

How should post-conflict societies balance their demand for truth and justice?

Written by Sweta Madhuri Kannan

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SWETA MADHURI KANNAN, AUG 27 2011

Since the end of the Cold War, circa 85% of the ensuing conflicts have been intrastate in nature[1]. Characteristic of these intrastate wars is their intractable nature and the multiplicity of actors that are involved, both in inciting the conflict and in the actual violence. Compared to interstate wars, this multiplicity has had an impact on the determination of accountability and in some cases, this complexity has been exploited with a sense of impunity. The increased demand for truth and justice, two highly emotive terms in such post-conflict situations has paralleled the establishment of an international law and human rights regime. Commissions that deal with issues of truth and justice have become the norm: the question of how to balance these two, however, remains an issue of much debate in academia. In practice, post-conflict societies have come up with different models of how to deal with these issues; the models pertain to the nature of the conflict and the manner in which it was terminated, the distribution of power between the military, other armed factions or conflict participants, civil society and the (new) government. Another deciding factor among many others is the role that the international community plays, both in the conflict and its conclusion.

This essay will discuss the questions of how to define truth and justice in societies that have experienced intrastate war. It will further examine how these demands are currently dealt with by referring to contemporary examples; it will discuss the benefits and the flaws of existing institutions, such as Truth and Reconciliation Commissions (TRCs) and war crimes trials. The essay will conclude with an outlook on alternative mechanisms. By taking the example of the Rwandan Gacaca courts, this essay argues that similar forms of local truth-telling commissions might be an effective tool to address the weaknesses that have been identified in other mechanisms (i.e. TRCs). Although the terms 'victim' and 'perpetrator' are going to be used in this essay, the author is of the opinion that these are particularly unhelpful terms in the context of post-conflict societies. They imply set patterns of behaviour, even though the line between 'victims' and 'perpetrators' is incredibly fine.

To begin with, the essay will shortly describe post-conflict situations and explain the demand for truth and justice in such settings. It will go on to define truth and justice; trials and TRCs will be touched upon in the context of defining restorative justice before presenting alternatives.

Post-conflict societies

As mentioned earlier, societies that have been exposed to intrastate conflict are marked by the existence of multiple factions and divisive lines in society. Due to the complexity and abundance of factions involved in the conflict, it is particularly difficult to distinguish between 'victims' and 'perpetrators' in these situations. Often, a sense of victimhood is juxtaposed with vague depictions of the 'Other': the perpetrator[2]. Accordingly, numerous such perceptions exist and it is crucial to overcome these negative attitudes. As opposed to interstate wars, the conclusion of intrastate wars forces (former) combatants, enemies and innocent onlookers to resume their lives within shared national boundaries.

The process of transformation from a situation of ongoing conflict to the consolidation of a (new) government is often a slow and difficult process. It is marked by several phases of peace-making and reconciliation that are vulnerable to

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subversion. In the aftermath of conflict, the vagueness of contested concepts such as 'truth' and 'justice' are amplified by the multiple claims to them made by various sections of society. Calls for peace, justice and truth come predominantly from sections of society that see themselves as wrongly caught between the cross-fire of the conflicting parties. The demand for justice and truth often emerges from a distinct sense of victimhood[3]. Individuals or groups that are personally affected by the conflict by losing a family member to the violence, for example, tend to raise these concerns in public.

Depending on the individual using these terms and their personal history, 'truth' and 'justice' come to symbolize very different things. A post-conflict society thus faces multiple challenges in terms of responding to calls for truth and justice, starting with the issue of deciding whether both could be handled simultaneously, or whether these processes would have to be sequenced. Societies in which the conflict was ended by a negotiated compromise, such as Mozambique, have evidently taken a different stance towards truth and justice than societies faced with a decisive military victory, such as Iraq. Depending on how the conflict was concluded, the parties to the conflict, the national distribution of power and relations to the international community, and many more aspects the reconciliation process can be, as in Mozambique[4], a bottom-up process, or as in former Yugoslavia, a top-down process[5]. These aspects indicate the complexity of initiating a peace (not to mention a reconciliation-) process. The following section will examine definitions of truth and justice, in an effort to lay the ground for discussions of how (and whether) to manage 'truth' and 'justice'.

