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A need for a Truth and Reconciliation Commission for Sri Lanka

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An introduction

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When Bishop Desmond Tutu proposed establishing a "Truth and Reconciliation Commission" (TRC) for South Africa many thought it was a "Pie in the sky" idea with a lot of air but no substance. Little did the world realize that according to recorded history, the first such commission was in 403 B.C. That was when the Athenian Civil war was brought to an end with an amnesty for those who were responsible for what the Greek historians have labeled as the "Tyranny of the Thirty".

The South African TRC was a compromise between two equally unacceptable extremes. At the one extreme was the holding of trials along the pattern set by the Nuremberg and Tokyo Military Tribunals. That would have wrenched the South African social fabric apart. The process that has now led to a participatory form of democracy in which the South African Conservative Party at one extreme and the South African Communist Party at the other extreme with the ANC and the Democratic Party straddling the middle, with all ethnic groups participating in the governance of the country, may never have been possible.

At the other end was the option of considering the finality or closure to all that had happened in the past as passed, and to begin a new socio-political chapter moving the nation forward. But that would have denied the people of South Africa from recording, in the collective national conscience, a period of their history which provided the political anvil upon which the post – apartheid society was being fashioned. Additionally, the sufferings of those who died under the apartheid system since the days of Prime Minister Strydom and until de Klerk, would have become mere events etched on sand to be blown away by a "Harmatan Wind". Besides, the need to bring all sections of the South African polity

– the whites, Indians, the Bushmen and the Blacks – together into a single and expanding social fabric with varying colours, might have been lost. Unless and until the truth had been told, however unpalatable it might be, is accomplished in the open and forgiveness sought, there could never be any reconciliation.

As a general rule applicable to all societies emerging out of a period of social and political turmoil, there may be many benchmarks that the collective memory of a nation cannot easily assimilate, explain and understand. The Athenians went through that in 403 B.C. and the South African nation experienced that at the end of the apartheid period. There are 14 other nations that have emerged out of varying periods of social unrest that have selected the path of confronting the truth, seeking forgiveness and reconciling with the past and with those who had been responsible for the perpetration of those events for which forgiveness had become necessary. These nations provide similar patterns of unrest: Argentina, Uganda, Chile, Chad, El Salvador, Haiti, Guatemala, Nigeria, Sierra Leone, Ghana, Timor Leste, Peru, Morocco, Liberia.

The Post-Conflict Period

In all conflicts there is always a period that could be marked as a period of “ post conflict”. Even after the 100 years war there was a period of “post conflict” where the damage inflicted upon France and England was rebuilt. To deny the existence of such a period in the history of a nation emerging out of a period of conflict is to deny the obvious.

“Truth and Reconciliation” is not to be considered as a packaged product which you order as you would a Nestle’s or Cadbury’s product in a bazaar. It is a concept that could be packaged under several labels. In Argentina it appears on the national shelf packaged as the “National Commission on the Disappeared”. In Uganda it appears as the Commission of Inquiry into Violations of Human Rights. In Guatemala the concept is labeled as the Historical Clarification Commission. In Morocco it is referred to as the Equity Reconciliation Commission. It is only in El Salvador, Haiti, South Africa, Sierra Leone, Peru and Liberia that the Commission is referred to as the “Truth and Reconciliation Commission”. In Timor Leste the Commission has a more factual name. There it is referred to as Commission for the Reception of the Truth, And Reconciliation. The concept might appear under

many different names but it remains underpinned by a need to discover and document the truth and thereafter seek reconciliation.

The idea of Truth and Reconciliation which forms the foundation of the proposed Commission has been rejected unthinkingly by some as a foreign idea and as an idea which is an importation from an alien culture. The current xenophobic trend among some elements in the country is an aberration in an island nation so hospitable to foreign visitors and receptive to external influences while maintaining the robustness and richness of its own distinctive indigenous culture. It is also difficult to understand the myopia of opposing all foreign concepts when Sri Lanka has sizable adherents of the four great religions of the world – Buddhism, Christianity, Hinduism and Islam – where both, the discovery of Truth and the acts of Reconciliation, are accorded the highest respect, reverence and acceptance. Besides, as mentioned earlier, the roots of this as a post-conflict healing process extend as far back as 403 B.C.

Important pre-conditions

There are a number of indices which makes TRC s effective. Of these the one that is of the greatest importance is that there must be a collective interest among all persons from all segments of a society to demand justice. This interest must not be particularistic. It must not emerge only from those who have been victims of the social unrest. There must be a consensus of the whole of the society that at the end of the day; justice must be rendered to the nation as a whole. There must also be a realization that both collective and individual wrongs had been perpetrated upon the societies that constitutes the nation. A wrong committed against a person or against a collection of persons is tantamount to a wrong against an entire nation. The conditions that had adversely affected the society must be such that there had arisen a collective social consensus asking for justice. Unless there is such a consensus a TRC would not be an effective instrument for investigating the causes that had led to the traumatization of an entire society.

