9 Rural women and their access to the law

Gendering the promise of post-war justice

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Introduction

At the heart of Sri Lanka's nearly three-decade-long civil war (1983–2009) between the Sri Lankan state's armed forces and the Liberation Tigers of Tamil Eelam (LTTE) over the formation of a separate state of Tamil Eelam, were women with a variety of experiences of the war. Some were combatants, administrative and nursing officers in the LTTE's "Birds of Freedom" women's military wing or the Sri Lanka army's Women's Corps. Others were part of the LTTE's elite "Black Tiger" suicide squad. Numerically more significant, however, are the women of Tamil, Muslim and Sinhala ethnicity who survived, bearing the brunt of the war and its aftermath, as war widows, of whom there are an estimated 89,000 (Witting et al. 2016). In the former war zones of the north and east, many Tamil and Muslim women are also heads of households where livelihoods have been destroyed by the war (International Crisis Group 2017). They are also victim-survivors of conflict-related domestic and sexual violence, mothers, wives or sisters of family members who were forcibly disappeared, and caregivers to those disabled in the war if not disabled themselves. Women living in these areas as well as in the contiguous border villages also face multiple internal displacements – an estimated 80% of the displaced population were women (Satkunanathan 2018). The pervasive militarization of these areas has also meant restricted mobility and insecurity for women (de Mel 2017; Satkunanathan 2018). As a result of these experiences, women are also at the forefront of calls for transitional justice and accountability for war crimes, particularly in the north and east, through membership of associations such as Families of the Disappeared, Women's Action Network, Maatram, Affected Women's Forum, Suriya Women's Development Centre and the Trincomalee Women's Network, to name but a few.

Sri Lanka's justice system has, by and large, failed these women. It is plagued with issues that deter them from accessing it freely. Distance to courts of law, poor public transportation particularly in rural areas, low levels of legal literacy and high legal costs obstruct access to justice in general for both men and women (Jayasundere and Valters 2014). Women face additional barriers, such as less access to information, greater restrictions to

mobility and cultural attitudes that deter them from the judicial process (Jayasundere and Valters 2014). Inadequate gender mainstreaming within the law has resulted, moreover, in judicial bias against women (evident in the misogynist stereotypes contained in legislative enactments)¹ and the consideration of women as unreliable witnesses in evidence procedures (Abeywardena 2016, pp. 37–44; Fonseka and Schulz 2018; de Mel and Samararatne 2017; Medawatte 2020; Centre for Equality and Justice 2018). These prejudices impact adversely on principles of equality and equity supposedly at the heart of the law. As such, they also have implications for the execution of transitional justice in Sri Lanka.

In relation to war-related harm, there have been only a few prosecutions to date, whether for conflict-related sexual violence, such as the Krishanthi Kumaraswamy and Vishvamadhu cases,² or for enforced disappearances.³ These cases navigate/d a highly politicized context in which political interference, from the gathering of evidence at police stations onwards, is commonplace and a culture of impunity is entrenched (Pinto-Jayawardena and Guthrie 2016; Pinto-Jayawardena and Anantharajah 2016). Successful prosecutions, such as in the Krishanthi Kumaraswamy case, were reliant on political will at the highest levels of the executive and the military.⁴ In such contexts but also more generally, in order to establish their autonomy, courts of law establish maze-like procedures. These procedural intricacies favour those who can afford good legal counsel, while those without such resources are often stumped, constituting “a source of new imbalances” (Galanter 2002). All of the above in the Sri Lankan context has resulted, particularly for poor, rural war-affected women, in a deterioration of trust in formal institutions of justice. In this environment, their reliance on other frameworks of justice play an important role when seeking redress for harms.

