

Rooted in Sri Lanka's Own Soil: Finding Our Very Own Path to Transitional Justice

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Abstract — *This paper will look at the notion of Transitional Justice. It will attempt to find out if Transitional Justice can be classified as a Human Right. It will explore ways and means of how Transitional Justice could be realized in Post War Sri Lanka.*

It will consider the suitability of the Four Pillars namely Criminal Justice, Truth Seeking, Reparation and Institutional Reform.

Also, the application of the Joinet Principles namely restitution, compensation, rehabilitation, satisfaction and guarantee of non-repetition will be explored with regard to Sri Lanka.

The experience of other countries is to be studied and shared through the medium of the research. Examples of South Africa, Nepal, Columbia, Peru, Germany, Rwanda, Sierra Leone and other Jurisdictions will be looked at. Namely, Truth-telling Commissions, Criminal Justice in the form of Prosecutions, Victims' Rights and Reparation.

The current trends in Transitional Justice will be explored.

The role of Civil Society in promoting Transitional Justice will be discussed. Afghanistan and Congo will be taken as case studies.

The paper will also probe into whether true democratization could be achieved without trials. In this regard the methods employed in Uruguay and Argentina will be studied and discussed.

Finally, the road to Sustainable Peace will be mapped out with the promotion of democratic ideals: Truth, Dignity and Justice.

Keywords: Sustainable Peace, Justice, Dignity

I. INTRODUCTION

Sri Lanka is in a period of Transition. The focus of this paper is Transitional Justice, Sustainable Peace, Truth and Dignity. The International Centre for Transitional Justice (2014) defines the concept in the following manner: "Transitional Justice is a response to systematic and widespread violations of human rights. It seeks recognition for victims and promotion of possibilities for peace, reconciliation and democracy. Transitional Justice is not a special form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuses. In some cases, the transformation happens suddenly; in others, they may take place over many decades."

Different definitions are being given to the concept known as Transitional Justice. To the people of Sri Lanka who are trying to rebuild their lives after three decades of death and destruction as a result of terrorism the approach should be weighted more towards restorative justice in order to pave the way towards Sustainable Peace.

II. GUARANTEEING THE RIGHT TO PEACE AND THE RIGHT TO DEVELOPMENT TO WAR-AFFECTED COMMUNITIES

Is Transitional Justice a human right? Peace, Development and Human Rights are parts of a triangle. One cannot exist without the other. The triangle would collapse if one concept is taken away. The right to peace is guaranteed to people of Asia by the Asian Human Rights Charter of 1998 in the following words: 'All persons have the right to live in Peace so that they can fully develop all their capacities, physical, intellectual, moral and spiritual, without being the target of any kind of violence.' In a presentation titled Human Rights and Peace – a Third World Perspective a Sri Lankan Constitutional Jurist stated: "So far as Third World

Countries are concerned they not only accept the indivisibility of human rights, their universality and inseparable association with peace and security but also consider that these concepts are steeped in their own cultural and religious traditions. Thus the Asian doctrine of Dharma –meaning sense of fairness, right or duty-may be considered to be inseparable from that of “Ahimsa” or “peace and non-violence” not only physical, but also economic, social and cultural of a lasting and constructive peace based on respect for human rights would be greatly facilitated through a strategy of integrated and endogenous development, popular participation in development, the satisfaction of human needs and the increase in the quality of life of the people. As the International Instruments on Human Rights have pointed out, the main goals to be attained in this connection include: the effective implementation of the right to work for a just remuneration under equitable and favorable conditions, the right to an adequate standard of living including food, clothing and housing, the elimination of poverty, hunger and malnutrition, the right to education directed to the full development of the human personality, the elimination of all forms of discrimination and exploitation and the right of all members of society to participation in the development process.

