood for the people of these devastated communities, the difficulty of rebuilding their homes, and the widespread neglect by the government who made empty promises to address post-conflict dilemmas. In the midst of the fight for economic survival, issues of killings, abductions, torture, arrests and detentions continue to plague the communities even after the war. Hundreds of people continue to look for family members who disappeared during or after the war. Addressing these problems is primarily essential alongside addressing socio-economic issues. These problems demand adequate legal services.

Responding through the Barefoot Lawyers' Program

LST's concept of legal empowerment is motivated by the objective of promoting "development with equity using the Human Rights-Based Approach (HRBA)."¹⁵⁴ One of the strategies to achieve this objective is the "legal empowerment of communities through the "Barefoot Lawyers" initiative. The plan is to train community-based lawyers and law graduates attached to community-based organizations to engage in "raising awareness and legal empowerment." LST believes, an assumption that underlies the core idea of legal empowerment, that people who "are aware of their rights, with access to information, listened to and supported will utilize democratic processes within the narrow space still available to them to take charge of their own economic and social transformations."¹⁵⁵ With support from LST and its partner organizations, aggrieved communities and individuals would be encouraged to access justice by, among others, initiating legal proceedings. For the minorities, this means giving them a voice in Sri Lanka's legal system, an important aspect of achieving peace, justice, accountability, reconciliation, and development.

The concept of barefoot lawyers is not novel. It has percolated through history to represent the ideal of fair access to justice even in the farthest corners of pristine communities.¹⁵⁶ In Indonesia, legal practitioners of modest backgrounds and means took on the Government and the Suharto family in class action suits, and won them.¹⁵⁷ These courageous individuals were referred to as "ghost" or "barefoot" lawyers.¹⁵⁸ They attended court hearings literally in bare feet or in sandals.¹⁵⁹ In 1999, the Indian Institute of Public Administration launched an intensive program of legal training for ordinary citizens.¹⁶⁰ The goal was to organize them as cadres to pursue "public interest suits" and protect the interests of the common citizen."¹⁶¹ They too were called "barefoot lawyers."¹⁶²

¹⁵⁴ *Ibid.*, p. 8.

¹⁵⁵ *Supra*, p. 10.

¹⁵⁶ Origins of the Barefoot Lawyers, Marcus Family Law Center, <http://www.barefootlawyer.com/about/barefoot-lawyer-concept/> accessed on 14 April 2013.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

In China, a barefoot lawyer is a self-taught legal activist.¹⁶³ Many barefoot lawyers are peasants who taught themselves enough law to file civil complaints, engage in litigation, and educate fellow citizens about their rights.¹⁶⁴ The term is a variation of the earlier selfless fellows who shared medical knowledge and some degree of medical expertise – the “barefoot doctors.”¹⁶⁵ Barefoot lawyers extend legal services for free, and in many instances, counseled for controversial or politically sensitive cases that mainstream legal professionals would be reluctant to pursue.¹⁶⁶ Noted barefoot lawyers in China include the blind self-taught activist Chen Guangcheng and Guo Feixiong.¹⁶⁷ Due to the nature of cases that barefoot lawyers appear in, they are often met with punitive reprisals by authorities.¹⁶⁸ Guo Feixiong¹⁶⁹ and Chen Guangcheng¹⁷⁰ suffered much for their advocacies as barefoot lawyers.

As regards LST’s own barefoot lawyers, LST wisely chose to utilize lawyers already based in the communities. The advantages are two-fold. They have proximity and accessibility to their clients – the communities and its people. And, since they belong to the communities, they have the trust and confidence of the people. There is less apprehension in seeking their services. LST commissioned four lawyers for the program that covers Killinochichi, Mullaithivu, Jaffna, Vavuniya, Mannar and Batticaloa, the North and East. Each lawyer was assigned a certain area to render services. They report to LST from the ground. Training was conducted for these lawyers on legal empowerment, human rights, and on their mandates. As in other countries with controversial and politically sensitive cases, the barefoot lawyers of Sri Lanka too have often faced formidable challenges in carrying out their duties, aggravated by a heavy workload. They must provide timely action to meet the legal needs of post-conflict communities. The cases deal with property or land issues, enforced disappearances, killings, arrests, detentions, threats and intimidation.