Understandings of justice in a border village

The data for this chapter is drawn from a rural border village in the former war zone of the North Central Province of Sri Lanka. The term “border village” denotes a village situated at the outskirts of a conflict zone, which makes its residents and property vulnerable to direct attacks or indirect harm resulting from the military incursions of the parties to the conflict.⁵ Its income is derived from agriculture and the Civil Defence Force (CDF) to which many of its men belong.⁶

The village suffered a horrific bombing attack during the war in which many people, including children, died. As a small, endogamous village, everyone lost a relative. A young woman’s impression on seeing the bodies laid out in the village school hall was apt:

It was like seeing people we know at some kind of function ... that was how the bodies were also kept. That is to say, every face we saw, we knew, recognized ... that day was an event that I will never forget.⁷

Apart from the bombing, following the abduction of two villagers by an enemy group in the 1990s, about 100 families from this village had also spent two long spells in refugee camps, one of which lasted nearly six years.⁸ On returning to the village when it was safer, the villagers spent nights in make-shift shelters in the forest to avoid enemy detection.⁹ They also spoke of intergenerational harm and of disrupted education.¹⁰ We were also told that many youngsters in the village were addicted to drugs, due to a sense of stagnation and hopelessness.¹¹ More than a decade after the bombing, its narration continued to evoke powerful memories of loss.

The villagers' narratives force a re-examination of a common assumption that in such contexts anger and resentment against perpetrators of violence is the default norm – a conjecture also informed by an adversarial legal system. What we actually found were dissenting memories, and a departure from the victor's perspective, indicative, perhaps, of the rural peripherality of their lives – even though all the women were Sinhala Buddhists and, as such, beneficiaries of the Sri Lankan state's emphasis of and support for Sinhala Buddhism (see Chapter 4 in this volume). For them, the war was ambient but not the only orientation point or route to the present. Many villagers articulated a deeper sense of injustice at how the state had failed to provide them with title deeds to the lands they had been forced to abandon during the war, or at the re-demarcation of forest land undertaken by the Forest Department which threatened their areas of cultivations. As noted by a woman at a focus group discussion (FGD):

When speaking about the war, it has been ... this is 2019, right? Yes, it's been ten years since the end of the war. These ten years have been enough time for the government to restore the people who were affected back to their normal life. That has not happened in our village.¹²

Clearly, no development drives have targeted the village. Its only educational institution is a primary school. The prosperity in the south of the country, where a majority of Sinhalese live, is missing – evident of how “large parts of the rural hinterland, further away from Colombo, had little to show for it, [with] many areas ... only marginally better off than the war-torn districts of the north and east that they border” (Venugopal 2018). In this context of precarity, the villagers insisted on being *in the moment*, and not only in the past. They subtly resist a politics of the “duty to remember” the war. In the interviews the women came across as having a pragmatic, open-ended relationship with history, refusing to ransack the past for political or ethno-nationalist gain (Eng and Kazanjian 2003; Judt in Rieff 2016, p. 80). They did not speak ill of Tamils and some noted their traditional interactions, as a border village, with this community although these connections have now been lost.¹³ They did not abandon the idea of criminal justice for the war-time harms they experienced. But they had a pragmatic approach to justice, which emerged from their recognition that the legal system was stacked

against them. From a Buddhist perspective they also noted that hatred (*vairaya*), which one risks when remembering injustice, is harmful. When asked for their responses to post-war justice claims, a woman declared “*apo – apita vairaya epa*” (Oh no! We don’t want hatred), which also pointed to how she understood our question on justice as being, first and foremost, about a retributive system of criminal justice.

That respondent was Leelawathi (pseudonym). To date, she is the only person from the village to be summoned to a court of law regarding a crime committed during the war – in this case the abduction and murder of her husband. Leelawathi’s narrative is instructive for understanding how the weight of the law, which promises to act “in the best interests” of everyone involved (Motha 2018), bears down on rural women. In the face of Leelawathi’s alienation from the law, her story also marks the transformative potential of local cultural and religious beliefs. She draws on these beliefs to remember the past in more agentive ways and to open a pathway to an ultimate justice over which she has more control. Her decisions regarding post-war justice illuminate the fault lines that will occur if transitional justice maps itself onto existing legal procedures of criminal accountability. They also invite us to reappraise the relationship between the law and the sentiment dubbed “belief in a just world”.

