



TRANSITIONAL JUSTICE SEARCH FOR APPROPRIATE MODEL

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Abstract:

This research paper will comprehensively try to put the concept of transitional justice as it has evolved over time and explain the different models of transitional justice. The classic debate of peace versus justice will also be discussed in brief to analyze how different models of transitional justice are applied in different societies and no uniform approach can be taken when deciding upon the model of transitional justice. Two, case studies will be examined in detail to understand the application of transitional justice in post-conflict societies. First, Athens democratic transition will be studied because it was earliest form of democratic and it has various lessons for present day societies because Athenians learnt from their past mistakes and improved upon the model of transitional justice. Then one recent case study of transitional justice in Sri Lanka will be examined in detail to understand how various types of institutions were made and the importance of active role of women and civil society in such conflicts.

Index Terms – Transitional, Institutions, Approach, Justice

INTRODUCTION

Once a conflict has ended, what should be the best way for the society to transit into civil society? Should the defeating party need to make peace with new situations and be let off or they must be tried and prosecuted for the crimes they committed? What should be given priority in aftermath of such violence, peace and stability or justice for the past wrongdoings?

These questions are highly important, yet their answers are complicated and at times controversial because there can be no objective approach while finding solutions to problems of transitional societies that go through massive human rights violations. Also, transitional justice raises not only legal questions but also very complex mixture of philosophical, moral, and political questions and hence any attempt to study this field from one lens won't give full picture of the problem and the possible solutions.

Transitional justice is a multi-layered and complex concept. According to the UN Secretary General's 2004 Report, on the Rule of Law and Transitional Justice in conflict and Post-conflict, Societies, transitional justice may include both judicial and non-judicial mechanisms with different levels of international involvement and individual prosecutions, compensation, truth-seeking, institutional reform, examine carefully and dismissals, or a combination thereof. The International Centre for Transitional Justice an NGO which is involved in transitional justice initiatives in over 30 countries, defines the major approaches as: prosecution, truth-telling, reparation, institutional reform, promoting reconciliation and social reconstruction, memorialization and considering gendered patterns of abuse.

AIMS & OBJECTIVES

- To study the concept of transitional justice and how it emerged in twentieth century.
- To highlight the aims and objectives of transitional justice.
- To critically evaluate the common challenges faced by post conflict societies in delivering transitional justice in context of peace versus justice debate.
- To study the different approaches to transitional justice through case studies and their critical analysis.

RESEARCH PROBLEM

Transitional justice in conflict resolution creates the tension between two conflicting yet highly relevant goals of maintaining peace and stability one hand and imparting justice on another. There is a compromise which every state has to make while resolving conflicts and this compromise depends on the situations of each society undergoing such transitions, however there is a need that the approach taken by transitional regimes upholds the rule of law in society and criticisms against its legality or retroactivity are addressed in conflict resolution.

HYPOTHESIS

This research paper is based on the hypothesis that different models of transitional justice should be applied in resolution of conflicts since no particular approach is adequate to such large scale atrocities

SCOPE & LIMITATION

The researcher has limited her study to some of the approaches of transitional justice like truth commission, criminal tribunals and institutional reforms and not all models of conflict resolution have been discussed. Also, two important case studies have been discussed in this regard and not all cases could be covered.

RESEARCH METHODOLOGY

The researcher has used doctrinal, descriptive, and analytical method of research for this paper. The author has used both primary and secondary sources of data.

Concept of Transitional Justice**Definition and Scope**

According to International Centre for Transitional Justice “Transitional justice is a response to a systematic and widespread violation of human rights. It seeks recognition for the victim and promotes possibilities for peace, reconciliation and democracy. Transitional justice is not a special kind of justice, but justice adapted to societies transforming themselves after a period of spreading human rights abuse. In some cases, these transformations happen suddenly, in other way they may take place over decades.” Transitional justice both backward and forward looking. It affirms that successive government must build institutions which bring justice to the past violence while showing their commitment to good governance in the future. Justice amount to replacing violence with words and terror with fairness and finding a path between too much memory and too much forgetting.

According to United Nations, “Transitional Justice is the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large scale past abuses to ensure accountability, serve justice and achieve reconciliations.” In addition to judicial mechanisms, gross human rights violations can also be addressed through broader transitional justice measures. *In the Declaration of the High-Level Meeting on the Rule of Law*, Member state emphasize on the importance of comprehensive approach to transitional justice with the range of judicial and non-judicial measures to ensure accountability, provide justice and remedies to victim and promote reconciliations and establish security system and restore confidence in the institutions of the state and promote rule of law. The goals of Transitional Justice are rather ambitious: nothing less than the transformation, or the regeneration of a whole society. It involves political, economic, cultural, sociological and psychological actions: prosecutions, Truth and Reconciliation Commissions, lustration, public access to police and government records, public apology, public memorials, reburial of victims, compensations, reparations, literary and historical writings, and blanket or individual amnesty. More often, Transitional justice combines a number of these tools in a holistic approach, acknowledging that none of the above measures will ever provide a sense of closure and adequately