How do we make Right to Peace and Right to Development in war-affected communities a reality? Civil Society plays a vital role in the provision of Restorative Justice. They should be empowered so that they could intervene with the expression of ideas at rural level and policy level. Also Community Workers could assist in bringing about changes in policy that facilitate participatory administration in the former conflict zones. Networking is vital to effect discussion and debate on important issues affecting the communities. The existing Governmental, Provincial, District and rural organizations should be empowered and strengthened so that through advocacy, lobbying, research and communication of ideas peaceful coexistence and the right to development is realized.

III. APPLYING THE JOINET PRINCIPLES

It is interesting to focus on the Joinet Principles formulated by the United Nations in 1996. Mr.

Joinet in his capacity as Rapporteur prepared a working paper on the Administrative Justice and Human Rights and the question of impunity of perpetrators of Human Rights in 1996. It is pertinent to determine if the Joinet Principles would be effective in Sri Lanka.

The Joinet Principles encompass restitution, compensation, rehabilitation, satisfaction and guarantee of non-repetition. Financial Compensation has been given to selected rehabilitees. A comprehensive rehabilitation programme has been carried out under the supervision of the Ministry of Rehabilitation. An Office of the Commissioner General of Rehabilitation was set up. In the aftermath of the war having considered the level of involvement of each and every cadre and the duration of their involvement and the specialized training they received; they were categorized and dealt with accordingly. The cadre who were involved in serious incidents and who had advanced training were investigated and prosecuted. The cadres who had minimal training and minimal involvement and who were with the LTTE for limited duration were recommended for release. Certain others were recommended for Rehabilitation. Cadres who were forcibly recruited and give compulsory training and were compelled to fight an attack. Those who had escaped and run away from the LTTE were rearrested by the LTTE who were punished and compelled to serve the organization; were dealt with leniently. Those cadres who had average involvement and were part of the LTTE fighting force were also recommended for long term rehabilitation and were reintegrated into society. The cadres who were involved in high level intelligence gathering and surveillance were investigated and prosecuted. As a measure to prevent the eruption of Terrorism and Violence the Government issued a special gazette banning sixteen organizations suspected of aiding and abetting terrorist organizations with immediate effect, to stop them from operating in Sri Lanka and the rest of the world.

As an activist who has worked with grassroots people and Community Leaders it was observed that it was Restorative Justice that is relevant to Sri Lanka. The words of the Former Nobel Peace Prize Winner, Desmond Tutu is relevant here. Desmond Tutu pointed out: “There are different kinds of justice. Retributive Justice is largely

Western. The African understanding is far more restorative-not so much to punish as to redress or restore a balance that had been knocked askew.”

III. STRUCTURAL CHANGES TO SYSTEM OF CRIMINAL JUSTICE IN SRI LANKA

Furthermore, it is known that Transitional Justice is made up of four pillars. Sri Lanka in her own style has satisfied the requirements of all four pillars. Criminal Justice, Truth Seeking, Reparation and Institutional Reforms .The Criminal Justice System has been prevalent since British times. The Attorney General’s Department has undergone reform to ensure the smooth functioning of the mechanism even in the peripheral areas. Structural changes have taken place in the Attorney General’s Department in keeping with the Provincial structure. Nine Additional Solicitors General have been put in charge for the nine Provinces to coordinate with the Law Enforcement authorities of the Provincial Administration in the maintenance of Law and Order in the respective provinces and prosecute in serious crimes. The Additional Solicitors General so appointed were put in charge of the overall Province to oversee and supervise the work of Counsel who appear for the State in both Civil and Criminal matters. The Additional Solicitor General would be answerable to the Attorney General for all functions of State Counsel working in the Province and would exercise overall supervision of Civil and Criminal cases where the State is a party.

The Additional Solicitors General would also act in an advisory capacity to all Government Departments functioning in the Province and also the Provincial Administration and tender legal advice on any matter within the Province. This would facilitate better coordination and Access to Justice.