Defining truth

Academics writing on reconciliation agree that truth and justice are both vital components. Lederach adds mercy to this equation, stating that these three elements need to be balanced to ensure sustained peace[6]. Of these, truth has proved to be the most elusive, although the question of what defines truth has been asked for centuries. Claiming access to the 'truth' – or even claiming truth itself – can be a highly political act in post-conflict societies. The meaning that is accredited to this term is as varied as those laying claim to it. In some cases, 'truth' is presented as legal truth, historical or even religious truth. A clear distinction has to be made between what is held to be true by individuals and similarities in narratives that emerge from the community, i.e. communal – or societal – truth. Individual notions of truth are naturally influenced by conflict, perceived victimhood and personal losses that have been made. Discourses of the 'Other' contribute heavily to the establishment of crass binaries between what is perceived to be good (and permissible) and bad (therefore non-permissible). Many of these ideas remain strong in post-conflict societies, thus influencing individual, as well as collective definitions of truth and un-truth[7]. Credibility of those claiming to speak truth is consequently categorized along these binaries. That is, truth spoken by members of the 'in-group' is truth, by those of the 'out-group' is seen as untruthful and manipulative. In such a scenario, the least political forms of truth are historical, factual accounts that emerge from society. The philosophical concept of truth that relates to this notion is called the consensus theory. Advocates such as Plato regard knowledge that is agreed upon by the majority of society as truth[8].

In practice, this has led to the establishment of temporary institutions, such as official inquiries or Truth and Reconciliation Committees (TRCs). Both are temporary mechanisms used to find and accumulate fragments of 'truth'. Whereas inquiries are restricted to extracting evidence from society and making recommendations based upon this knowledge, TRCs seek to tackle the reconciliation of society by encouraging both victims and perpetrators to speak out; simultaneously, they are utilized as tools to initiate a reconciliation process in society. By granting victims and perpetrators the 'space' to narrate their experience of violence and abuse, the TRC attempts to recreate the conflict situation historically, by putting matching elements of evidence together to form a more comprehensive picture[9]. It is crucial, however, to create an image that is broad enough to be inclusive and to provide the necessary shared framework for a shared past. At the same time, this process has to be specific enough to satisfy victims' demands for explanations of what happened, when it happened – and, most profoundly, why it happened[10]. In a post-conflict society in which the possibility of a return to violence is great, it is important to avoid alienating sections of society as best as possible, as this could easily translate into the re-arming of these factions. In that sense, TRCs are also used to deconstruct exclusivist and extremist discourses that play on perceptions of identity as preventive measures[11]. South Africa is held up as the most successful post-conflict society till date that set up a TRC in order to deal with past human rights violations and other crimes committed during Apartheid.

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Defining justice: retributive and restorative justice

Retributive or transitional justice

Retributive justice is a form of evidence-based justice that seeks to pursue and punish individuals that are understood to have breached either national or international law and legal conventions. Transitional justice '(...) shifts the primary focus of crime from offenses against a faceless state to a perception of crime as violations against human beings'[12] and thus refers to the need of persecuting human rights abuses, in order to clear the ground for the restitution or establishment of democracy. Trials held in this period of transition seek to demonstrate firstly, that the (new) regime is intent on deconstructing notions of impunity, and is willing to enforce the rule of law, societal codes of conduct for the greater benefit of society[13]. Secondly, by holding trials, the new government symbolically seeks to pursue justice on behalf of the victims, i.e. those personally affected by breaches of law. These actions could also be seen as a trust-building exercise, as by instating independent courts and initiating prosecutions immediately, the state demonstrates its capability and willingness to establish trustworthy, impartial governance at the service of its citizens. Failure to do so would most certainly invite international – and internal – pressure to impeach individuals that were involved in perpetrating atrocities. The establishment of international courts, such as the International Criminal Court thereby represent an alternative channel for prosecution, if national courts are seen to have failed to deal appropriately with the issue[14].

In the process of creating these norms however, law necessarily creates hierarchies of pain, as it has to differentiate between victims in order to find an appropriate punishment for the offender. These processes try to rationalize grief and personal loss – in a manner that might not be appropriate. Franke criticizes that these trials seek to rationalize the shame and pain that victims suffer, indicating that the '(...) stickiness of shame suffered by female rape victims whose sexual assault during wartime remains permanently materialized in and through pregnancy and birth'[15]. It is thus questionable, from the point of view of those who, for example, experienced or survived the disappearances and the torture during the 'Dirty War' in Argentina (1976-83) to which extent reparations ensuing from such court cases might be appropriate. Ethically speaking, as the example of the Madres de la Plaza de Mayo clearly illustrates, there is nothing that could make up for the pain of losing a loved one[16]. The Madres have been demonstrating for the past three decades to have their children, who were kidnapped and most likely tortured to death during the dictatorship, returned to them. Many reconciliation attempts have been initiated; the Madres, however, rejected these, stating that settling for anything less than their children would dishonour the memory of their children[17].