repair the injuries of the past. However, Transitional Justice remains a rather optimistic answer to mass violence, one that goes against the defeatist argument that would make genocides and mass atrocities forever unforgivable and imprescriptibly. It is certainly true that neither a judicial sentence nor an apology can ever be coextensive with the horrors of mass violence. We are unable to forgive what we cannot punish, and we are unable to punish what has turned out to be unforgivable. *Hannah Arendt* famously said. And indeed, as *Lawrence Langer* wrote, the logic of law will never make sense of the illogic of genocide. But transitional justice argues that the recognition of this fundamental disproportion should not become an excuse for fatal attitudes. These crimes do exceed the domain of humane affairs, but humans can, and must, nevertheless oppose them. The question of transitional justice thus arises in particular in two sets of constellations, either as a matter of post conflict justice in the context of armed conflict; or when dealing with past abuses committed by dictatorships or authoritarian regimes. The concept is characterized by a past of massive human rights abuses and a process of transition to peace and democracy. The primary objective of transitional justice is to end impunity and establish the rule of law in the context of democratic governance. The language of transition in Transitional justice is thus rather optimistic, teleological and seductive, forming a before-and-after narrative of change; it implies that 'after' will lead to something better.

The United Nations Four Pillars of Transitional Justice

- (i) **Truth:** The first step towards social dialogue and reconciliation is to establish and acknowledge the truth on the violations committed. Parties to the conflict and most importantly victims and their families have the right to raise voice heard and their queries answered. A society has the right to know the truth about past events and the perpetration of heinous crimes. This is crucial to address and punish past ill-treatment, but also represents a solid wall against the return of same violations in the future.
- (ii) **Justice:** The identification and prosecution of culprit of gross human rights violations and international crimes is crucial, as it serves both a preventive and reparative purpose. Strong accountability mechanisms show that atrocities do not go unpunished, thereby deterring future abuses.
- (iii) **Reparation:** Victims of gross human rights violations have the right to receive adequate reparation for the harm suffered. Dimensions of reparation go well beyond economic compensation, and also include symbolic gestures, such as public apologies and the building of memorials, and measures aiming at improving the life of victims and their families, like scholarships or access to health services.
- (iv) **Ensuring non-recurrence of past abuses:** learning from past mistakes, all efforts must be made to prevent gross human rights violations in the future. This includes mainly institutional reforms reinforcing accountability, transparency and fairness. Transitional justice mobilizes numerous actors: international, regional and national institutions as well as civil society organizations. On the long run, their work is crucial to re-establish the rule of law and public trust towards the State.

International Trails to Transitional Justice

After the Second World War, it seems useful to distinguish between international and domestic developments in the field of transitional justice at the international plane; a shift towards the criminal prosecution of perpetrator took place especially with the International Military Tribunals of Nuremberg and Tokyo. The judges of Nuremberg clearly defined themselves as the high moral authority and use the trail to tell the story about past. Once a cinema screen was introduced in the courtroom and the prosecutor Robert Jackson used those images to confront the perpetrator with their deeds while survivors were testified face to face in an encounter to restore the lost morals of victims. The challenge of Nuremberg was clear as the re-founding of political and moral community through the narration of past-abuse but the Tokyo tribunal did not have the same impact as Nuremberg was though it was subject to criticism. The overall goal of tribunals was to prevent injustice as said by *Robert Jackson*, at the opening of trials in 1945, that four Nations, coloured with victory and displeased with injury stay the hand of retribution and voluntarily submit their enemies to the judgment of law is one of the significant tributes paid to the victims. The tribunal was crucial in that they helped the development of international justice with the belief of crime against humanity.

Without the Nuremberg precedent, in the mid of 1990 more recent development included by the United Nations, decided to create an international criminal tribunal for both Yugoslavia and Rwanda. Those institutions mostly rely on the retributive model of transition created in Nuremberg and Tokyo and predicated on the same principles i.e. ending impunity, moralizing international affairs, creating a link between peace and justice. These *ad hoc* tribunals were also the result of the occurrence of several and more contingent factors due to the end of the cold war. Through the tribunal the idea of norms of international judicial intervention and foreign policy tools was born. The tribunals have had some more significant achievements more than one sixty persons were prosecuted by the ICTY and contributed to the promotion of international law itself regarding the definitions of genocide and crime against humanity, the non-armed conflict law and the issue of command responsibility. ICTR defined rape as crime of war for the first time and convicted Rwanda's former prime minister named Jean Kambanda. Serbian president Slobodan Milosevic was sent to Hague while still in power and prosecuted before he died in the cell. So, all these cases established that heads of state were no longer immune from prosecution. But this *ad hoc* tribunal has nevertheless been criticized for their inherent limitations. It was argued that the nature of *ad hoc* tribunals was against the very principle of the rule of law, they were meant to enforce and motivated by political interest. Most specifically it was said that tribunal had a very little social impact as perceived as fundamentally biased, they did not get much support from the survivors of the struggle. The issue of remoteness, geographical and cultural was thus become more extreme. As tribunals did not get enough support from the affected populations. Despite those criticisms one of the main legacies of the *ad hoc* tribunal has been the creation of a permanent international criminal court by Rome statute in 1998. ICC as a permanent international criminal court is perhaps the most important landmark and definite achievement of this evolution having the jurisdiction over genocide, crime against humanity, war crimes and crime of aggression committed after 1st July, 2002. It was the creation of a difficult compromise with strong political restraint and necessity of respecting state sovereignty.

