

FACING THE DEMONS OF THE PAST: TRANSITIONAL JUSTICE IN GUJARAT

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Scholars of transitional justice have recently suggested that our understanding of transitions need not be restricted to societies moving from authoritarian regimes to democracy. In fact, “non-paradigm transitions” occur in purportedly democratic states as well, in the aftermath of large-scale and State-sanctioned violations of human rights. This article focuses on one such non-paradigm transition occurring in the state of Gujarat in India post the 2002 communal carnage. The author proposes that in addition to retributive responses to the human rights violations, a Truth and Reconciliation Commission should be seriously considered as a means of effecting a real transition to peace in Gujarat.

Introduction

The end of World-War II heralded a new era for the growth of human rights concerns and discourses. The international eye, obsessed in the past with wars and conflicts between states, came to acknowledge the seriousness of more “domestic” conflicts along ethnic, racial or religious lines, involving massive violations of human rights, as matters of international concern.¹ With this evolved “transitional justice”—an ever-expanding field of academic and policy interest that studies a range of approaches that societies undertake to reckon with legacies of widespread or systematic human rights abuse, as they move from a period of violent conflict or oppression towards peace and democracy.²

A ‘transition’ conveys the idea of a journey, and by extension, the idea that there is a starting point and a final destination. Antinomies are thus central to the concept of a transition. “Transitional justice” invariably deals with “paradigm transitions”—transitions from authoritarian rule to democratic regimes, for instance, Latin American states shifting from military to civil rule, the change from apartheid to majority rule in South Africa, and Eastern and Central European states in post-communist flux.³ These, and other similarly

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¹ For example, the conflicts and consequent human rights violations in Sri Lanka, Iraq, South Africa, Rwanda, Sierra Leone and several other situations of conflict that do not involve states *inter se* are all instances of the internationalization of domestic disputes.

² See generally, The International Centre for Transitional Justice, *What is Transitional Justice*, <http://www.ictj.org/en/tj/>.

³ Neil J. Kritz, *Coming to Terms with Atrocities: Review of the Accountability Mechanisms for Mass Violation of Human Rights*, 59 LAW & CONTEMP. PROBS. 127 (1996) [hereinafter Kritz].

placed societies, have evolved several mechanisms including international tribunals, truth commissions, and traditional justice delivery systems, to deal with the violence that characterized previous authoritarian regimes. Scholars have recently argued for a more nuanced understanding of the transitional process by conceptually separating war/peace transitions from illiberal polity/democracy transitions.⁴ In other words, they ask for an unbundling of the dual antinomies that are characteristic of “paradigm transitions”. This essentially calls for a broadening of the discourse of transitional justice to include transitions from violent conflict (ethnic, racial or religious) to peace within broadly “democratic” states as well.

This article focuses on one such non-paradigm transition in the state of Gujarat in India, one of the largest democracies in the world. In 2002, Gujarat witnessed large scale communal violence directed against the Muslim minority in which the state itself was complicit.⁵ The carnage was portrayed as a “spontaneous reaction” to the burning of a train at Godhra in which 59 men, women and children perished, most of them Hindu *kar sevaks*.⁶ In fact, the program was a planned and systematic attack, in which 2000 people were killed in less than 72 hours.⁷ Several independent organizations have definitively stated that the scale and nature of the state-facilitated attacks on the minority community in Gujarat suffice to legally label the carnage as

⁴ Colm Campbell et al, *The Paradox of Transition in Conflicted Democracies*, 27(2) HUM. RTS. Q. 174 (2005) [hereinafter Campbell].

⁵ PEOPLE’S UNION FOR CIVIL LIBERTIES, AN INTERIM REPORT TO THE NATIONAL HUMAN RIGHTS COMMISSION (2002), available at <http://www.pucl.org/Topics/Religion-communalism/2002/gujarat-nhrc-submission.htm> [hereinafter PUCL REPORT]

⁶ The U.C. Bannerjee Committee was appointed by the Central Government (Railway Ministry) in September 2004 to probe the Godhra train carnage. The Committee in its report found that the fire in the railway coach was “accidental, possibly caused by short circuiting.” The Gujarat High Court in October 2006 held the constitution of the U. C. Bannerjee Committee by the Railway Ministry to probe the Godhra train carnage illegal and unconstitutional. It restrained the Centre from tabling the committee report in Parliament or taking any further action on it. The Shah-Nanavati Commission of Inquiry, constituted in 2002 to inquire into the Godhra train carnage and the pogrom that followed subsequently, is yet to submit its final report. However, several gaps in the “conspiracy theory” of the Gujarat government have been pointed out to the Commission since there is no real evidence that there was any sort of Muslim conspiracy to set the train on fire. See “Godhra Incident: Chinks in Conspiracy Theory”, <http://www.rediff.com/news/2006/dec/05godhra.htm>.