The Additional Solicitors General along with his team of Legal Personnel from the Department will also be involved in the training of Law Enforcement Officials, the Police and other Government Department and Institutions. Also, the Police Department has been brought under a new Ministry in order to improve its efficiency. The new Ministry charged with Law and Order has been established in Sri Lanka. The Ministry will formulate policies and programmes to ensure law and order. Among the new Ministry’s remit is the

implementation of the Police Act and other relevant laws. Maintaining law and order, traffic control, providing effective services to the public and minimizing corruption are the subjects that come under this Ministry. A research is being carried out by University Academics focusing on the efficacy of Law Enforcement Agencies in the Northern Province; especially with regard to the functioning of the Women’s desks in the Police Stations.

Chief Minister Wigneswaran (2014) in a speech made at a Conference on Post War Development made allegations with regard to an increased incidence Gender Based Violence in the war-affected areas.. It is submitted that these allegations are unfounded in the absence of reliable data to support such accusations. Since the enactment of the Second Republican Constitution there has been an effective mechanism to address issues pertaining to women’s rights in the form of a justiciable Fundamental Rights Chapter in the Constitution of Sri Lanka. It is noted that these allegations are not sustainable in light of the fact that hardly any women in this country have invoked the jurisdiction of the Supreme Court in its Human Rights jurisdiction to complain of any discrimination based on gender or Gender Based Violence in the work place or otherwise.

Furthermore, an amendment to the Penal Code by Act No. 22 of 1995 has brought in new offences pertaining to Gender Based Violence and enhanced punishment in respect of all offences involving violence against women and children. Therefore we see a very gender friendly, new legal framework in place in terms of prosecuting and punishing perpetrators of Gender Based Violence in Sri Lanka.

Additionally, since 1981 there has been a separate Ministry on Women’s Affairs functioning in Sri Lanka headed by a Cabinet Minister and a Deputy Minister which has a network of Gender-Friendly graduates working as Women Development Officers attached to the different Pradeshiya Sabhas. They could be approached by any victim of Gender-Based Violence.

The Police Stations in the country have trained Officers at their Women’s Desks and the Sri Lanka

Police has a Women's Bureau which deals with individual complaints.

In addition, there is a Gender Complaints Unit at the National Committee on Women at Battaramulla where any victim can get services of a counsellor if faced with a violation and offering free legal advice.

Further, the Human Rights Commission which has ten branches also entertains Gender Complaints. Recently A hotline (number 1938) was established so that complaints can be received and channelled to the appropriate forum. In addition, Sri Lanka has a vibrant Civil Society such Community-Based Organizations, NGOs and the island-wide network of Women's Organization SLWNGO who could file Public Interest Litigation cases and facilitate relief to violence-stricken women as they have Fund-Raising Capacity and expertise.

The goals of Transitional Justice include addressing and attempting to heal divisions in society that arise as a result of human rights violations. Also, bringing closure and healing the wounds of individuals and society, particularly through truth telling, providing justice to victims and perpetrators. The creation of an accurate historical record for society, restoring the rule of law, reforming institutions to promote democratization of human rights, ensuring that human rights violations are not repeated and promoting co-existence and peace.

An ancient proverb articulates that a wise man or woman learns from the mistakes and experiences of others; a fool does not learn at all. Therefore, it is prudent to survey the Transitional Justice initiatives of other countries. Since South Africa has been considered as a model by many it is fitting to focus on the Post Apartheid scenario here.

IV. EXPERIENCES OF OTHER WAR-AFFECTED COUNTRIES

Shela Meintejees (2004) a Senior Lecturer in the Department of Political Studies in the University of Witwatersrand expresses her disappointment with this mechanism.

