

A Study on Identifying the Challenges Faced When Implementing Transitional Justice: (A Case Study of Chile Transitional Justice Process)

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Abstract: *The humankind has taken various measures in an attempt to minimize conflicts across the globe, to prevent any conflict from happening repeatedly and to make sure that the global peace is established. Because of these attempts many study fields were introduced to the world and in mid 1990's Transitional Justice (TJ) came to the fore. Many countries across the globe tried to implement TJ could not achieve its fullest potential due to various challenges and negative impacts towards the process. These challenges and negative impacts occurred when implementing TJ in several countries seemed different from one another, there are similarities as well. The main purpose of this study is to conduct an extensive and a thorough search into these challenges or the negative impacts when implementing TJ. In addition, the study will look into finding a method to identify these negatives beforehand and implement Transitional Justice in a way that these pessimistic factors will not harm the process of Transitional Justice with main attention to Chile Transitional Justice process. A descriptive methodology will be used to conduct this study. Once the secondary data is gathered, those data will be studied and reinterpreted to determine the main purpose of the study. Source for secondary data will be books and journals written on TJ (About the selected countries). Further, the study expects to gather data from the internet, various reports, news articles and expert interviews on Transitional Justice.*

Keywords: Transitional Justice, conflict, challenges, Chile

1. Background of the study

The humankind has taken various measures from time to time in an attempt to minimize conflicts across the globe, to prevent any conflict from happening repeatedly and to make sure that the global peace is established to secure the innocent lives of people across the globe. Because of these attempts many study fields were introduced to the world and in mid 1990's Transitional Justice (TJ) came to the fore. There are four main pillars to Transitional Justice and they are, Truth, Reparation, Accountability/Justice/No Impunity, Non-Recurrence .

1.1 The effects of Transitional Justice on Sri Lanka

Sri Lanka is a perfect example for this scenario. Before implementing the Transitional Justice (Before 2015: International isolation) in 2010 Sri Lanka loss GSP+. Between 2012 – 2014 periods, HRC resolutions was imposed against Sri Lanka. Further, in 2014 Office of the United Nations High Commissioner for Human Rights (OHCHR) was mandated to conduct international investigation.

However, after implementing transitional justice (After 2015: Restoration of prestige) in 2015 Office for National Unity and Reconciliation (ONUR) co-sponsored the Human Rights Commission Resolution 30/1 and created the Secretariat for Coordinating Reconciliation Mechanisms (SCRM). In 2016 a consultation task force was introduced and thus marked the beginning of Office for Missing Persons (OMP). Moreover, in

2017 Sri Lanka gained GSP+ again. It is clear that after the commencement of implementing TJ process in the island, Sri Lanka's international prestige and credibility grew rapidly in a positive manner.

Under the implementing process of TJ Co-sponsored by Sri Lanka, reaffirming sovereignty and control below actions welcomes Sri Lanka's proposal of establishing TJ Mechanisms like An Office on Missing Persons, A Truth and Reconciliation Commission, A Reparations Authority, An Accountability Mechanism with international participation Sri Lanka is firmly in control of the Transitional Justice agenda in the national context. Transitional Justice is essential for a country to develop and to break cycles of violence so that the not dealing with the past will not come back to haunt countries. Moreover, TJ is about realizing fundamental human rights. The inclusive process is vital to the growth of a country. Law and practice are constantly evolving and contributing to the global body of law and practice of TJ. Logical connections of TJ pillars can produce best results (Ganguly, 2018).

2. Literature Review

2.1 Introduction

The military dictatorship of Chile (1973-1990) was established after the democratically elected socialist government of Salvador Allende was overthrown by a CIA-backed coup on

11th September 1973("Truth Commission: Chile 90 | United States Institute of Peace," 1990).After Salvador Allende was overthrown, the country was ruled by a military junta headed by General Augusto Pinochet. The military regime carried out systematic suppression of political parties and the persecution of protesters, where it left over 3,000 dead or missing, tortured tens of thousands of prisoners, and drove an estimated 200,000 Chileans into exile ("Truth Commission: Chile 90 | United States Institute of Peace," 1990). Pinochet's plans to remain in power were foregone in 1988 when the regime accepted democratic displacement in a referendum that which reestablished democracy in 1990. After he Pinochet dictatorship ended in 1989 when he conceded to holding elections and then lost to Patricio Aylwin by a narrow margin. Shortly thereafter, President Aylwin established Chile's National Commission for Truth and Reconciliation known as "the Rettig Commission" Under the Charter: supreme Decree No. 355 in April 25, 1990, issued by President Aylwin with the signatures of the Minister of the Interior and the Minister of Justice, to investigate human rights abuses that occurred during the Pinochet regime ("Truth Commission: Chile 90 | United States Institute of Peace," 1990)(Online encyclopedia of mass violence, n.d.-b).