⁷ NATIONAL HUMAN RIGHTS COMMISSION, ANNUAL REPORT OF THE NAT’L HUM. RTS. COMM’N: (2002-2003) [hereinafter NHRC REPORT]. The carnage also resulted in 1,13,000 Muslims living in relief camps with thousands more displaced in various other ways. The economic loss inflicted on the Muslim community amounted to a staggering 38,000 million rupees. 250 mosques and ‘*dargahs*’ were demolished, signifying that the attack was aimed at destroying the community as a whole.

“genocide”.⁸ Thus, Gujarat has been selected as an appropriate case-study of transitions from incidents of large-scale violence to peace within purportedly democratic states. The author enquires into whether the transitional mechanisms designed by societies like South Africa which underwent “paradigm transitions” lend themselves to useful application in Gujarat.

The author starts by pointing out the limitations of an exclusively retribution-based approach to transitions in Section I. Reconciliation, a broader concept encompassing both truth and justice, has been presented as an alternate, wider approach in Section II. It has first been understood in the Hegelian sense and then its importance to transitions has been briefly outlined. Section III focuses on a popular reconciliatory mechanism, the Truth and Reconciliation Commission, by adopting the South African model as a workable example. Section IV makes a shift from the discussion of paradigm transitions to an examination of “conflicted democracies” and the unique concerns for transitions therein. The author argues that there is a pressing need to demand institutional transformation instead of being content with slow and incremental reform that is normal in most democracies. In particular, the author suggests that it would be worthwhile to consider the ‘Truth and Reconciliation Commission’ as a mechanism to bring about this institutional transformation in “conflicted democracies” as well. Section V looks at Gujarat against the theoretical background established in the previous sections and concludes that it is, indeed, a conflicted democracy. The utility of considering the possibility of creating a Truth and Reconciliation Commission in Gujarat follows as a necessary corollary.

I. Isn’t Retribution Enough?

The positivist orientations of international law lend criminal prosecutions a place of central importance in any discussion on achieving justice in the aftermath of genocidal violence.⁹ Convicting perpetrators for the abuse of human rights is often viewed as the only real means of “doing justice”;

⁸ INTERNATIONAL INITIATIVE FOR JUSTICE IN GUJARAT, THREATENED EXISTENCE - A FEMINIST ANALYSIS OF THE GENOCIDE IN GUJARAT (2003). [hereinafter IJJ REPORT]. The People’s Union for Civil Liberties has labeled the carnage as genocide. *See also* PUCL REPORT, *supra* note 5.

The events comprising the Gujarat carnage of 2002 also satisfy the definition of genocide in Article 4, Statute of the ICTR. *See also* the judgment of the International Criminal Tribunal for former Yugoslavia in Prosecutor v. Jelešić, IT-95-10 ICTY, ¶ 83. The Trial Chamber noted that it is accepted that genocide may be perpetrated in a limited geographic zone. ■

⁹ Kritz, *supra* note 3.

allocating punishment to those who justly deserve it. Furthermore, by making examples of the major perpetrators through the drama of courtroom trials, criminal prosecutions are said to be the most effective deterrent to similar abuses in the future.¹⁰ While we must acknowledge that criminal prosecutions have an important role to play in achieving justice and maintaining social order, it is submitted that it is necessary for us to re-think the monolithic approach towards the achievement of peace and justice that they seem to suggest. In other words, even if we accept that criminal prosecutions are an important component of justice-delivery in the aftermath of genocidal violence, is retribution all there is to justice? And even if criminal convictions serve as a deterrent to the commission of future atrocities, are they a permanent and lasting guarantee against similar violent confrontations?

i. An expanded meaning of “justice”

Perhaps there can be no real answer to the first question of whether retribution is exhaustive of justice, since the very notion of “justice” is an elusive one, incapable of an *a priori*, objective determination. Still, the need to achieve “justice”, as perceived by various wronged parties in a situation of conflict, is real if one is serious about the commitment to peace. Let it therefore suffice to point out that amongst the myriad perceptions of justice, ‘retributive justice’ is but one such perception, albeit one worthy of attention. Professor Charles Villa-Vicencio identified at least five different forms that justice could take including deterrent justice, compensatory justice, rehabilitative justice and justice as the affirmation of human dignity.¹¹ To insist on retribution as the only