Writing about the South African Truth Commission Sheila Meintejes states that a major aspect of this

exercise took the form of creating a safe space for victims and perpetrators to disclose their experience in a truth and reconciliation process, that attempted to navigate a host of almost irreconcilable differences. However, the new democratic state was left to make a settlement with those who made the claims for reparations. A special Presidential Fund was set up in order to effect the settlement but its disbursement gave rise to considerable anger disillusionment on the part of those acknowledged as 'victims' of apartheid during the Truth and Reconciliation process. The new Democratic Government took an inordinate amount of time to process claims and the final amounts. The outcome was disillusionment with the State for its tardiness and inability to adhere to its own commitments. Survivors of the apartheid conflict have seen perpetrators receive state funding to defend their Amnesty cases, running into Millions of Rands. While they were forced to pay Counsel (Advocates). Civil Society Organisations have, since the Truth and Reconciliation Commission closed its doors, begun to organize survivors to pressure the Government, even when taking the State to Court with the assistance of donors. A new terrain of struggle has opened up around the issue of reparations that threatens to undo much of the work of the TRC.

"Rwandans to take ownership and responsibility for helping our compatriots stand on their own feet again." The Prosecution of Perpetrators in Rwanda was the topic of discussion in an Interview with Lonzen Rugira (2014), An African Scholar and Researcher. "As far as material compensation is concerned, survivors could file cases in formal courts against individual perpetrators and claim moral grief. That was possible between 1996-2000 prior to the establishment of the Gacaca Courts." In the aftermath of the Genocide, Hutus and Tutsies continued to live together and therefore the Rwandan Government had to make the reconciliation process the centerpiece of their policies. The International Community put in place the ICTR and the Rwandan Government made use of its own domestic judicial system and introduced at a later stage, the Gacaca Courts. The Gacaca Courts could be viewed as a Restorative Justice experiment. Therefore, the success of the mechanism depended on the realization of these core tenets of restorative justice. Gacaca has been praised for its restorative quality which is seen in

its effort to create social harmony and trust. The Gacaca shifted the emphasis away from the level of the State to the level of victims and community. The distinct lack of legal expertise within the Gacaca's structure has been the source of much criticism. Judicial Impartiality too was in question. Amnesty International and the Human Rights Watch were calling for the reform of the Gacaca system.

'This is not to suggest that the Community-based justice is inherently-flawed but the Communitarian practice of justice should not negate the importance of trust, fairness and impartiality within the deliverance of justice.

In Nepal (International Center for Transitional Justice, 2012) a Truth Commission was set up. However, when reading the reports of the said Commission it is apparent that this mechanism was not victim-centred. The Disappearance Commission and the Truth Commission were disjointed. Broad-based consultations of victims and Civil Society were not apparent. There should have been more emphasis on recognition of war-affected communities such as War Memorials.

A Victim's Law was passed in Columbia (Human Rights Watch, 2011). Most Victims did not fulfil requirements of formally reporting crimes against them because of logistical barriers and fear of Paramilitary retaliation.

In Peru the Truth Commission findings and recommendations have been opposed by Traditional political sectors and some local elites. The trials of people accused of grave crimes are proceeding at a slow pace, the needs of victims do not receive adequate attention and the demands of the families of thousands of disappeared people are met with inaction and indifference.

The Nuremberg War Crimes trial reflected the widespread sense among the anti-Nazi Allies in the Second World War that the terrible conflict against Germany, the most destructive war in history, should not end like other wars: it was not a calamity to be overcome, but an unprecedented crime to be punished (Marrus, 1997). A basic question confronting Transitional Governments of course is whether to undertake the prosecution of the leaders of the ousted regime or their henchmen for the abuses inflicted upon the

nation. Some will argue that trial and punishment of these people is not only essential to achieve some degree of justice, but a public airing and condemnation of their crimes is the best way to draw the line between old and new governments. Others claim they are simply show trials unbecoming of democracy, and that they are manifestations of the victor's justice. The best way to rebuild and reconcile the nation is to leave the past behind by means of a blanket amnesty.