In the objects pursued by a TRC the problem often arises as to whether in fact a Truth Commission discovers the truth, demonstrates it or constructs it objectively from desiderata obtained from its enquiries. The Peruvian Truth Commission and some others have taken the position that its

responsibilities are simply to investigate and restate objective, measurable, quantifiable facts that had occurred within a particular time frame at a given location. If the facts are not so determinable then the TRC would conclude that there is nothing that the commission could do. That kind of approach is perhaps unsuitable for situations that are as complex as in Sri Lanka or were in South Africa. Investigative approach there must be, but underpinned by objectivity. Evidence of facts in the Sri Lanka conflict as it has been in South Africa, being largely circumstantial, a TRC must principally approach its work both analytically and deductively. The engagement undertaken is to participate in a scientific exercise which focuses on " the observation of facts and the drawing of deductions from them" .

The purpose of a Truth Commission is not to investigate the vicissitudes unleashed by nature but by humans against other humans. These are not perpetrated and conditioned by planetary movements not within the control of humans. They are perpetrated by humans against other humans, premeditated, preplanned and specifically targeted with a ferocity that would maximize damage and destruction. The destruction envisaged is without consideration of the ambit of destruction and the numbers of potentially innocent humans that may be destroyed. These decisions made, to cause the maximum destruction to property, maim and kill other humans are taken by human beings who are capable of recognizing, if they thought at all, the ethical elements involved in the equation which they have established to cause death and destruction. There is therefore a moral problem which the Truth Commission must consider which might hold the key to reconciliation. When pursuing the moral or ethical element the enquiry may very well lead the Commission into uncharted waters to seek answers to a larger question of whether there is a moral or ethical justification, if justifying is ever possible, for the damage and destruction done. Such damage is done not only to the material substrate of a nation, but also to its ethical or moral fabric. The Truth Commission may be called upon in Sri Lanka, as it was in South Africa, to show a pathway for reconstituting the moral or ethical fabric of the nation.

A problem that has bedeviled the findings of Truth Commissions is the determination of the standard of proof against which facts may be established. The degree to which the facts established by the Commission are considered correct would provide the legitimacy to the deductions and conclusions

made by the Commission. In the juridical sciences there are two tests recognized against which the truth of a fact may be established. One is "beyond reasonable doubt" and the other is "a balance of probabilities". Truth Commissions the world over have swung between these two extremes and finally settled on accepting facts which are so 'compelling that no prudent man would decline to consider them as true'. The test is an objective test and against that test much of the Truth could be discovered in Sri Lanka, as it did in South Africa.

In the work of a Truth Commission an intimate relationship is established between truth and justice. The victims' justice is found in having the truth of the wrongs which were once alleged to have been committed, being now established as facts. As a part of the Hegelian theory of justice it has been said that even a wrongdoer has a right to justice. The justice for a wrongdoer is to suffer just punishment through which the wrongdoer may redeem himself. Such punishment may arise in different forms but in whatever form it might appear, it should be a punishment not fitting the wrong done but one that enhances reconciliation. It is in this way that a Truth Commission paves the way to an ultimate reconciliation.

Truth and Reconciliation Commissions are not Criminal Tribunals. They do not administer the criminal law of the land. However they engage in a finding of "guilt" and of "innocence". Guilt is based largely on debasing human values. Human values are debased by engaging in conduct which is contrary to the common values of mankind. The commission's work does not involve in establishing a winner or a loser. Nor does it establish a regime of penalties, which denies and deprives life, liberty or property of the wrongdoer. The findings of a Truth Commission finds the reasons for the conflict and may lay down parameters transgressing of which caused the conflict.

A Need for a T.R.C.