¹⁰ The mandates of the international tribunals set up in Yugoslavia or Rwanda are illuminative in this regard. Article 1 of the Statute of the International Criminal Tribunal for the former Yugoslavia, adopted on May 25th, 2003, states that the said Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia including genocide. Similarly, the Statute of the International Criminal Tribunal for Rwanda, in its preamble, expresses grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda and considers the ICTR as a means of putting an end to such crimes. It further reiterates the conviction that “the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace..” and the belief that “the establishment of an international tribunal for the prosecution of persons responsible for genocide and the other above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed”. Article 1, Statute of the International Criminal Tribunal for the former Yugoslavia,

¹¹ Charles Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted* (manuscript) at 12 cited from Kader Asmal, *Truth, Reconciliation and Justice: The South African Experience in Perspective* 63(1) MOD. L. REV. 1 (2000) [hereinafter Asmal].

means of effecting justice is, therefore, unimaginative at best and profoundly inaccurate at worst. In South Africa, for instance, the injustice of apartheid had social, economic and political dimensions. Criminal trials could not address the entire edifice of apartheid. Justice required, *inter alia*, the correction of a skewed socio-economic legacy and redistribution of resources.¹²

ii. Prosecutions and future peace

The second question raised was whether criminal prosecutions are sufficient to ensure lasting peace in the future. The author contends that criminal prosecutions *alone* cannot bring about a successful transition to peace. They form one piece in the larger “peace jigsaw” that is required to be cobbled together. They contribute to peace to the extent that they might prevent persons and communities whose rights have been abused from taking matters into their own hands and triggering fresh waves of counter-violence. This is not very different from the role criminal law generally plays in maintaining social order. However, criminal prosecutions alone are not successful in addressing the unique difficulties that the mass violation of human rights or genocidal violence throws up. Criminal prosecutions alone are incapable of addressing the underlying causes of such mass-violence- economic, social or cultural- and thus cannot attempt the complex process of rebuilding relationships at the individual and community levels.¹³ The rebuilding of past relationships in turn is necessary for the most minimal conception of peace, namely, coexistence. In societies which are additionally undergoing a regime change (from an authoritarian regime to a democratic set-up for instance), the process of rebuilding relationships assumes even greater importance in enabling formerly antagonistic parties to participate together in the new, democratic structures that are being created.¹⁴

iii. Practical constraints of criminal prosecution in the aftermath of genocide

¹² *Id.*

¹³ See generally, Ratna Kapur, *Normalizing Violence: Transitional Justice and the Gujarat Riots*, 15 COLUMBIA J. GENDER & L. (2006) [hereinafter Kapur], where the author points out that the primary focus of transitional justice has been killings, abductions, disappearances etc. She argues that this overly legalistic approach fails to recognize that institutional arrangements and structures are deeply implicated in the production of such harm. In fact, the normalization of the violence of the Gujarat riots was partly a product of the legal, political and religious discursive practices of the Hindu Right.

¹⁴ INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, RECONCILIATION AFTER VIOLENT CONFLICT- A HANDBOOK 17 (D. Bloomfield et al eds., 2003) [hereinafter RECONCILIATION HANDBOOK].

Finally, the prosecution program invariably comes up against huge practical difficulties that paralyze its potential to serve either of the functions discussed above. Reverting to the South African scenario, prosecutions were practically impossible, given that there was no victor from either side of the negotiators. A compromise had to be made between the international demand for prosecution of perpetrators of gross human rights violations and the national appeal for peaceful transition, reconciliation and justice.¹⁵

The case of Rwanda also demonstrates the need for pragmatism to temper an absolutist approach to prosecution. In one of the most horrific genocidal massacres in recent memory, up to one million Rwandan Tutsis and moderate Hutus were brutally slaughtered in just fourteen weeks in 1994. Throughout their first year in office, many senior members of the new government insisted that every person who participated in the atrocities should be prosecuted and punished. This approach, however, would put more than 100,000 Rwandans on trial, a situation that would be wholly unmanageable and certainly destabilizing. To compound the problem, the criminal justice system of Rwanda was decimated during the genocide, with some ninety-five percent of the country's lawyers and judges either killed or currently in exile or prison. By mid-1997, some 115,000 Rwandans were detained in prisons built to house a fraction of that number on allegations of involvement in the genocide, while the national Ministry of Justice still had just seven attorneys on its staff.¹⁶ The International Criminal Tribunal in Rwanda (ICTR) set up under the UN auspices in 1994, is another forum for undertaking criminal prosecutions in relation to the genocide. The Tribunal, in strictly adhering to the due process rights of the accused, has been painfully slow in undertaking trials. Since it began hearing cases in 1996, the ICTR has heard only 33 cases completely.¹⁷