Hear with this study will focus on identifying the challenges faced by Chile when implementing Transitional Justice.

2.2 Challengers on Truth Commission

Since the early 1990s, the international human rights community has advocated truth commissions as an important part of the healing process, and they have been suggested as part of the peace process of virtually every international or communal conflict that has come to an end since.

Several countries implemented truth commissions after a conflict situation in order to determine the truth and facts behind it. However, due to the structural errors and the errors with regard to appointed individuals for these commissions, the expected results or the outcomes by implementing a truth commission was not delivered.

How a truth commission will function is highly dependent on who is appointed to the commission. A number of commissions set up by new presidents were in fact highly partial. In the case of Chile, the transition was not a clean break with the past and segments of the old regime maintained significant power. The truth commission contained an even split between Pinochet supporters and opponents, but the military still rejected the commission's findings. ("Truth Commissions | Beyond Intractability," n.d.)

Not only in Chile, even in other countries who implemented a Transitional Justice process and initiated a Truth Commission could not achieve the expected results as the prominent lawyers that were appointed to these commissions were not impartial as expected.What has been perhaps the most common method is to appoint well-respected members of

society to commissions. Being perceived as above politics makes them an ideal choice, though they need not be strictly impartial. It would be difficult to remain so after living through such an experience. ("Truth Commission: Chile 90 | United States Institute of Peace," n.d.)

In order to overcome this issue El Salvador appointed prominent foreign legal advisers to these commissions. However, these appointments of foreign agents triggered a negative reaction from within the country stating that it is a threat and a breach of country's sovereignty.

In the case of El Salvador, for example, the violence was seen as so polarizing that no Salvadoran could fairly assess what had happened. The UN secretary-general, with the agreement of the parties to the peace accords, selected a former Colombian president, a former Venezuelan foreign minister, and a former president of the Inter-American Court of Human Rights to conduct the truth commission. But this is hard to do because of the internal pressure from the nationalist social groups. So appointing a fair truth commissions is the most challenging part in TJ possess. And Chile is the best example.("Truth Commissions | Beyond Intractability," n.d.) Therefore, it is clear that ensuring an impartial setup is essential and the main challenge to implement a truth commission. However, the most challenging barrier is that post conflicts regimes do not have a tendency to implement truth commissions to seek the truth. At such junctures, a third party will try to implement truth commission in order to seek truth and once again, this will give birth to internal forces to state these moves as a threat to sovereignty of the country.

The former military regime in Chile also attempted to prevent the implementation of the truth commission using a similar method. However Patricio Aylwin who was in power managed to control this situation by implementing "the Rettig Commission", Under the Charter: supreme Decree No. 355 in April 25, 1990, without the participation of foreign delegates. The truth commissions must be implemented soon after a conflict as any delay can result in losing much needed evidence for the truth seeking attempts but in most of instances, the timely implementation of the truth commission does not take place properly. "The Rettig Commission" by Chile is accepted by many as a delayed such attempt.

One other major bottleneck faced by Truth Commissions is that they do not possess the power to implement the recommendations suggested following their investigations. The Truth Commission can only seek truth and report what has happened and also they can make recommendations on what needs to happen but they do not have the power to implement them. Due to this non-judicial manner of the truth commissions in most occasions, their findings go unattended. Apart from the above-mentioned issue, one other holdup is that truth commissions are unable to bring the human rights violators to justice and as a result, the commissions are getting a negative reputation. This scenario is affecting the Truth Commission and its necessity.

A central question of truth commissions is whether their search for truth is incompatible with bringing human rights violators to justice. Truth commissions do not have the power to punish, nor should they. In contrast to the courts, truth commissions do not have the same standards of proof or evidence. Where the rule of law is so eroded, courts may not be functioning or the sheer number of cases would overwhelm the system. Justice may be served in a few select cases, but the process of seeking truth will serve the greater number of people. Where the court system is functioning, it may be heavily tainted by the abusive regime and not trusted by the population to administer justice. This does not preclude, however, the use of their reports in trials and issuing warrants ("Truth Commissions | Beyond Intractability," n.d.).