Restorative justice

In contrast to retributive justice, restorative justice seeks to implement a broader, more inclusive approach. It encourages the offender to take responsibility for the deed, while emboldening the victim to voice their needs. More broadly speaking, restorative justice aims at institutionalizing peaceful approaches to solving issues of truth and justice, such as finding non-violent mechanisms of how to deal with violations of human rights. TRCs represent one such mechanism; they often have a broad mandate that allows them to make recommendations for compensation or structural reform[18]. They therefore represent a potent tool for societies to deal with structural injustices that might have fuelled the conflict in the first place. The South African TRC, which is seen as the most successful to date, has nevertheless not been effective in compensating individuals for the crimes. The government used the guise of promoting societal compensation over individual ones to justify their inaction[19]. Further, the TRC testimonies are expected to initiate a process of national, as well as individual catharsis that is supposed to be reinforced by material compensations of the victims. However, showing no remorse for the crimes or maintaining innocence can be a highly incendiary act[20]. Some TRCs have the –disputed – ability to grant individual or blanket amnesties. Amnesties, from a victim's perspective seem to counteract other efforts towards bringing justice to the victims; perpetrators are seen as being almost rewarded for their deeds. Proponents of amnesties argue that these are necessary for the creation of a new social and political order based on human rights principles; the emphasis here lies on the creation of standards that are equal and inclusive. Amnesty can thus be understood as a reconciliatory mechanism that seeks to forgive and include offenders into the new social order.

One of the positive consequences of the TRC is the manner in which perceptions of 'victims' and 'perpetrators' as

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opposites are blurred. An example of such blurred lines in conflict could be seen in the German Reich's use of Latvians as forced labour. Employed as watchmen, some individuals 'excelled' in their positions: Jewish survivors have accounted to the brutality and inhumanity that was particular to individual Lithuanians[21]. TRCs inadvertently question the validity of categorizations, such as 'victim' and 'perpetrator', by emphasizing the need to look beyond these crass binaries'. By presenting conflict participants as multi-faceted individuals, TRCs can overcome these binaries. They implicitly question the utility of trials, as these internalize strong binaries and reproduce them by presenting the offender as a threat to society.

Alternatives: possible solutions

Some of the most striking aspects of the discourse dealing with truth and justice in a post-conflict setting are conceptual issues. The recurring question is how to balance the need for truth, justice, mercy and peace appropriately. Most conceptions take for granted, however, that these are four distinct elements that need to be sequenced. In 'The Meeting', Lederach points out that these four elements actively require one another to lead to sustainable peace[22]. To him, peace is both a condition and a process; it is necessary both to initiate and to accompany the other processes: without peace, the pursuit of both truth and justice are likely to falter. Truth without justice renders it impotent, whereas justice without truth can easily be seen as partial and tainted[23]. Of these four elements, mercy is probably the most contentious. It is still dismissed as an 'irrelevant religious concept in a political world'[24], even though Hannah Arendt rightly stated that '(...) Without being forgiven, released from the consequences of what we have done, our capacity to act would, as it were, be confined to one single deed from which we could never recover; we would remain the victims of its consequences forever'[25]. This statement demonstrates the important role that mercy and forgiveness play in a reconciliation process; forgiveness is an element needed in bridging internal rifts and divides in society. Spiritual leaders, such as Archbishop Desmond Tutu, have also played a significant part in advocating for forgiveness and supporting the reconciliation of the South African society. Although the impact of his leadership may not be tangible, both he and Mandela (as the secular leader) played a vital role in ensuring the prevention of further violence; to some, they personified society's pursuit of peace and justice[26]. Lamin argues that similarly inspirational leaders were sorely needed in the case of Sierra Leone and Liberia. He points out that Bishop Hunter attempted to assume a similar role in Sierra Leone, but failed for the lack of a strong secular counterpart[27].

Seen from a larger perspective, this raises the question of whether the involvement of religious institutions changes the dynamic of the reconciliation process. Contrary to beliefs such institutions would necessarily be supportive of reconciliation due to the morality inherent in most religions; religious institutions have played a rather ambiguous role. The Orthodox Church in post-Milosevic Serbia has been particularly controversial: rather than furthering the message of peace and reconciliation, it has continued to spread 'hate speech' and advance Milosevic's extremist agenda long after he was indicted by the War Crimes Tribunal in The Hague[28]. Of course, there are numerous instances in which religious communities supported the peace process, such as such as the Catholic Community of Sant' Egidio's substantial support in the Mozambican peace process. These examples serve to illustrate the differentiated role(s) that religious institutions play in the reconciliation process. It can therefore be problematic to expect a positive outcome just by including religious communities into the reconciliation process.