Currently, a "third" generation of international criminal tribunals, so called "hybrid" courts with national and international involvements observable. For example, the Special Court for Sierra Leone, the Extraordinary Chambers in the Court of Cambodia in 2003 or the Special Panels for Serious Crimes in the District Court of Dili (East Timor) in 2000 established with the various degree of internationalization often accompanied with alternative forms of accountability such as truth commission.

At the domestic level, a diversity of approaches continues to exist when it comes to addressing issues of transitional justice. In particular the question whether crimes may be amnestied in the interest of reconciliation received varying answers. A rather strict approach was pursued in Germany after the fall of the Berlin Wall in Central and Eastern European countries. The Federal Republic of Germany prosecuted those responsible for gross and systematic human rights violations such as killing fugitives at the Wall, although with comparatively lenient sentences. A programme of vetting and lustration disqualified Stasi agents and informants from public employment. In Latin America, conversely, during the transitions to democracy after the military dictatorships of the 1970s and 1980s, many of the past abuses were met with amnesties in countries such as Argentina or Chile. The same holds true for Peru when it came to dealing with human rights abuses committed in the fight against left wing guerrillas (the Shining Path) under Fujimori. However, almost the entirety of these amnesty laws was recently repealed; *inter alia* because of the pressure of the Inter-American Court of Human Rights. In Colombia, to facilitate transition and the demobilization of non-state armed groups, compromise formulas were sought, with reduced sentences for paramilitaries who laid down their arms and confessed. Again, a different path was chosen in South Africa with the establishment of a Truth and Reconciliation Commission in 1995 which granted individual amnesties in return for the disclosure of crimes committed.

The challenges faced during these transitions will be dealt with in a subsequent part. For now, it seems sufficient to ascertain the diversity of possible approaches to questions of transitional justice. Still, as will be argued in the following, clearer criteria may be derived from international human rights and humanitarian law which reduce the national leeway of action on how to deal with past abuses.

Different Models of Transitional Justice and Challenges Faced

Truth Commission

Truth finding initiatives focus on the investigation of past human rights violations. They are undertaken by truth commissions, commissions of inquiry and other fact-finding missions, with truth commissions being the most prominent initiative. Truth-commissions have the primary purposes of investigating and reporting on key periods of recent abuse. They map and document patterns of past violence: this usually includes statements from victims and witnesses, thematic research, the organization of public hearings, declassification of archives and the like. More than 30 truth commissions have been created worldwide so far. The best known is the 1995 Truth and Reconciliation Commission in South Africa. Truth commission may be established regardless of whether trials are conducted to inquire into and reveal past wrongdoing. In fact, while these commissions with their primary focus on reconciliation were initially regarded as alternatives to criminal measures, there is now a wide conviction that they work in a complementary way. Since it is not the purpose of prosecution to serve the rights of each victim individually, the victim-centred approach of truth commissions is important to address individual grievances and foster reconciliation. They are thus an important element of restorative justice. In fact, it would overburden the justice system to ask criminal trials to rehabilitate and compensate the victims. This especially when faced with large scale abuses and weak judicial structures. What is more, truth commissions may contribute to building a historical record, identify the root causes of a conflict and map patterns of past violence in order to prevent recurrence. Especially in cases of enforced disappearances this may be important for close relatives too, since it should help them to cope better with the uncertainty as regards the fate of the person who disappeared. The truth commissions' relationship to an eventual criminal prosecution of perpetrators varies. Sometimes, their insights feed into the criminal investigations, such as in Peru. Only rarely have truth commissions the competence to provide for individualized amnesty, such as in South Africa. Even if truth and reconciliation commissions do not have a say in prosecution, their relationship to institutions tasked with the latter should be clarified ab initio so as to avoid tensions as for example in Sierra Leone.

Reparation

Reparations initiatives seek to recognize and address the harms suffered by victims of human rights violations. They can be designed in many ways, and may include symbolic as well as financial or practical measures. Victims' reparation programmes can contribute to repair the material and moral damages of past abuse. They may comprise a diversity of measures such as financial compensation, return of property, official apologies, but also psychological aid to victims and memorialisation efforts. The latter could include museums and memorials to preserve the public memory of victims and raise moral consciousness of past abuses. Reparation programmes have been established in countries such as Chile, Argentina and Brazil to cope with the atrocities committed during the military dictatorships. Other examples include the Canadian government's apology "Statement of Reconciliation" to indigenous Canadian families for removing their children, including a 350 Million Dollar fund; or the Iraq Compensation Commission which also had international involvement. While providing for financial reparations is surely important, a mere compensation of victims does not seem sufficient. Rather, reparations should be accompanied by some kind of accountability of perpetrators in order to avoid the appearance of hush money.