2.3 Challengers on Reparation

There is a growing awareness that addressing past injustice is a crucial part of the process of healing and reconciliation. In order to move towards a peaceful future, governments must acknowledge and respond to the wrongs and injuries of the past, especially state-sponsored human rights violations include genocide, slavery, torture, arbitrary detention, rape, and systematic discrimination. Such violations cause serious damage to the physical and moral integrity of individuals and to the very existence of groups, communities, and peoples. Although these harms are often irreparable, international and national courts have required states to pay victims compensation for both material and psychological injury sustained as a direct result of their actions or policies ("Truth Commissions | Beyond Intractability," n.d.).

The space given for reparation committees to function is limited and as a result, they seemed to be stuck within. Therefore, the reparation process at a post conflict scenario is stalled. Chile can be taken as a perfect example. The Rettig Commission was mandated to document human rights abuses resulting in death or disappearance during the years of military rule, from September 11, 1973 to March 11, 1990. Significantly, torture and other abuses that did not result in death were outside the scope of the commission's mandate ("Truth Commission: Chile 90 | United States Institute of Peace," n.d.).

One major conflict within the reparation process is that one cannot properly evaluate the value of the traumatic experience of a victim neither it can be given a price. Customary international law suggests that the victims of human rights violations must receive a remedy for the injuries they have suffered. But what counts as an appropriate remedy? One way that governments can respond to human injustice claims is to issue sincere apologies. However, apologies may not do enough to satisfy victims' demands for justice and allay their fears that the same atrocities might be repeated ("Truth Commission: Chile 90 | United States Institute of Peace," n.d.). financial assistance is inadequate to address the psychological and social justice needs of the individuals involved. In addition to suffering physical injury, victims of human rights violations typically suffer psychological injury and emotional distress. Compensation programs that simply

pay out financial grants are not sufficient to help individuals overcome this psychological trauma. This is because the amount of distress, injustice, and anger that survivors typically struggle with is immeasurable. It is impossible to compensate for years of sexual abuse or for the loss of a child. Substantial material assistance cannot bring back the dead or fully ameliorate all of the pain that victims have suffered ("Truth Commission: Chile 90 | United States Institute of Peace," n.d.).

Even though transitional societies in the third world manage to estimate a value for the loss of a victim, there is a lack of resources for reparation. This is the major bottleneck for TJ process when implementing reparation in the third world. Many of the countries where human rights abuses occur are developing countries burdened with high levels of poverty and a variety of social structural problems. They may regard an expensive compensation program as far less important than the revitalization of the economy. And because these states have limited resources to compensate victims, these resources are often spent unequally. Not all victims receive just compensation (Maiese, 2003a).

In some instances victims refuse to obtain reparation as they feel like they named a price for their loss (which is priceless), or betray to their deceased loved ones for money. At a setup like this, the main intention of the reparation process will be destroyed and further the hatred which is expected to eliminate will escalate. Victims may hesitate to accept financial grants because they suspect that the government is trying to buy its way out of guilt by paying "blood money." Others may feel that if they accept reparations, they will be expected to forget about the past. For this reason, mothers of the disappeared group in Argentina, Madres de la Plaza de Mayo, refused compensation in absence of public recognition that their loved ones had been political opponents and not criminals (Maiese, 2003a).

2.4 Challengers on Accountability/Justice/No Impunity

Justice is often considered as above all social structures and it is one mechanism that everyone will be treated equally. At Transitional Justice process, justice play a major role and below given is local and international legal articles related to justice.

- In International Covenant on Civil and Political Rights:
Art 2 (3): Right to effective remedy
- In Sri Lanka's Constitution:
Art 12: Equal protection of the law

Taken in its broader sense, justice is action in accordance with the requirements of some law. justice is often thought of as something higher than a society's legal system. It is in those cases where an action seems to violate some universal rule of conduct that we are likely to call it "unjust."