By the same token, religious institutions and other non-governmental institutions can be involved in local truth-seeking and truth-telling initiatives. Conceptually, this links into Lederach's notion of supporting simultaneous truth and justice processes. He suggests that reconciliation is most successful if these elements are combined[29]. Expanding on this concept one could argue, that these processes are bound to be most effective, if they engage every level of society. Truth and reconciliation commissions attempt to involve large parts of society, but their temporary nature preclude long-term, in-depth involvement of civil society. For example, the 'Recovery of Historical Memory' Project in Guatemala is an initiative supported by the Catholic Church that launched an independent inquiry, as the government's truth commission was understood to have inadequate authority[30]. Apart from such independent inquiries, there is a possibility of setting up local truth-telling commission that are modelled on the Rwandan Gacaca courts[31]. Tiemessen writes that Gacaca courts, translated as 'judgment on the grass'[32], are based on pre-colonial forms of communal dispute-resolution. The main focus lay on penalizing the violations of

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communal rules and finding peaceful ways of bringing the community back together. Based on such a system, local truth-seeking missions would be beneficial to post-conflict societies. The Gacaca courts were established for the main purpose of relieving the Rwandan government's burden of having to deal with innumerable cases of the *génocidaires* in a humane and just manner[33]. The personal nature of the Gacaca system makes it extremely conducive to supporting an agenda of re-humanizing the enemy. It encourages regarding the respective 'Other' as a member of one's community again; it also ensures the confrontation of perpetrators with victims. Due to the sheer impossibility of escaping each other in small communities, the Gacaca system invariably leads to the perpetrator's confrontation with the repercussions of his/her deed, i.e. with the impact of the crime on the victim's life. This might lead to a more profound change of perceptions and attitudes of both individuals – and by extension, the change of attitudes in society.

The Gacaca system also represents a much more cost-efficient way of dealing with personal and societal traumas, than large-scale TRCs – their grassroots nature make them almost free of cost (apart from time, effort and maybe some remuneration that needs to be invested)[34]. Such local initiatives also have the advantage of affecting a level of sustained and continuous change. Official TRCs tend to have a temporary mandate and are thus restricted in their ability of continuously influencing and supporting society.

In terms of justice, these community-based judgements could be seen as a truly appropriate form of restorative justice. It is appropriate, because the judges are intimately familiar with the case and the repercussions that the offense has had on the victim; the judgment therefore can be more suited to the victim's needs, while also taking the nature of the offense and the offender into account. Appearing before such an intimate council can – in some cases – equal a form of public shaming[35]. The appearance itself then becomes an element of a deeper transformative process towards the healing of the community, the victim and the offender. Arguing that such mechanisms prevent societies from moving forward by remaining attached to the past is folly. Remembering the hurt, the pain, the violence is necessary, to ensure that they do not happen again. This acknowledgement of guilt makes it easier to move on. Spain and the total amnesia that was laid on the Franco period is, of course a counterexample. However, one would have to distinguish between the repression of memory (Spain) with the engagement with memory. In human psychology, it is well known, that repression leads to some form of eruption in due time[36]. A similar process is to be expected in terms of national memory: particularly, if this memory is officially manipulated. It can therefore be vital to establish one authoritative and factual account of the events, for the sake of all those involved. Naturally, establishing such a system has its repercussions. These informal commissions could be seen as lacking legitimacy, they could be regarded as too 'toothless' to be truly effective. Furthermore, this system can be incredibly trying for those incapable of – or unwilling to – engage with the past. It is also based on a notion of communal life as rural life; one could therefore argue that this system would be appropriate only to such areas. The answer to these arguments would be that small-scale, communal truth-telling sessions could be seen as a *concept* and therefore universally applicable, with adjustments. These commissions can only involve individuals who are willing to engage; they must have the insight to not be imposing.

Conclusion

The reconciliation of war-torn, divided societies is a long and difficult process. It is incorrect to expect individuals to be healed within one, two or three years after the conflict as for some this might take a lifetime. The most important factor to bear in mind is the distinct differences between healing processes that take place at the societal level and those that concern individuals. The dynamics can be very different; often it is necessary to establish inquiries and Truth Commissions to initiate cathartic experiences at the societal level – this might not necessarily be the best way of dealing with the pain for individuals. Rebuilding state infrastructure generally requires less sensitivity than trying to do the same with traumatized individuals. One needs to be mindful not to over-generalize measures to deal with issues of truth and justice in post-conflict societies, though, as none of the measures discussed in the essay represent a panacea. Instead it is crucial to take aspects, such as the particular circumstances of the nature of the conflict, its termination and the parties involved, into account: these shape society's demands for truth, justice or both. One of the most important tasks that society has to fulfil is to overcome the hate and the de-sensitization to violence that is prevalent. It is, however, not enough to provide institutions to deal with issues of truth and justice individually; instead, these have to be recognized as the continuation of conflict resolution by other means. This

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acknowledgment would certainly grant these concepts a higher standing within the field of conflict resolution. Finally, it might ease the path for accepting reconciliatory processes not as temporary but as long-term processes as the most soothing medicine for national and individual traumas is time.

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Written by: Sweta Madhuri Kannan
Written at: Aberystwyth University
Written for: Prof Richard Jackson
Date written: May 2010