Up to now, the programme has earmarked the following post-conflict issues so that legal services revolve round these.

- Land grabbing by military;
- Land problems of Muslim communities who wished to return to their lands after the end of the civil war and after leaving these lands for more or less 30 years;

¹⁶³ Melinda Liu. “Barefoot lawyers”, *Newsweek*, 4 March 2002.

¹⁶⁴ You-Tien Hsing and Ching Kwan Lee, *Reclaiming Chinese Society: The New Social Activism* (Routledge, 2009).

¹⁶⁵ *Ibid.*

¹⁶⁶ Margaret Y. K. Woo, Mary E. Gallagher, *Chinese Justice: Civil Dispute Resolution in Contemporary China*, (Cambridge University Press, 2011).

¹⁶⁷ Human Rights Watch. *Walking on Thin Ice* 28 April 2008; Peter Ford. China’s blind activist lawyer, Chen Guangcheng, released from prison, *Christian Science Monitor*, 9 September 2010; Tim Johnson, In China, lawyers fighting for justice routinely harassed, *Knight Ridder Newspapers*, 15 November 2005.

¹⁶⁸ Radio Free Asia. ‘Chinese Rights Lawyer Beaten, Staging Hunger Strike in Prison’, 28 Dec 2007.

¹⁶⁹ Human Rights in China. Rights Defender Guo Feixiong Sentenced to 5 years in Prison. Nov 13 2007.

¹⁷⁰ Grammaticas, Damian (10 February 2011). “China activist Chen Guangcheng ‘under house arrest’”. *BBC News*.

- Harassment, intimidation and actual threats on civilians and former LTTE cadres from the military or police;
- Locating family members forcibly disappeared; and
- Arrests and detentions.

The barefoot lawyers reported that many complaints had been lodged by their clients before various government agencies like the Human Rights Commission of Sri Lanka, the Divisional Secretariat offices, the police, and the courts. In most cases however, their complaints were either not resolved in their favor, dismissed, ignored, or filed away and forgotten in the judicial system's interminable processes.

LST's barefoot lawyers have as clients, Sri Lanka's underrepresented and marginalized ethnic groups, predominantly the Tamils and Muslims. As a result, the barefoot lawyers themselves experienced varying degrees of threats or harassment from the military. They were subjected to surveillance, beaten, or even sexually abused. The spouse of one of the lawyers was abducted by the military twice, and physically and psychologically abused on two occasions. The lives of the barefoot lawyers have been put at risk numerous times since this program began because of their work.

2013: A better year for the Barefoot Lawyers

The program included awareness raising activities in the districts covered. However, the security risks of prospective participants and of the barefoot lawyers curtailed plans of implementing these training programs in 2012. The first four months of 2013 saw more activity taking place in perceived 'safer' areas particularly in terms of conducting trainings for the targeted groups. In January 2013, one training was conducted in the Musali area, which catered to participants from five villages. The training focused on raising awareness of the participants on their fundamental and human rights, and advising them of the legal remedies that are available for violations of their rights. A follow up training was conducted the following month in this same area to guide and assist the participants in the filing of fundamental rights cases and writ applications. From these trainings, the participants were encouraged to establish their own community-based organizations.

In March, another awareness raising activity was conducted on sexual and gender based violence to a group of private transport employees in Mannar. LST held a legal aid clinic the following month to further follow up on the earlier training programs conducted and to provide further assistance to the communities, especially on the issues affecting their lands. A workshop on land rights was held in the Madhu Division to give a more focused legal discussion on land issues.

Thus far, LST has drawn up a directory of partner or network organizations and individuals during the course of the inaugural year. It has also commenced preparing and compiling training

and briefing materials on legal empowerment for the teach-ins during the second year of the project.

The future of the program is expectedly bright. For one, there exist a strong necessity and urgency for legal services in post-conflict communities. This was revealed during the previous livelihood projects participated in by LST. While the primary objective of these projects was towards economic development, it became imperative for the communities and the people to redress their civil and political concerns. For, how can they progress economically, if their lives and security are at risk, their families have been arrested or detained, or worse, disappeared and killed?