Having laid down these several benchmarks of a, and for a, TRC it is necessary to evaluate the need for a TRC for Sri Lanka. Almost 60 years after Sri Lanka regained her political independence from 450 years of Western colonial rule; we have still to weld ourselves into a united nation. The Constitutions of the past and the governance of successive administrations have been unable to satisfy the grievances of ethnic minorities - quite apart from the

economically under-privileged - to create a peaceful and stable nation. The debate goes on within the country as to whether we are primarily a Sinhala Buddhist nation in which other ethnic and religious minorities are tolerated, or whether we are a genuinely pluralist democracy with a multi-ethnic and multi-religious character with a collective history and culture we can all be proud of. Many other countries are multi-ethnic and multi-religious as a result of a history of international conflict, normal migration flows and enforced transfers of population. That debate - exclusivity versus inclusivity - is at the heart of our national identity crisis and until we resolve that in a satisfactory manner we are not going to treat each other as fellow citizens with the equality, dignity and respect we all deserve irrespective of our ethnic, language, religious and other differences. And yet we have achieved the enormous advantage of identifying ourselves as a democratic country where the institution of elections has been firmly established throughout our postcolonial history. That is a rare achievement in the developing world where coups, military dictatorships and other forms of undemocratic regimes have been all too common. The other institutions of a democracy such as an independent judiciary, freedom of the press, justiciability of human rights and a transparent and accountable system of governance may not be as robustly rooted as all of us would like but they remain as commonly accepted ideals enshrined in our constitution. An all-party consensus may be said to exist on these democratic values excluding the LTTE. That is a start. It is a modern achievement based on history and tradition enriched by the four religions in our country and consistent with the evolution of political science through the centuries.

Despite that solid base we have still not been able to resolve the catastrophic conflict between the LTTE pursuing its secessionist aims through terrorism, and successive elected Governments defending the unity, territorial integrity and sovereignty of the country. The political violence connected with the Sri Lanka Tamil minority's efforts to obtain redress for their grievances dates back over four decades. The present level of intensity causing an estimated 65000 deaths and immeasurable destruction may be traced to the mob riots of 1983 and its aftermath. While the conflict rages on with no signs of a ceasefire being implemented or peace talks resuming, a more serious failure is the inability to arrive at a consensus even among the parties in the democratic mainstream on a new Constitution which will satisfy the aspirations of all ethnic and religious

groups in our country. That failure is connected to the identity crisis of our country. The debate about whether we should have any form of devolution of power or power sharing in some variant form of the unitary or federal models is thus viscerally linked to how we see ourselves as a nation. It explains why some groups and parties deny the existence of an ethnic problem and only see a terrorist problem to be solved through exclusively military means


In these exceptional circumstances we must rethink the normal and logical establishment of a TRC after a conflict is resolved. During the post –Colonial Period. What is the cart following the horse may not be so in Sri Lanka where inter-ethnic relations are fraught with so much tension, misunderstanding, sense of historical wrongs and a desire for revenge. Perhaps, for Sri Lanka, a TRC could be a part and parcel of the conflict resolution itself rather than a post conflict mechanism to stabilize a negotiated solution. A precedent has already been set with the commission to investigate the 1983 riots and the compensation paid to those who were its victims. A TRC to investigate the complaints of victims of injustice, murder, abduction, discrimination and other crimes and violations of human rights committed as a consequence of ethnic rivalry could help to exorcise the problem of racism in our society. All ethnic groups could apply to give evidence before the TRC whether Tamils affected by Government, military or administrative actions; Sinhalese affected by the LTTE's terrorism or Tamil nepotism; or Muslims discriminated or hurt by LTTE acts or Sinhala majority deeds and indeed any other perceived acts of injustice based on discrimination. Cases that have been the subject of judicial process already must be excluded but can be cited. New cases and general representations by groups or individuals must be permitted.

A TRC at this stage of our history could function as a catharsis enabling us to enter the modern age to confront the development challenges ahead. It will be a national laundering of our dirty linen with all groups confronting the common guilt and shame we carry. Inevitably past history will be dredged for justifying claims and alleging grievances. To be credible and acceptable to all the TRC should ideally comprise persons with judicial experience and be drawn from each of the ethnic groups in the country together with persons from countries with ethnic or religious problems similar to ours. Thus we would envisage a small Commission of not more than 10 (ten) men and women that would have widely respected non-political representatives of all ethnic

and religious groups in the country as well as representatives of countries like South Africa, India, Malaysia or Singapore or Northern Ireland. The powers of the Commission will have to be drafted carefully under the Presidential Commission Act drawing upon the experience of other TRCs throughout the world. The Commission will have to hold sittings in all parts of the country including, if necessary, in districts controlled by the LTTE. All parties should feel free to make representations and give evidence before the Commission. The result should not be a report upholding group rights but objectively seeking truth and reconciliation within the unalterable parameters of the territorial integrity, the unity and democratic character of Sri Lanka.

It is most important that the appointment of the Commission should not interfere or delay the process of either peace negotiations or the search for a constitutional package to satisfy the aspirations of all groups. It should be concurrent process intended to facilitate the other parallel processes. If it is concluded ahead of the other processes it will facilitate their progress and success. If it concludes after the other processes it will help consolidate their implementation.

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