In Gujarat too, the nature and scale of the communal violence in 2002 puts the criminal justice system under severe strain. The first problem faced by the Prosecution relates to the First Information Reports (FIR) lodged with the Gujarat police while the riots were occurring. Several witnesses have testified that lodging FIRs was made as difficult for them as possible by the police. It

¹⁵ Phenyio Tshenolo Keiseng Rakate, *Dealing with the Hatchet of the Past: A Critique of the South African Truth and Reconciliation Commission Report*, 40(3) *INDIAN J. INT'L L.* 547 (2000) [hereinafter Rakate].

¹⁶ Payam Akhavan, *Beyond Impunity: Can International Criminal Law Prevent Future Atrocities?*, 95 *AM. J. INT'L L.* 7 (2001).

¹⁷ For current information on the status of cases, see generally, <http://69.94.11.53/ENGLISH/cases/status.htm>.

has also been recorded that the police very often did not register the case against those named by the victims.¹⁸ In some cases, the police themselves lodged the FIR before private parties could do so in order to control the investigation. The FIRs are thus devoid of the details required for a successful prosecution of the case.¹⁹ The trial of the numerous cases registered has also encountered several problems and has failed to punish the perpetrators in a speedy and effective manner.²⁰ Even five years after the carnage, the number of convictions remains abysmally low.²¹ Some of the cases tried by the “fast-track courts” set up in Gujarat to try the riots cases have had to be retried on account of bias.²²

Perhaps the claim that justice in situations of mass-atrocities requires a creative approach is now better contextualized. Any effective system of transitional justice must take into account the staggeringly large number of

¹⁸ CITIZENS FOR JUSTICE AND PEACE, CONCERNED CITIZEN’S TRIBUNAL, GUJARAT 2002: AN ENQUIRY INTO THE CARNAGE IN GUJARAT (2003).

¹⁹ For instance, in Naroda Patiya (one of the areas that was worst-affected by the communal violence), the FIR lodged by the police covers a duration of 9 hours and a range of events in different locations. The FIR is an omnibus collection of cognizable offences, providing no clear demarcations under which the investigation may be carried out. The FIR is flawed because it does not provide any details about the individual crimes themselves- the timing, location and so on. Most of the FIRs lodged begin with a description of the Godhra event and the wording of the FIR makes it appear that the violence was a justified retaliation against the Godhra tragedy- an indication of the subjective viewpoint from which the investigation was carried out. The uniform wording of the FIRs across the state also hints at there being orders from political superiors to register the cases in such a manner. See Vrinda Grover, *The Elusive Quest for Justice in GUJARAT-THE MAKING OF A TRAGEDY* 356 (2002).

²⁰ Most of the 5,067 rioters who were arrested, causing the Sabarmati Central Jail authorities to look for additional space to accommodate them, have now been released on bail. A total of 691 cases were filed, of which 414 have now been deemed 'without merit.' A year after the riots, there were 508 cases pertaining to the riots pending trial. The recommendations of the NHRC to appoint the Central Bureau of Investigation to look into these crimes have not been accepted by the Government. See *The Gujarat Riots: A Year Later*, February 26, 2003 available at The Gujarat Riots Homepage, <http://www.rediff.com/news/2006/dec/05godhra.htm>.

²¹ Azim Khan Sherwani, *Gujarat four years later*, available at <http://indianmuslims.in/aankhen-ab-bhi-nam-hain-gujarat-four-years-later>.

²² For instance, in the Best Bakery case, in which 14 innocent persons were burnt alive in the said bakery in an act of premeditated venom, the Fast Track Court set up at Vadodra to try the case summarily acquitted all the accused. The case was retried by the Supreme Court which, in 2006, convicted 9 of the 21 accused. Thus retribution took almost 5 long years to achieve. The case became extremely controversial on account of one of the key prosecution witnesses, Zaheera Sheikh, turning hostile and giving inconsistent testimonies to the Court. She was sentenced to one year’s imprisonment by the Supreme Court for perjury. See *Zahira Sheikh v. State of Gujarat*, (2004) 4 SCC 158.

potential cases and the overwhelmingly small number of available personnel to process them.²³

In the light of the limited potential of retribution-based solutions to mass-abuse of human rights as discussed above, this article argues that there is a compelling justification for considering alternate approaches towards effecting such transitions. The philosophical underpinnings of reconciliation, as an alternate approach, have been discussed in the following section, hoping to provide the necessary background for finally exploring the reconciliatory approach as a useful option in Gujarat.