Institutional Reform

Increasingly today, transitions are viewed from a broader and more future oriented perspective which also focuses on institutional reforms. Institutional reforms are concerned with the building of fair and equitable institutions as a safeguard against the recurrence of human rights violations. They embrace constitutional and legal reforms including security system reforms as well as free elections. Measures such as vetting, lustration and disarmament, demobilisation and reintegration programmes are important components of such reforms. Vetting is the screening and removal of members of the public service who are responsible for grave human rights violations. It also implies refraining from recruiting them. For instance, candidates for the 2009/10 Afghan elections were vetted. Another example was the removal of corrupt court officials involved in crimes of the fallen Tunisian regime. A sub-category of vetting is lustration, which refers specifically to the vetting processes and laws that were implemented in the former communist countries in Central and Eastern

Europe after the Cold War. In any case, relevant institutional reforms should be complemented by further initiatives such as comprehensive training programmes. Overall since institutional reforms are increasingly concerned with the development of stable democratic institutions and the general implementation of the rule of law, a welcome broadening of the approach to transitional justice is conceivable.

Challenges to the Implementation of Transitional Justice

The contribution of the three major challenges will be limited for the implementation of transitional justice. The possible problem between justice and achieving peace i.e. peace v. justice when the conflict is still going, huge variety of social, institutional, political context and domestic financial, institutional, political constraints to implementation.

(i) Peace v. Justice

“True peace is not merely the absence of tension; it is the presence of justice”

-By Martin Luther King Jr.

One of the major challenge to the concept of transitional justice was reflected in the debate of peace v. justice by government leaders, diplomats, lawyers, journalist, commentators argued over international affairs on the topic of ‘du jour’ (French word, means something happening or popular at the current time) while diplomats usually cherish having more tools in their toolbox and the beginning of international criminal justice has not been uniformly welcomed by the international diplomatic corporation. There was the perception of an inherent problem between the goals of achieving peace and justice in the aftermath of dispute viewed as mutually exclusive when the conflict was still going on, peace school proponents argued that the only way effectively to end violence was by granting amnesties and brokering negotiations to persuade criminals to lay down their arms. Justice school proponents stated that if the perpetrator of human rights abuses did not stand trials, impunity for crimes would continue into the new regime. Over time some change in perception seems to have occurred. Increasingly peace and justice are viewed as mutually reinforcing and justice is even considered to be an important precondition for peace. Justice school of thought seems to have taken over by stating that only when justice is done, a new civil war will be prevented. Thus, the peace versus justice debate seems somehow settled which also correspond to the pro-justice taken in the relevant human rights jurisprudence.

(ii) Variety of National Situations and the Impossibility of “One Fits All” Strategy

The next difficulty to approaches to transitional justice is the variety of national situations. The political, social and institutional context differs from country to country. The variables are sheer endless and include factors such as the scale and extent of past human rights violations, varying number of perpetrators, difference in the strength of domestic institutional structures specially of the judiciary, the varying importance of positions still held by former human rights perpetrators, a different involvement of the international community, the distinct geo-political position of state. Consequently, a one fits all solutions to transitional justice seems impossible rather a case specific solutions are to be found in each case.

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(iii) Domestic Institutional, Financial, Political Constraints to Implementation

The third challenge concerning the implementation of transitional justice strategies relates to the danger of overburdening fragile democracies when they have to deal with massive human rights violations. When state structure is weak and former rulers and human rights abusers still remain in influential positions. Especially democratic transitions in Latin American countries as Argentina showed the difficulty of bringing former members of the military junta to justice who had remained in influential positions. The crucial question is how to promote accountability for past abuses without risking a smooth transition to democracy? Further problems relate to the frequently insufficient financial institutional resources to deal with massive human rights violations committed in the past. Weak judicial and institutional domestic structures are overburdened when too many human rights perpetrators have to be brought to justice. The best example for such difficulties perhaps Rwanda’s struggle to cope with thousands of perpetrators in the aftermath of the 1994 genocide.

Now, we have studied the concept and structure of transitional justice models in detail. We will examine in coming two chapters the detailed application of transitional justice in two societies and try to find how each nation faced unique challenges and devised it own transitional justice model to overcome them.