"Transitional Justice has become a well-established fixture on the global terrain of human rights. It entails an insistence against unwilling governments that it is necessary to respond to egregious violence and atrocity. Yet there also worrisome tendencies of the international community to impose 'one-size-fits-all', technocratic and decentralised solutions which are steeped in Western Liberalism and often located outside the area where the conflict occurred. Transitional Justice may be alien and distant to those who actually have to live together after the atrocity. It is accused of producing subjects and truths that are blind to Gender and Social Injustice."

A Truth and Reconciliation Commission was set up in Sierra Leone in 2011. There was a great deal of skepticism among the local community. The critiqued it on the basis that it was 'culturally inappropriate.'

Rather than assuming that these failings are specific to Sierra Leone, it is important to question whether or not they suggest more general failings of transitional justice mechanisms in peace building processes.

As Graeme Young points out:

"It is clear that new forms of Transitional Justice are needed that cohere with local contexts, contingencies, ontologies, epistemologies, every day needs and desires, understandings and traditions of justice.

How can Truth, Dignity and Justice be achieved in Sri Lanka?

Following the conclusion of a thirty year conflict President Mahinda Rajapakse the Lesson Learned and Reconciliation Commission to support the drive towards national unity and reconciliation after decades of division. The Commission drew

from the experiences of Victims, Academics and Activists who were connected in different ways with the armed struggle. The LLRC was established in May 2010. The LLRC recommendations are being implemented now. There is great deal of work to be done. New Legislation has to be enacted. Changes in administrative structures have to be brought about. The Cabinet of Ministers approved the National Action Plan to implement the LLRC. There were ninety one recommendations originally. Subsequently, fifty three recommendations were added by the Cabinet of Ministers totalling it up to One Hundred and Forty Four. The actual implementation began in July 2012.

In following the National Action Plan compensation was paid to different war affected communities. Also the website of the Rehabilitation Ministry highlights details of rehabilitated Ex Combatants as recommended by the LLRC.

V. TAKING THE INITIATIVE

Guaranteeing a life of dignity to war-affected communities has been a priority of the University Grants Commission. The academics attached to different State Universities who formed themselves into a Committee under the leadership of the University Grants Commission felt that the war affects people in different ways. Along with physical suffering there is also psychological trauma which leaves many a deep and penetrating scar in the minds and hearts of these unfortunate people. Lending a helping hand to these men, women and children who are struggling to leave behind their dark and ugly past and assisting them in their journey towards a life of dignity, peace and happiness, involves many things; one being attitudinal change. According to their area of expertise these Academics have initiated different Community-based projects to ensure a life of dignity to the war-affected people. As a part of attitudinal change positive thinking and confidence building entails fighting out the many obstacles that are thrown up along the road to prosperity and contentment. Similarly, effective decision making is a skill that enables them to weigh all the options and select the best course of action. Legal literacy provides empowerment. Exposure to the basic Laws and Human Rights paves the way to access to Justice. The Northern

Province boasts of an effectively-functioning Court System. Each Local Government Unit has its own Health Officer, Child Rights Protection Officer and Women Development Officer to serve the community. Also these victims of war would benefit immensely by involvement in team building exercises and the know-how on how to improve relationships. Finally, awareness on Income Generation activities coupled with Skills Training will undoubtedly enable them to lead fulfilling and contented lives which will pave the way to peace, happiness and prosperity.

VI. CONCLUSION

Rosemary Nagy (2008) is critical of the Eurocentric mould of Transitional Justice. She boldly asserts: "Transitional Justice has become a well-established fixture on the global terrain of human rights. It entails an insistence against unwilling governments that it is necessary to respond to egregious violence and atrocity. Yet there also appear worrisome tendencies of the international community to impose 'one-size-fits-all', technocratic and decentralised solutions which are steeped in Western Liberalism and often located outside the area where the conflict occurred. Transitional Justice may be alien and distant to those who actually have to live together after the atrocity. It is accused of producing subjects and truths that are blind to Gender and Social Injustice."

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