II. Philosophical Underpinnings of Reconciliation

i. Reconciliation

The term ‘reconciliation’ is used to signify two distinct phenomena. It can be used to denote both a goal and a process. As a goal, it remains largely aspirational; a state of things towards the attainment of which we direct present efforts. As a process, it refers to a “present-tense way of dealing with things”²⁴, designed to achieve that final goal.

It might be useful to invoke Hegel’s concept of reconciliation at this stage. In his conceptualization, ‘reconciliation’ or ‘*Versöhnung*’ is the process of overcoming conflict, enmity, alienation or estrangement; the result is the restoration of a state of harmony, unity, peace or friendship.²⁵ The concept of ‘*Versöhnung*’ strongly connotes a process of transformation. When two parties become *versöhnt*, they do not resume their old relationship unchanged. Instead they do so by changing their behaviour and attitudes in fundamental ways.²⁶

Thus, societies emerging from major civil strife or from the brutality of oppressive regimes attempt (or ought to attempt) reconciliation. The violence of the past often does not allow them to resume pre-conflict relationships as they existed- a fundamental change is required. For instance, it is extremely unlikely that members of ethnic or religious minorities, whose rights have been violated by their former neighbours or friends from an opposite group, will be

²³ Kritz, *supra* note 3.

²⁴ RECONCILIATION HANDBOOK, *supra* note 14.

²⁵ M. O. HARDIMON, HEGEL’S SOCIAL PHILOSOPHY- THE PROJECT OF RECONCILIATION 93 (1994 [hereinafter HARDIMON]).

²⁶ *Id.*

able to resume their old friendship after the conflict, unchanged. Any process of transition must, therefore, aim at affecting transformation of the old relationships through a whole-hearted confrontation and acceptance of the past.

However, it is important to note that reconciliation does not signify the total absence of conflict or a state of perfect harmony. Hegel too maintains that conflict and antagonism are integral components of reconciliation with the social world. It is crucial only that any process of reconciliation eliminates “fundamental contradictions” or fundamental conflicts that make coexistence impossible.²⁷ Simply put, reconciliation means finding a way to live alongside former enemies- not necessarily to love them or forget the past- but to coexist with them to a degree sufficient to share our society with them and participate together in building democratic institutions and processes.²⁸

To some, reconciliation seems to suggest ‘resignation’ or acceptance of defeat, a tendency to overlook or ignore the atrocities committed in the past. Reconciliation is then posited as being the antithesis of justice (taking the guilty to task). In actuality, reconciliation is none of this. Hegel clarifies this by stating that it is impossible to be resigned to a particular circumstance while being *versohnt* to it- the latter requires a wholehearted acceptance of the situation, ridden as it may be with imperfections, rather than a quiet submission to the powers that be.²⁹ Thus reconciliation is not an excuse for impunity or an exercise in “forgetting”. It does not stand opposed to either truth or justice. Oftentimes, retributive justice achieved through the mechanism of courts might be necessary to achieve reconciliation. In fact, reconciliation is an overarching process that includes both truth and justice as necessary elements but not as its only ingredients.³⁰

Understandably, the process of reconciliation is likely to be long-drawn, taking decades or even generations to fulfill its goal. It must necessarily comprise short-term and long-term measures directed towards changing attitudes, prejudices, emotions, perceptions of history and so on. This includes truth commissions, reparations etc. in the short term, and education, retrospective apologies etc. in the longer term.

²⁷ *Id.*

²⁸ RECONCILIATION HANDBOOK, *supra* note 14, at 21.

²⁹ HARDIMON, *supra* note 25.

³⁰ RECONCILIATION HANDBOOK, *supra* note 14.