TRANSITIONAL JUSTICE IN EARLIEST FORM OF DEMOCRACY: ATHENS CASE STUDY

Democratic transitional justice is as old as democracy itself. Athens saw two restorations of democracy by other throwing of oligarchy once in 411 B.C. and once again in 403 B.C. In both transitions retribution measures were taken against the oligarchs, however the degree and intensity differed as was learned by Athenians from their experience in transitional justice. When oligarchy was thrown for the first time, the democratic regime took harsh retribution to prevent oligarchs from coming into power again. But, what they failed to do was to attack the root cause of oligarchic coup itself. So, when in 403 democracy was once again restored, the democrats reacted differently. This time they made constitutional and institutional reforms in the democratic regime which had led to its failure in the past. Also, while dealing with oligarchs, they preferred reconciliation over retribution.

To understand these democratic transitions better, we can trace some of the reforms that took place around 594 B.C. at the time of Solon. One of the most important reforms in context of transitional justice was passing of amnesty law that restored civil rights to those who had been disfranchised, except exiled condemned on charges of homicide or massacre, or for seeking to establish a tyranny. This law later became the model for amnesty legislation of 405 B.C. that, in the wake of the defeat of Athens by the Spartans fleet, cancelled some of the harsh sentences passed after the overthrow of the oligarchs in 411. Now, we will study how transitional justice approach and model differed within Athens as they tried to learn from their experience.

First Model: The Demise of Oligarchy and Emergence of Democracy

Athens had imperialistic aspirations which led to its expansion and emergence as an empire; however this came at the cost of war and bloodshed. The decision to go into war was not outright undemocratic as an assembly decided it, yet it was not always wise. This led to opposition from oligarchs against the assembly for putting the idea of war into first place and then persuading people to accept it. This led to the coup in 411 by oligarchs and they came into power, however this lasted only four months due to internal conflicts.

So, when democracy was again to be restored through transitional justice it was done through two measures. Firstly, the transitional democratic government that came into power started the prosecution of extremist oligarchs. After democracy was restored fully in Athens again vindictive measures were taken against wider number of people. Yet, these measures were not purely victorious justice based approaches because of following three reasons:

- ❑ Firstly, there were legal proceedings to prosecute the oligarchs and it was not merely persecution of all oligarchs.
- ❑ Secondly, some were tried and acquitted who served till the end the oligarch regime.
- ❑ Thirdly, the democratic regime so established didn't prosecute retrospectively for attempting to overthrow democracy since it was not a crime at that point of time. Later on, legislation was passed to penalise this but it was made into force prospectively.

Second Model: Final Restoration of Democracy

The next oligarchic regime came into existence because of the failure of democratic regime in its internal matters and also due to external threats. The events that led to this failure were trial of generals who failed to rescue the dead bodies of sailors in the sea battle against Spartans in 406 B.C. The prosecution led to execution of six generals who were present in Athens which created turmoil in the society over functioning of democrats. One of the generals executed was a war hero of democratic transition in 411. This decision was regretted later, but the damage had already been done and citizens were distrusted towards the democrats. Also, when new generals were elected on basis of their loyalty to government rather their competence in military people

When in 405 Athenians lost the battle of Aegospotami, because of their less abled generals, it led to coming into power of oligarchs once again under the Spartans auspices. Once oligarchs came into power, they created terror by creating a condition that each member has kill one alien resident and other atrocities were committed in revenge as the oligarch had been banished by democrats. To consolidate their regime, they created a limited citizenship and expelled the rest from the city. These people who had been expelled took residence in the city of Piraeus where they with the help of democratic army who had been exiled attacked oligarch and were able to kill their two main leaders. The Spartans then interfered with the supervision of treaty between "men in Piraeus" and "men in the city". Following are some of the important terms of that treaty:

- Athenians who wished to leave the city have to settle in Eleusis, where they will have the rights citizenship and their own government.
- The citizens of Eleusis will have to contribute from their incomes to the defense budget.
- Citizens of Athens and Eleusis are not allowed to visit each other city except for the celebration of the Mysteries.
- Prosecution for homicide was limited to case where it was done with the hands (*autocheiria*).
- There was amnesty for most of the people and even those who were not covered would get immunity once they rendered their account.

The terms of this agreement regarding amnesty are more important. Since, it required that only homicide with own hands amounted for trial, many people could not be prosecuted since they didn't fall in strictest sense under *autocheiria*. This was done to limit the prosecution, because mass scale prosecution would have created more hostilities and another war among democrats and oligarchs. As, I will discuss in further case studies vetting is very important part of transitional societies when a particular ideology and its followers are seen as threat to stability to formation of new regime. This was done during Athenian period also, through "rendering accounts". This process of rendering accounts was done all public officials with the help of a jury chosen by citizens.

The problem faced in Athens during these two transitions is very similar to recent democratic transitions and hence this study becomes highly important. The solutions proposed by them are similar to recent transitional justice models; however there are some unique features which are not to be found in any of recent case studies. The 411 transitional periods saw more of retributive justice whereas in 403 it became more of a negotiated justice under Spartans supervision. The two transition periods saw coming into power of democrats and they made use of past experience in transitional justice. In the first transition excessive retribution became necessity also in light of Athens having no jails to incapacitate the oligarchs.