Moreover, legal services in post-conflict communities are scarce, if not totally non-existent. Some lawyers may practice in some areas. But the cost of their professional fees and their lack of knowledge of human rights deter communities and people from availing of their services. Barefoot lawyers fill this need. They are the first contact in accessing justice. Undoubtedly, in due time, the communities and the people themselves shall learn to assert their rights on their own with occasional assistance from the barefoot lawyers. From their ranks too will rise the next generations of committed counsel for the people.

If the barefoot lawyers are to be successful, they have to overcome these challenges: (a) threat to the lives and security of the barefoot lawyers; (b) threats to the lives and security of network organizations and individuals, restricting them from working publicly with barefoot lawyers; (c) threats to client's lives and security; (d) fear of reprisal, thus preventing or curtailing them from seeking legal advice or asking help from authorities; (e) their clients' distrust in authorities, the legal system, and the Government; (f) lack of resources to reach out to far-flung areas; (g) lack of resources to conduct wider documentation and gather more evidence; (h) lack of resources to pursue administrative or court actions; and (i) lack in their numbers. Inevitably, the "Barefoot Lawyers" project will always find its lawyers threatened because its clients are among those whose adversaries are the institutions that are supposed to protect them, or people who want to change the iniquitous system and its adversaries would be those heavily affected by relevant reforms. The threats are ironically, grim reminders that the project is accomplishing its mandate. It will also be a testament to the triumph of the initiative.

5 Conclusion

It surely is difficult to end a story where its plot is just unfolding. Who, after all, would know the ending? And, who would want to destroy the suspense altogether by speculating on the outcome? This is the same situation in Sri Lanka's post-conflict legal empowerment initiatives. There can yet be no conclusion to this episode that is still evolving.

But there can be an expression of gratitude that legal empowerment is taking place, that it is holistic, and that it is growing. The civil war evokes bad memories, and who would wish to recall the devastating war? Post-conflict restoration will be a painfully difficult process and at various stages will require much persuasion and persistence to get a clear picture, whether right or wrong.

Post-war recovery is itself a political act for which compromises will be tried and tested, and if no one complains, forged. This is the defining moment for Sri Lanka's after a violent past. Its turbulent history is prone to interpretation and re-interpretation as history is read and re-read. Often, history is written by the victor. And where ethnic conflict is involved, the situation proves more challenging when the conqueror thinks that such and is the adverse ethnic group.