In its narrower sense, justice is fairness. It is action that pays due regard to the proper interests, property, and safety of one's fellows. While justice in the broader sense is often thought of as transcendental, justice as fairness is more context-bound. (Maiese, 2003b). When considering Justice Part of the President Aylwin established Chile's TJ process A 1978 amnesty law, decreed by the military government to cover the period of September 1973 to March 1978, continues to be interpreted by the Supreme Court as precluding even the investigation into, and determination of responsibility for, human rights abuses during that time. Inquiry is thus barred into virtually all disappearances and the bulk of executions. Regarding abuses committed by military personnel after March 1978, the Supreme Court with great controversy awards jurisdiction to military courts as a matter of habit, and those courts in an equally routine fashion allow the investigations to lapse. Perpetrators of gross and multiple violations of human rights remain effectively above the law. Some, still on active military duty, retain positions of responsibility (Maiese, 2003b) ("Truth Commission: Chile 90 | United States Institute of Peace," 1990).

At a post conflict, stage the existing laws and regulations are not enough or rather not well equipped to establish justice. Except for few countries, the legal systems in most of the countries are not mature enough to address state-sponsored human rights violations include genocide, slavery, torture, arbitrary detention, rape, and systematic discrimination.

Since the conflicts are not that common and do not occur on regular basis, countries when structuring their legal systems do not consider the outcomes of conflicts neither they consider the mechanisms to establish justice following a conflict. Secondly the partial and impartial factors that affected the Truth commission, will affect the Justice process too. How a Justice process will function is highly dependent on who is appointed to the commission. A number of commissions set up by new presidents were in fact highly partial.

The best strategy to overcome this pessimistic outcome is to initiate foreign or hybrid courts (mixed composition and jurisdiction, encompassing both national and international aspects, usually operating within the jurisdiction where the crimes occurred). However, such initiative will be then labelled as a breach of country's sovereignty and that will be the biggest challenge when implementing justice process.

2.5 Challengers on Non-Recurrence

What is expect from the non-recurrence pillar is to break the conflict cycle. This can be done by identifying the root causes of violence. Non-recurrence is the final expectation of transitional justice. All the challenging factors that affected the Truth, Reparation and Justice pillars will prevent TJ from achieving its final stage, which is non-recurrence hence all the barriers preventing the other three pillars can be taken as challenges for the non-recurrence pillar as well. Successful measures against these challenges will ensure the success of

the non-recurrence pillar. One of the major factors that defy the successful implementation of the Non-Recurrence process is that influential individuals, such as warlords, commanders, or politicians perceive peacebuilding as a threat to their positions, and try to impede or influence work in this sector ("Peacebuilding Manual/Challenges in Peacebuilding - Wikibooks, open books for an open world," 2016).

Participation of all parties involved in a conflict situation is important for the TJ process since it is going to resolve confrontations and take measure to make sure that such conflict will not occur in the future. However, it is a challenging process as in most instances the victors of a conflict will impose regulations upon the losing side. Such victors justice scenario is not healthy to implement a Non-Recurrence model as justice will not be done for the so called losers or victims since they will not be stakeholders of the transitional justice process. This is one of the major challenges for non-recurrence process. ("Peacebuilding Manual/Challenges in Peacebuilding - Wikibooks, open books for an open world," 2016).

The lack of competent individuals/implementing partners with experience of peacebuilding and a general lack of qualified and reliable human resources is another major factor affecting the progress of Non-Recurrence model. Further, there is a lack of trained human resources in peacebuilding and conflict resolution, especially for conducting the training in rural communities ("Peacebuilding Manual/Challenges in Peacebuilding - Wikibooks, open books for an open world," 2016)

Not only in Chile, but in many countries, access to remote areas absorbs time and resources; and weather conditions prevent work in rural areas during winter. These constraints apply to the majority of Non-Recurrence and peace building programmes but sufficient donor fund support could help widen and improve their impact, such as for reliable transportation to remote areas ("Peacebuilding Manual/Challenges in Peacebuilding - Wikibooks, open books for an open world," 2016).

2.6 Problem Statement

Though many countries across the globe tried to implement Transitional Justice could not achieve its fullest potential due to various challenges and negative impacts towards the process. Even though the challenges and negative impacts occurred when implementing Transitional Justice in several countries seemed different from one another, there are similarities as well.

Attempts of opportunistic political forces to ignite the society to gain advantage, spreading of hatred among social groups by extremists' groups in the society can be seen as examples, which prevents Transitional Justice from being implemented properly. However, that is a light explanation done on the surface level of the actual problem.