The law’s authority and belief in a just world (BJW)

Citing a wide body of literature, Rachel Fasel and Dario Spini (2014) note that “belief in a just world” enables people to confront their physical and social environments as though they were stable and orderly, commit to long-term personal goals and derive life satisfaction. Even when victimization is systematic as in prolonged wars, this belief can enable greater resilience and coping (p. 195). In a context such as post-war Sri Lanka, if belief in a just world is crucial for resilience and recovery from war, what does access to the law for war crimes mean for rural women who may hold different understandings of justice? Belief in a just world is neither a simple nor a homogenous category of beliefs. Sutton and Winnard (2007), citing the work of Lipkus et al. (1996), emphasize a distinction between belief in a just world in relation to self (the understanding that the world is fair to oneself), which leads to motivation and confidence in the achievement of life goals, and belief in a just world in relation to others (the understanding that the world is fair to others). The latter can lead to prejudice and even a desire for revenge against others, but also to mitigation of threats to oneself. Upholding a belief in a just world typically requires, therefore, constant effort. Victims do so by either denying or minimizing their hurts, by understanding harm as inevitable or amendable, or by seeing themselves (in a self-accusatory move) as the cause of the harm (Frankenberg 2014; Kaplan 2012).

Each of these positions is evident in Leelawathi’s narrative. What were her expectations towards the law *as* justice, and towards the legal process for

vindicating her rights as a war victim-survivor and adjudicating culpability for the abduction and murder of her husband? Summoned to a High Court for a hearing on the case, she did not comply. Her response to the law was shaped by the generally felt disillusionment with law enforcement authorities. The women spoke, for instance, about police prejudice against them not necessarily because of their gender but because they were “uneducated and poor”. They also noted that they would only approach the court, if at all, as a collective group and not as individuals. For them, Heaven would be a place where they were treated with dignity and respect by authority figures.¹⁴ Leelawathi spoke, additionally, of being watched by the “enemy” and the fear of being harmed while at court, rendering her children bereft again. She thereby flagged witness protection as a crucial condition for accessing formal justice.

Eventually Leelawathi did go to court, but not before the law’s authority bore down on her in the form of a police threat of a warrant against her, perhaps for contempt of court.¹⁵ Apart from this intimidating and enforced start, her entire experience at the High Court was one of bewilderment. She related how she encountered “a well-dressed Tamil man with a flower in his ear” and three or four other Tamil men at the court gates who frightened her, prompting her to hide. This court is in the vicinity of a Hindu *kovil* (temple) from which it is not uncommon for men (particularly in the north and east) to come out after a *puja* (ceremonial worship) wearing a flower in their ear.¹⁶ For Leelawathi, a resident of a traditional Sinhala Buddhist village, this encounter with a strange man, queered by his flower, was a site of incomprehensible cultural difference. As in Kafka’s short story “Before the law” (whereby, like the supplicant at the gate in the story, Leelawathi is also a petitioner from the countryside) these men at the gate of the law appear to her as an intimidating hindrance to justice. Inside the court it is no better. Only her name, that of her husband and the date on which he disappeared are asked and confirmed in Sinhala. For the rest, the charges are read out in Tamil, a language she does not understand. No translation is offered or provided by the court.¹⁷ The court’s failure to abide by its constitutional mandate of upholding the language rights of all citizens (Article 18 of the 1978 Constitution) positions her as an abject subject before the law.

The women’s statement that they would not go to court alone was borne out by Soma (pseudonym) who accompanied Leelawathi to court. Soma’s attitude to justice was markedly different to that of Leelawathi: she spoke a language of rights and resistance and stated that the villagers had no option but to protest, as the authorities and the media had failed to satisfy their demands for justice. Soma also offered an alternative interpretation to Leelawathi’s conduct in court. She recalled:

In the witness box she [Leelawathi] said “I forgive. I do not ask for compensation. It can’t be calculated”. The judge didn’t speak but he appeared to nod and approve of her statement. I was wondering whether the judge doesn’t understand Sinhala. Did he not want to appreciate her

when she smiled and forgave? I also wondered whether he was uppish because of his position.

Even though Soma intuited that the judge approved of Leelawathi's stance, his failure to verbalize his approval had left her confused. Leelawathi, on the other hand, was clear that she did not forgive the accused, although she did voice empathy for him. She stated:

I don't have hatred towards them. I will never litigate either. I will not do anything unfair by them. This must be a sin I committed in a past life. If not, if he committed it in this life, he must take responsibility for it, for like your shadow that comes behind you, you must take responsibility for your actions. I am removing this from the root itself. I will never hate this person.