In 403 instead of excessive retribution amnesty to large number of people was offered along with the option of exile, because Athenian wanted peace and stability which they feared to jeopardize by creating anger amongst a section of society. It was a moderate form of transitional justice which was either imposed by Spartans or Athenian democrats themselves or as a condition by oligarchs to give up power.

Transitional justice took place through private individual actions. This includes criminal trials, fine imposition, barring from public offices and loss of civil and political rights of citizens. These different verdicts were passed through juries who after listening to the parties voted through secret ballot. The composition of these was in 411 transition periods random, however in 403 it was constituted in such manner to be biased towards oligarchs.

Transitional justice was achieved through legal principles in the sense that retroactive legislations were not passed during both the transitional periods. Along with penal actions a great emphasis was put on constitutional and legal reforms. These reforms were shaped according to lessons learnt from previous transitional justice approach. One most important aspect of this Athens case study on transitional justice is that those retributive emotions which led to second war between democrats and oligarchs were replaced by amnesty and option to leave the city of Athens. This case study shows that past experience of a nation should play greatest contributor in future development of transitional justice models, and can lead to great success if underlying causes of conflict are determined and those causes themselves are eliminated so that no future dispute arises. Athens example shows that they valued peace and stability more than providing justice for past atrocities and this compromise was proved to be successful in the sense that they were able to achieve democracy, though at the cost of leaving some people in search of justice.

TRANSITIONAL JUSTICE IN TWENTY FIRST CENTURY: SRI LANKA CASE STUDY

Civil war in Sri Lanka, which the state terms as war on terror, ended with defeat of Liberation Tigers of Tamil Elam (LTTE) in 2009. This conflict roots can be traced in systematic violence and marginalisation against Sri Lankan Tamils, Muslims, and other ethnic minorities. The economic factors like distribution of land, access to natural and state resources, employment opportunities and educational institutional became highly undemocratic and repressive after reforms in 1977. The civil war which began in 1983 for the demand of independent state for Tamils caused death of millions of people, along with economic and environmental crisis. Attempt was made in between to negotiate a settlement through international mediation by signing of ceasefire agreement in 2002. However, this agreement was not honored by both sides leading to both parties into full-fledged war which ultimately lead to the defeat of LTTE in 2009 ending 25 years civil war.

This end of war led to widespread demand for justice for death, displacement and dismantlement of institutions. This justice was not be achieved only through formal legal process of trials but also fixing moral and political responsibility on people who violated International humanitarian rights law (IHRL) and international human rights law (IHL). Mahindra Rajapaksa who held the power as President of Sri Lanka post-civil war until 2015 was responsible for deciding the approach of transitional justice. However, under his regime the state tried to repress human rights activists and resisted any form of scrutiny from national or international bodies. But, some notable steps were taken with the help of civil society to deliver justice through truth commissions and with special attention to the plight of women and marginalised people. Now I will address different initiatives taken in transitional justice faced in Sri Lanka.

Past Transitional Justice Initiatives

During 1990s insurgency operations in southern and western parts of Sri Lanka led to disappearances of thousands of civilians and combatants. These disappearances were further escalated by outbreak of war in east and north. The justice for these disappearances became center of 1994 general elections and was one of the promises that led to victory of Chandrika Kumaratunga's victory as President in 1994.

When she came into power, her party established inquiries to investigate the disappearances in three regions that happened during 1988 to 1994. These were called Presidential Commission of Inquiry into the Involuntary Removal or Disappearance of Persons. To address remaining cases an All Island Commission was established in 1998 as a Presidential Commission of Inquiry. These three commissions inquired into almost 27,000 complaints and were able to establish more than 15,000 disappearances. All Island Commission was able to establish necessary evidence for another 4,473 disappearances. The three regional commissions also were able to identify suspects in 1,681 cases and the report all these suspects along with recommendations was sent to a separate unit established under police department. However, the reality remains that very few security forces personnel were tried for these disappearances and out of them handful were convicted, and most of them were low ranking personnel.

The recommendation however led to speeding up compensation and issuance of death certificates. In the time of 1995 to 1999, around 15,000 death certificates were given for disappeared people and compensation was given to their families. There was no significant achievement of these commissions however; it was for first time acknowledged that large scale disappearances have taken place.

Post Conflict Transitional Justice Initiative

(i) Lessons Learnt and Reconciliation Commission, 2010

After intense pressure from international community Rajapakse government despite its constant denial for IHL or IHRL violations during final stages of civil war, constituted Lessons Learnt and Reconciliation Commission (LLRC). Its mandate was for the crimes committed after the signing of cease fire agreement in 2002 onwards and excluded some serious human rights violations. Also, it suffered from credibility concerns since government had ties with commissioners and there was no mechanism to ensure impartial and independent inquiry. There was a lacuna in providing necessary protection to witness and victims to approach these commissions.

Despite all these constraints, many people took recourse to LLRC with the help of human rights activists and organizations. LLRC held around 57 public meetings in 11 months, covering almost 40 locations. These visits led to appearance of more than thousand people before LLRC, with over 5,000 written statements by victims.