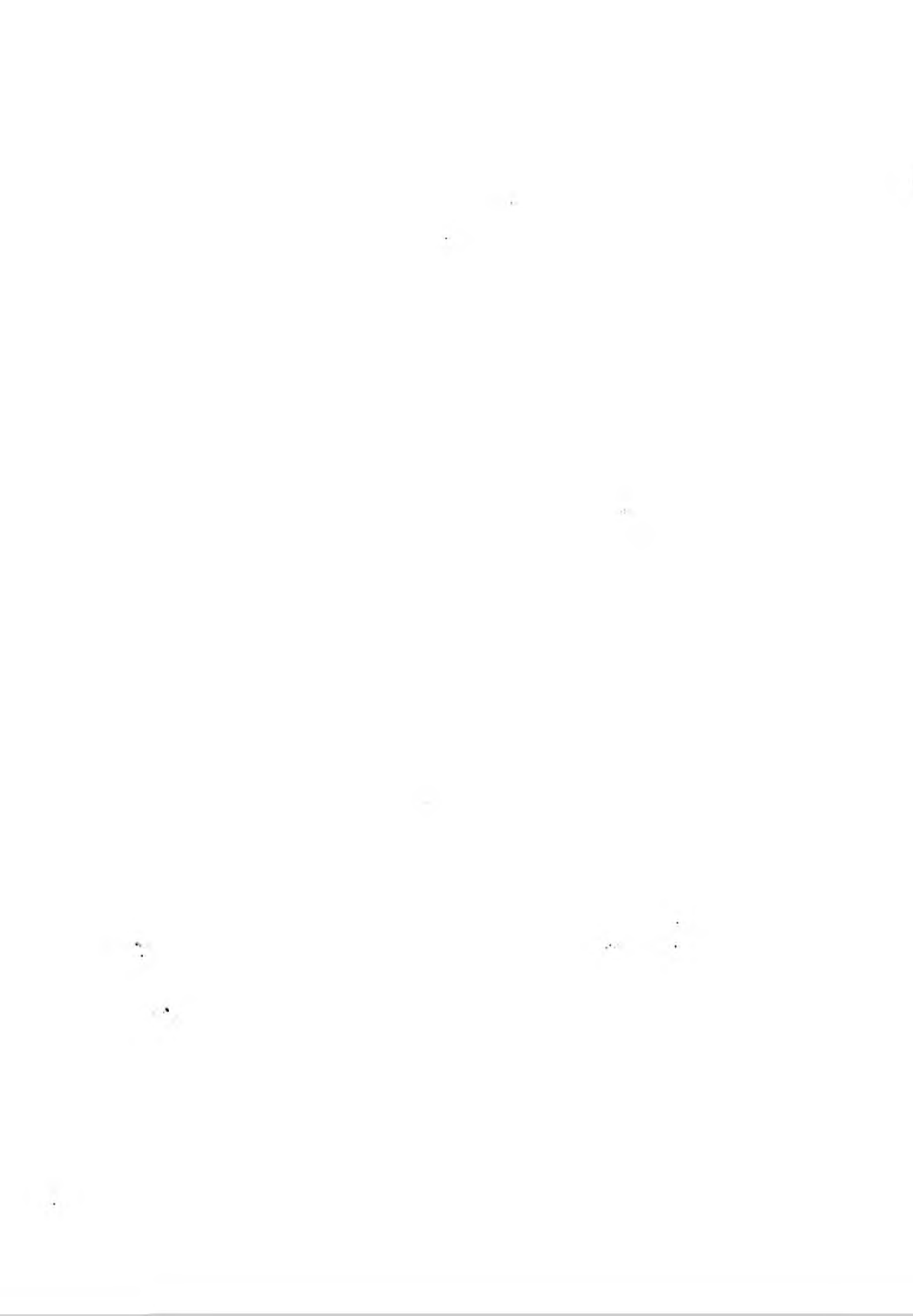
Legal empowerment, the bolstering of human agency through the law at the level of communities and people, will serve Sri Lanka in good stead in traversing the crossroads. At the very least, it gives the marginalized and underrepresented a voice in the legal system. This voice allows the victims to express their grievances in ways other than waging another war. It also paves the way for a stronger front for advocating equal treatment and equal protection under the laws. Thus, legal empowerment identifies the deficiencies associated with inadequate legal representation in the context of post-conflict injustice. This progression in the understanding of legal empowerment has enabled it to be viewed in a holistic framework.

The interplay between societal and personal, justice and reconciliation, and peace and development, is nowhere more pronounced than in situations like Sri Lanka. Post-conflict periods in fledgling democracies require intervention that takes a holistic approach. Law and legal empowerment must itself be holistic. To take each aspect individually or piece-by-piece will not achieve the desired end of post-conflict reconstruction. One cannot dream of never repeating the vicious and vacuous history of atrocities¹⁷¹ if one cannot discern the interconnection of the past to the present and the future.

Holistic legal empowerment in Sri Lanka is an ongoing and continuous process. The use of law for the dual roles of normalization and entrenchment of best practices will continue. As these efforts look at the history of brutality and violence and engages with the present endeavor of dealing with them, legal empowerment must also look forward to a point where the past will not and never be re-lived. Obviously, this is destined to be a long journey. Of course, the light that lingers from the shadows of a dark history will illuminate the road to be traveled. Yet hopefully, far greater freedoms would come from the destruction of the bondage and fetters.

Ultimately, the challenge is the reformulation of political and social structures that will move the country beyond a post-conflict society towards a just and peaceful one. This means a re-engineered political structure of autonomy or even federalism to accommodate genuine ethnic differences. Social structures will also have to change – culture must learn to be more multi-ethnic and not ethno-centric. This message is intended for both the majority and the minorities in Sri Lanka, admittedly great as their traditions have always been. An ethnic superiority complex has no place in a modern world. Sri Lanka and the rest of the world deserve no less.

¹⁷¹ M. Lenzen, *supra*.



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