Locating her own victimhood within the laws of karma, Leelawathi decided to walk away from court and avoid further involvement in the case. While information on how her case concluded is unknown, what is important to note here is that, in her rebuff of the court, she declines to be drawn back to the law on *its* terms. Instead, she turns to an alternative system of understanding within Buddhism without the antagonism of accusation and retribution that the law requires. Importantly, turning her back on the law was neither about forgiveness (misread as such by Soma) nor the forgetting demanded by political elites in favour of "moving on". Rather, it signified a belief in an ultimate justice – like a shadow that eventually catches up with a culprit – that keeps to a different temporality than the law, because it need not coincide with one's particular lifetime. This belief in ultimate justice was recognized by Fasel and Spini (2014) as an important coping mechanism where war related victimization was systematic. Citing Maes (1998), they noted:

When victimisation becomes a nearly ubiquitous phenomenon, as in Kosovo, people may come to believe in *ultimate justice*: even if a situation is unjust at present, justice will be re-established sooner or later (sometimes only after a person's lifetime). Belief in ultimate justice is associated with positive impressions of the victim, whereas *belief in immanent justice* (the tendency to perceive justice in the events that have already occurred) is more associated with devaluation of the victim and ascription of responsibility.

(Fasel and Spini (2014, p. 195, emphasis in the original)

Leelawathi's belief in an ultimate justice encourages her to be *patient* from a place that is, for her, culturally secure, true and therefore agentic. From such a place she refuses the law's certainties. She told us of the alleged perpetrator:

He was standing in the witness box. He was young, not old at all. He was quite thin. Tall, like my son, and thin. He was wearing a checked shirt and long black pants. He had become very, very thin. He looked at my face twice or thrice as well. When the judge was reading that book, he looked at me and frowned twice or thrice. The ... court room is not big – you can see the judge very clearly ... He looked at me, and at that moment, I thought to myself that if it is some sin I have committed, then it is over in this lifetime, or if you have done something, then you have to take responsibility for it.

Leelawathi's insistence here on the provisional – "*if* it is some sin I have committed" or "*if* you have done something, then you have to take responsibility for it" marks the fact that she refuses to act "*as if*" – that locution which, as Stewart Motha (2018) notes, is at the heart of the law's grammar because the law presents itself *as if* it is grounded on Kantian reason (p. 9) and therefore as solid fact (p. 88). In other words, Leelawathi refuses to go along with the prosecution's premise that *for the time being*, for the purpose of the court, this tall, thin young man who looks like her son is to be charged *as if* he were the murderer. She told us, "I did not see what happened with my own eyes, so how do I know?" Preferring to act on uncertainty rather than on the constative "as if", she refuses the law's sleight of hand.

Conclusion

According to Felstiner et al. (1980–1), there are three stages associated with accessing the law as justice: (1) recognizing an incident as injurious; (2) attributing the injury to someone outside of oneself; and (3) requesting a remedy for the harm (cited in Young 2009). While all three steps are informed by social and cultural norms and are dependent on *recognition* as well as BJW, the third step is particularly reliant on external sources such as impartial courts. Where, due to a multiplicity of reasons, this third stage fails to fulfil its promise, the effect of this failure on the victim-survivor, his/her immediate family and social circle is adverse. This is viscerally heightened in situations of armed conflict where, for women, the everyday challenges of gender insecurity and discrimination are exacerbated by trauma, displacement, poverty, peripherality, fragmentation of family and community, as well as risks in witnessing.

In courts of law, the broken promise of justice means impunity and lack of accountability for various crimes: a condition which, in Sri Lanka, both predates and postdates the war (Pinto-Jayawardena and Anantharajah 2016; Fonseka and Schultz 2018; Woodworth and Fonseka 2016; Dancy and Wiebelhaus-Brahm 2019). When the law fails victims-survivors, they resort or return to BJW to mitigate what is injurious in their physical and social environments. As the women's narratives reflect, however, there is no single approach to the law and/or justice. While for many of them law enforcement

has shown its limits by failing to protect their dignity, Soma, for instance, kept her faith in the legal arena as an important site of “protest for justice for what they lost”. Her approach is resonant with the demands of many Tamil women in the north and east for accountability through the courts (inclusive of international judges) for enforced disappearances (Amnesty International 2017; de Mel and Kodikara 2018). Leelawathi’s rejection of the law, on the other hand, challenged the idea of *requesting* a remedy through the courts altogether, and moved it towards a place of internal transformation within her control. Where the court was a theatre of bewilderment and fear, her route took an alternative inward journey, to a place Ratna Kapur (2018) would characterize as holding other “vocabularies of freedom” which challenge the “fishbowl” of liberal human rights.