The main purpose of this study is to conduct an extensive and a thorough search into these challenges or the negative impacts when implementing Transitional Justice. In addition, the study will look into finding a method to identify these negatives beforehand and implement Transitional Justice in a way that these pessimistic factors will not harm the process of Transitional Justice with main attention to Chile Transitional Justice process.

2.7 Research Objectives

2.7.1 Key Objective

To identify the challenges faced by Chile when implementing Transitional Justice.

2.7.2 Specific Objective

- 1) To determine whether negative affects towards Transitional Justice in Chile can be generalized.
- 2) To see whether the negatives affect towards Transitional Justice in Chile have similarities comparing to other countries.
- 3) To ascertain whether the negative impacts towards Transitional Justice in Chile have common features, regional-wise.

2.8 Significance of the Study

When comparing the experiences of different countries it is evident that it is always difficult to implement a Transitional Justice process in a country after a conflict situation despite it being so important. When implementing a Transitional Justice process what most countries do is that they take the experiences and lessons learned of other countries who have already implemented a Transitional Justice process, here the main focus is on the Transitional Justice implementing process but not about the difficulties or negative impacts towards Transitional Justice. If a proper study or attention is given towards these pessimistic impacts towards Transitional Justice, countries will get an opportunity to identify these negative phenomenon's and implement Transitional Justice more fruitfully. It is difficult to identify common factors to generalize the negative impacts towards Transitional Justice since studies conducted belongs to social sciences. However, a close study can pave the way to identify some similarities about these negative impacts towards Transitional Justice and the study will attempt to generalize this common symptoms.

2.9 Research Problem

What are the negative impacts that countries face when implementing Transitional Justice process?

2.10 Research methodology

2.10.1 Data Collection and Methods

A descriptive methodology will be used to conduct this study. Once the secondary data is gathered, those data will be studied and reinterpreted to determine the main purpose of the study.

Source for secondary data will be books and journals written on Transitional Justice (About the selected countries). Further, the study expects to gather data from the internet, various reports, news articles and expert interviews on Transitional Justice.

3. Conclusion

Transitional Justice over the years has evolved a great deal and have become an integral element in any liberal peace building operation across the human society. At present is has become an industry with teams of experts, consultants, standardized software packages or data management, and a set of assumptions regarding how to 'do memory' and why memory matters. With all these tools transitional justice will re-establish rule of law and will result in shaping the political institutions as well. Healthy political institutions will pave the way for sustainable healing of the victims, promoting reconciliation and extracting the truth about the past conflicts, which will guide a country to build a healthy civil society.

According to the study, it is clear that the transitional justice structure must be more flexible especially during a post conflict setup. The flexibility will make room for the transitional justice process to consider the mindsets, thinking patterns, attitudes, personal ideologies and political ideologies of the public when implementing a transitional justice module. Study also finds that in most countries such as Chile, the public view about the transitional justice is pessimistic as majority feels that transitional justice is another tool used by external forces to tamper sovereignty. Further, they feel it is a betrayal for the victory achieved following a conflict hence majority do not see it as a healing mechanism but a method to tamper the old wounds.

Therefore, it is clear that in post conflict societies transitional justice has a pessimistic reputation. But the irony is the actual expectation of transitional justice is completely opposite of what majority feels at present. Hence, a need has risen to design a proper mechanism to educate public belongs to post conflict societies on the actual face and intentions of transitional justice.

What needs to be done is the implementation of a large-scale propaganda explaining the actual expectations of the transitional justice process prior to its implementation. So that it will create a sound, positive atmosphere for a transitional justice process to grow. In addition, it is required to step outside the box, go beyond the traditional four pillars of the transitional justice, and create a modified version with the capability of winning the hearts of the people. Methods such as counseling, story-telling, public exhibitions, theatre, and the media are all important tools that can be used to address and heal the victims. Likewise, community-based self-help groups and advice centers can contribute heavily to cure victims of conflicts and the family members of victims of their loss.

The most important and the crucial part, which will affect the success of a transitional justice process, is creating reliable

human resources who are qualified individuals or implementing partners with experience of peacebuilding and conflict resolution especially when attending to implement programs in rural communities.

Transitional Justice is a process, which will help to identify solutions following conflicts occurred between humans by humans and therefore, possession of well-equipped human resources to work with post conflict society is an integral part for the success of transitional justice. Also designing an alternative approach and a mechanism with flexibility to address the post conflict societies will contribute largely to overcome the present challenges faced by Transitional Justice.

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