The LLRC gave its recommendation in 2010 as an interim report and final report in 2011. Despite the shortcomings of limited mandate and other as discussed above, it was successful in analysing the cause of conflict and gave recommendations for institutional depoliticizing, demilitarization, linguistic rights, land rights issue and other allegations. It in its report came up with list of people and organisation that need to be investigated. These recommendations were implemented half-heartedly and on selective basis by the government, but provided a strong basis for domestic and international actors to pressurize government especially in United Nations. It despite its shortcoming provided platform to many surviving victims to raise a voice and create a record.

(ii) Consultation Task Force on Reconciliation Mechanism, 2016

United Nations Human Rights Council in 2015 passed a resolution that was co-sponsored by Sri Lanka government called for efforts to deliver transitional justice through different methods like creating an Office for Missing Persons, an Office of Reparations, Truth, Justice, Reconciliation and Non-Recurrence and Judicial Mechanism with Special Counsel. The Consultation Task Force on Reconciliation Mechanisms (CTFRM) was appointed in January 2016 to facilitate public consultation on the design of these mechanisms. CTFRM composed of eleven independent people from field of law, health, human rights, media and academia. One important point to be noted here is that out of eleven members six were women and even amongst those eleven all ethnic communities were represented.

CTFRM was decentralised in working since it appointed consultation bodies at district and provincial level of victims, local leaders and here also half of them had to be women. Due to these decentralisation women organisations and civil society actively participated in the forms, meeting in town hall, focus group discussions etc. which succeeded in generating more than 7,000 submissions. The final report came out last year in 2017, made wide ranging solutions and recommendations regarding the mechanisms of transitional justice and other related issues. However, the biggest controversy and attention is on the recommendation for creating a Special Court with international judges to maintain independence.

TRANSITIONAL JUSTICE PROCESS BY CIVIL SOCIETY

Civil society is not equipped with carrying of transitional justice process on its own however; several efforts have been made in Sri Lanka by local and international community to advance truth, justice, and reconciliations. Some of the notable efforts are worth mentioning here since, generally it is understood that state is only responsible for advancing transitional justice goals and role of civil society is to be limited to creating pressure.

(i) International Feminist Fact Finding Mission (2002)

When ceasefire agreement was signed in 2002 it led to formation of Sri Lanka Monitoring Commission and brought hopes of establishing peace. Women were seen missing from these peace negotiations which led to various women's organisation and feminist to undertake international mission on importance of women's participation in such activities.

Women groups and community organisations raised the concern of displacement, violence, and poverty from point of view of women. Based on these observations and studies undertaken a report was presented to diplomatic missions highlighting the need of including women in peace mechanism and need to address women concern specifically in transitional justice.

(ii) Citizens' Commission on the Expulsion of Muslims from the Northern Province by the LTTE (2010)

During 1990s, Muslim population in the Northern Province of Sri Lanka was ousted especially in the regions of Jaffna, Mannar, Kilinochichi where more than 75,000 Muslims were asked to leave the town within hours. This expulsion remained mostly unnoticed to accounts of war. In response to this, Law and Society Trust established a truth-seeking initiative along with Community Trust Fund and Rural Development Foundation which worked closely with International Centre for Transitional Justice. This commission worked very closely with people with active engagement of those affected by this expulsion and researchers were also trained to document these experiences.

This commission continuously documented for two years the expulsion of Muslims and the consequences and published a report based on these findings. It provided for recommendation not only to national government but to international community also. It achieved success in the sense that it gave voice to thousands of Muslims in their own words about their trauma and marginalization for further advocacy.

(iii) Tamil-Muslim-Sinhala Sisters Group

In the eastern parts of Sri Lanka different ethnic communities like Muslim, Tamils and Sinhala which were before living peacefully were sharply divided after the end of 30 years of conflict. This undermined the mutual respect and harmony amongst the people creating a feeling of prejudice and hatred. In 1991, Suriya, a collective of women came into existence with the aim of restoring the social fabric in the different ethnic communities. It brought together Tamil women and expelled Muslim women to work together and learn new skills despite the shared suspicion and hostility towards each other. Suriya is one of its kind organization which works on study and use of cultural practice to bridge the ethnic gaps and rebuild mutual trust and respect for each other. For example, Suriya undertook one project whereby Tamil and Sinhalese women were made sensitive to anti-Muslim sentiment that came into being post-conflict and they were made to write letters to each other and Muslim women who were victims of these conflicts to share their stories and give courage to each other. These groups have helped women better understand each other's religious and cultural identities. These spaces created by women themselves and not state or NGOs, are very important in promoting an unbiased and independent forum to give strong locus for other transitional justice models like truth commissions and fact-finding bodies.