Critiques of liberal human rights are all the more important as these rights are central to transitional justice doctrine (Posner and Vermeule, cited in Webber 2012). Kapur does not dismiss the necessity of rights. Her argument, rather, is that

The notion that divergent understandings of freedom have always existed outside of the liberal and neoliberal imaginaries and related market terms is either barely considered by those who shape, support and implement the rights regime, or considered inherently alien and therefore irrelevant to the recursive ideological currents within the fishbowl.

(Kapur, 2018, p. 1).

This is why, even when transitional justice has accommodated local methodologies of justice as in the *gacaca* courts of Rwanda or the Special Court in Sierra Leone, the results have been mixed. Coerced participation and the footprint of stern post-conflict states with their own versions of reconciliation apart, these experiments have also been marred by a tension in the imposition of international frameworks which sit uneasily with local practices and expectations (Thomson and Nagy 2010, pp. 14–15, 20; Kelsall 2009; Friedman 2017, p. 384).

While we were interviewing her, Leelawathi left apologetically, stating that she had been called for a *kiri dane* (an almsgiving where women “of good character” play a dominant role) organized by a family in the village. They were unable to start without her. Where she had been unable to be agentive before the law, in the village she had forged for herself a role of belonging and leadership through her spirituality. Nowhere in her narrative did she refuse the necessity for justice or ask that the perpetrator be pardoned. It is just that her sense of justice transcended retribution, particularly in a context of doubt, given that the abductions took place in the forest, and the killings elsewhere, without village witnesses. She also noted that the accused produced at court may have been too young to commit the crime. Uncomfortable not only with court procedures but also with the prosecution’s assumptions, she turned her back on the law because it was at odds with the kind of justice and closure she required.

What are the implications of Leelawathi's trajectory for understanding the challenges of criminal accountability in the context of war? This is an important question for transitional justice in Sri Lanka. While her retreat from the law is an individual choice, other war-affected women continue to look to the courts for justice. A transformative justice would necessarily ensure full and equitable access for all women to the law in the first place. But beyond this, it would also have to accept that criminal justice as currently provided by the law is limited in both its substantive and procedural aspects. A transformative approach would, then, carefully but necessarily endorse a system that accepts a *range* of justice procedures and outcomes. To be fair, transitional justice does attempt this in its four pillars of criminal accountability, reparation, truth-telling and institutional reform, designed to enable different registers and arrangements of justice. Paul Gready (2011, p. 5) argues, moreover, of its "shift in ethos from substitution (choosing one mechanism over another ...) to complementarity". Yet a hierarchy which values the accountability pillar over the others still persists (International Center for Transitional Justice n.d.),¹⁸ especially where, as in Sri Lanka, accountability has been overlooked. Where even in these limited circumstances, formal legal justice remains the primary site of adjudicating criminal accountability, Leelawathi's discomfort with its dualism and authoritative-ness calls for amending the law in a manner that frees, without prejudice or dismissal, the witness who is not a suspect from conforming to the pressures of adversariality and retribution. This does not mean giving up on the goal of accountability. Rather, it requires states to redouble their efforts at finding other sources of evidence, thereby disbursing evidentiary responsibility beyond the witness. This is especially important for preventing the state from adopting the easier route of dropping a case altogether for lack of witnesses, particularly when the accused is a favoured party. Revising legislation and evidence procedures in this manner goes beyond fixing gaps in implementation to re-evaluate assumptions at the heart of the law itself. It also means instantiating an ecology of justice in which the diverse experiences and choices of war-affected women in particular, with their different understandings of justice, find acceptance.