CONCLUSION AND SUGGESTIONS

Increasingly strict parameters have been developed which guide the implementation of transitional justice. The concept of transitional justice evolved and was heavily influenced by human rights law and the assertion that serious human rights violations shall be investigated, prosecuted and compensated for. Likewise, international humanitarian law plays an increasingly important role. Still, despite the evolution of basic legal criteria, the question of transitional justice can be only partially addressed by strict norms. Apart from a minimum core, flexibility is needed. Every situation has to be addressed anew and differs in accordance with local contexts. There is no one-fits-all solution; no general formula to be adopted. As stated by the International Centre for Transitional Justice: "All transitional justice approaches are based on a fundamental belief in universal human rights. But in the end, each society should indeed must choose its own path. In doing so, often, important challenges are to be met. The international community thus has an important role when it comes to supporting the implementation of transitional justice at domestic level. And it becomes increasingly engaged. International activities take place in an increasingly principled way, guided by human rights parameters and turned to case specific solutions. Likewise, the development of stable democratic institutions becomes more and more relevant for international action in the field of transitional justice. In short, the international community seems to be increasingly aware of how important it is for a society to address the past in order to reach the future.

SUGGESTIONS

We studied how different societies in transition, responded differently to the issues of transitional justice. In all these case studies we saw some common elements like criminal trials, compensations, truth commission etc. however each case study also had its own unique model of transitional justice and the degree and intensity of application of common transitional justice models also varied in each state according to needs of that society in balancing the need of peace and stability on one hand and providing justice to victims of such conflict on another.

The title of the paper says the search for a model of transitional justice however; the authors here want to make the submission that any such search is going to be futile unless these models are studied in the context of specific societies. Transitional justice comes into picture only when conflict and human rights violations are so severe that normal justice delivery systems and institutions are unable to provide the same. In these extraordinary situations, every state has to make decisions according to conditions which led to such conflict and post conflict dynamics which in turn determine the approach of transitional justice. However, with the help of above mentioned case studies we can lay down some suggestions which are true in most transitional societies and are as follows:

1. Instead of top-down approach of transitional justice, building bottom-up model of transitional justice is relevant when victims of conflicts are diverse based on their identities of gender, religion, ethnicity, and their expectations from transitional justice vary. In such cases, state organs need to develop more decentralised model where local and regional participation is maximum and their concerns are reflected in developing the model for transitional justice.
2. Women participation is highly critical for the success of transitional justice models because their suffering is generally not addressed specifically, and they are general part of same victim group like men, however the challenges faced by them in

conflicts and post conflict are quite unique and require special attention that women are involved from the planning stage of transitional justice models and policies itself. This was done in the case Sri Lanka and was successful even in civil society models of transitional justice.

3. Civil society should play a major role not only up to advocacy of human rights or need for transitional justice, but also extend its role through creating informal organisations that further the goal of transitional justice by providing a platform for victims to come together and share their stories to build trust and harmony amongst different groups.
4. Constitutional and judicial reforms are required for transforming the state and its institutions to address the underlying cause of conflicts and to restore rule of law in the society. These constitutional and judicial reforms are required since focus can't be done only on exceptional cases to rebuild state-citizen relation.
5. During these conflicts it is not just state that is responsible for human rights violation, but also non-state actors are involved, therefore transitional justice approach can't be very state focussed as it won't achieve in digging out truth and accountability. In this regard people oriented localised spaces and mechanism become highly relevant.
6. Athens case study showed that past experience in transitional justice become highly important in designing the transitional justice approach as a state which has gone some similar conflict in past can best learn from its own experience rather than any other country model or one-fit size all model of transitional justice.

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Books

- (i) Jon Elster, *CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE*, 2004, Cambridge University Press.

This book contains the historical evolution of transitional justice along with detailed analysis of different elements of transitional justice structure. I have taken from it the Athens democratic transition in 403 and 411 B.C. to illustrate how earliest form transitional justice still has lessons for current societies going through same.

Article & reports

- (i) *Transitional Justice: Sri Lanka Case Study*, AJAR and Suriya Women's Development Centre, 2017.

This is a report published by Asia Justice & Rights and Suriya, which are human rights organisation based in Indonesia and Sri Lanka. This report contains comprehensively all the initiatives taken by government and civil society for the transitional justice in aftermath of civil war in Sri Lanka. I have referred this report to highlight the innovative model adopted in Sri Lanka along with its criticism.

- (ii) Ron Dudai, *Rescue for Humanity: Rescuers, Mass Atrocities, and Transitional Justice*, Ron Dudai, 2012, Human Rights Quarterly.

This is an article published by Johns Hopkins University Press. The article is probably the first work to explore the commemoration of rescuers from a human rights and transitional justice perspective. The article elucidated the significance of rescue in the transitional justice framework.

- (iii) Eric Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 Harvard Law Review 762 (2003).

In this article the authors discuss the problems faced in post-conflict societies in respect to application of transitional justice. The authors here try to make a strong case in favour of application of transitional justice despite the criticism that are levelled against it because of lack of legality, resource constraints, objectivity etc. and these criticism are countered by giving historical examples of success of transitional justice.

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