Notes

- 1 See for instance, Section 8 – Matrimonial Rights and Inheritance (Jaffna) Ordinance No. 1 of 1911 as amended; Section 3 Vagrants Ordinance No. 4 of 1881 as amended; Section 40 of Buddhist Temporalities Ordinance No 19 of 1931 as amended; and Sections 27 and 28 of Marriage and Divorce (Muslim) Act No. 13 of 1951 as amended.
- 2 The gang rape and murder of Krishanthi Kumaraswamy, a schoolgirl, and the murder of her mother and brother, and another villager who was among the search party occurred in 1996. The accused were military officers and one Reserve Constable manning the Chemmuni Checkpoint at which Krishanthi had been detained while returning home after sitting the Advanced Level Examination. The

accused were produced before a three-member High Court Bench in 1997. The three judges issued three separate judgments which were later challenged at the Supreme Court as being evidence of lack of concurrence and so were used by the accused-appellants for a *trial de novo*. However, the Supreme Court (S.C Appeal No. 2/2002) determined the Trial at Bar decision valid as all the judges had arrived at the same decision, albeit through diverse reasoning processes. The Vishvamadhu case is for the gang rape in 2010 (after the war ended) of a 27-year-old woman known in the legal record as 'Vishvamadhu' (the locus of the crime) and the sexual abuse of another woman. At the Trial at Bar (case number HC1569/2012 in Jaffna High Court) four Sri Lanka army personnel of the 572nd Brigade were found guilty and sentenced to rigorous imprisonment for up to 30 years. At an appeal on the basis that there were flaws in the identification of the accused-appellants, the Court of Appeal set aside the initial conviction and discharged the men on 10 October 2019. This acquittal has been challenged by Vishvamadhu and her case is ongoing.

- 3 One such bench at the Permanent Trial at Bar of the Colombo High Court was appointed in February 2020 to hear the abduction and disappearance of Prageeth Ekneligoda allegedly by Sri Lanka army men in 2010. Ekneligoda was a journalist. The other is on 11 young men allegedly abducted and disappeared by naval personnel in and around Colombo in 2008. Fourteen navy officers have been implicated in the crime with ransom as an alleged motive. However, both cases remain unresolved and open pending more evidence. Decades after the crimes were committed no perpetrators have yet been brought to justice.
- 4 Interview with Prashanthi Mahindraratne, prosecutor of the Krishanthi Kumaraswamy case. Colombo, November 2020.
- 5 Data is drawn from the Pluralistic Memories Project (PMP) 2015; Women, Trauma and Peacebuilding (WTP) project, 2018, and the GCRF Gender Justice and Security Hub project FGDs, 2019. Informed consent was obtained from all participants.
- 6 The Civil Defence Force is akin to the Home Guards and is paramilitary by nature. It was established by the Sri Lanka government under the Mobilization and Supplementary Forces Act No. 40 of 1985. It functions under the Ministry of Defence, and during the war members of the CDF were tasked with the protection of border villages. CDF men are drawn primarily from such villages and alternate between agricultural activity and defence.
- 7 PMP interview 16, 2015.
- 8 PMP interview 18, 2015; WTP respondent 1, KPI 1 2018.
- 9 WTP KPI 1 2018; PMP interview 17, 2015.
- 10 WTP KPI 1, 2018; PMP interview 17, 2015.
- 11 WTP respondent 1, KPI1, 2018.
- 12 GCRF interview participant, August 2019.
- 13 The village has had a long history of interaction with Tamils who have either passed through it on their way to the east, taken cattle and carts through the forest skirting the village, or bought cow dung from the villagers. PMP interviews 17 and 18, 2015.
- 14 GCRF FGD, August 2019.
- 15 The threat of a "warrant" is conveyed to Leelawathi by the local police force. Leelawathi, interview, August 2019.
- 16 Interview with a human rights lawyer who practises in the north and east, August 2019.
- 17 This is a common experience for Tamil speakers who encounter, on a daily basis, the dominance of the Sinhala language, including in courts of law.
- 18 In an introduction to transitional justice, the ICTJ states, for instance, that "[t]ransitional justice is rooted in accountability and redress for victims. It recognizes

their dignity as citizens and as human beings. Ignoring massive abuses is an easy way out but it destroys the values on which any decent society can be built”.

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