Reconciliation can take place at many levels. It can take place between fighting individuals, between individuals and the state as well as between entire communities that are at war with each other. Therefore, in the context of transitional justice, reconciliation will also have to occur at the level of such warring factions or communities.³¹

ii. Truth

It might appear that reconciliation is achieved far more easily by ignoring the truth about the past than by scrupulously arriving at it. Truth-telling is even perceived as actually hindering the process of reconciliation, based on the belief that “digging up the past” and “reopening old wounds” stand in the way of overcoming past conflicts and differences. This is especially true when violence has ceased due to political settlements entered into by warring parties and the balance of convenience lies in favour of “letting bygones be bygones”.³²

Some scholars argue that there is no necessary connection between truth and reconciliation. Priscilla Hayner, for example, points this out in the context of Mozambique where she believes that reconciliation is best achieved through silence. In the context of the Truth and Reconciliation Commission in Sierra Leone, Tim Kessal has argued that in some societies such as the community in Tonkolili, Sierra Leone, ‘ritual’ as opposed to “truth-telling” is far more effective in achieving reconciliation. This observation was based upon a study of the working of the TRC in Tonkolili. He contends that while the practice of confession and psychotherapy and psychoanalysis, its secular counterparts, have been culturally embedded in the West, they are marginal to the unique cultural imperatives in Sierra Leone.³³ Further arguments against truth-telling have been looked at in Section IV while assessing the criticism of the South African TRC.

Yet we find that, in general, truth-telling is considered an integral component of any post-conflict program of reconstruction and many countries today have set up commissions by the name ‘Truth and Reconciliation Commission’. The rationale is that it is practically impossible to be ‘reconciled’ i.e. move from a divided past to a shared future without acknowledging the

³¹ RECONCILIATION HANDBOOK, *supra* note 14.

³² RECONCILIATION HANDBOOK, *supra* note 14, at 26.

³³ Tim Kessal, *Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone* 27(2) HUM. RTS. Q. 361 (2002).

injuries suffered due to atrocities committed in the past.³⁴ The fissures caused by past violence are indeed real, and justifiably so. Any reconciliation that is achieved by a forced closure of these wounds shall necessarily be short-lived. Tina Rosenberg, a journalist who has written extensively on this topic, says: “If the victims in a society do not feel that their suffering has been acknowledged, then they . . . are not ready to put the past behind them. If they know that the horrible crimes carried out in secret will always remain buried . . . then they are not ready for reconciliation”. She adds, “The kind of reconciliation that lets bygones be bygones is not true reconciliation. It is reconciliation at gunpoint and should not be confused with the real thing”.³⁵

Understood in this way, it becomes clear that reconciliation is crucial to rebuilding societies transitioning to lasting peace and democracy. Its importance is twofold. First, reconciliation, however achieved, is the only way of ensuring that the violent conflict does not erupt again and peace is not threatened. Second, while politics might be useful in arriving at compromises or settlements, such settlements are on shaky ground until politicians realize that they need to address the larger attitudes of the communities they represent towards each other for the implementation of political decisions for peace.

III. The Truth and Reconciliation Commission

Truth and Reconciliation Commissions (TRCs) are instituted on the premise that truth lies at the heart of reconciliation. Although their exact structure and functioning varies depending upon the political and social context of the society undergoing transition, the broad goals and morality of TRCs remains more or less constant. In the twenty first century, several truth commissions have been set up in diverse locations, with the number only increasing.³⁶ The

³⁴ The argument in favour of “amnesia” is based upon utilitarian principles, i.e. an action must be judged by its benefit to the society as a whole. Thus the demands of the abused for a reckoning with their perpetrators may perhaps be set aside if in doing so the greater good of society will somehow be achieved. This is particularly argued when the political-historical fault lines run deep and it is nearly impossible to establish the “truth” about the past. However, it is submitted that the concept of “benefit” to society requires critical examination. It cannot be restricted to economic benefits or greater power in international relations. The concept of benefit must also emphasize the consolidation of the democratic process and a nation’s sense of its own moral self worth. This is usually better achieved by a frank reckoning with the past. See Stephen A. Garrett, *Models of Transitional Justice - A Comparative Analysis*, International Studies Association, 41st Annual Convention, Los Angeles (March 2000), available at <http://www.ciaonet.org/isa/gas02>.

³⁵ RECONCILIATION HANDBOOK, *supra* note 14.

³⁶ For instance, TRCs have been set up in South Africa, Sierra Leone, El Salvador, Cambodia, Guatemala, and Zimbabwe.

TRC in South Africa has been widely hailed as one of the “success stories” of truth telling as an effective means of transitional justice. This article thus examines the general structure, functions and impact of TRCs using the South African model. The author recognises that the South African TRC is neither the only model that could have been studied- indeed TRCs have been differently designed and implemented in several countries in the past decade- nor is it a model that is free from imperfections. However, since a comparative analysis of TRCs cannot be accommodated into the present study and the South African model would suffice as a working model for the limited purposes of this article, it has been chosen for a more detailed study.

i. South African TRC- Structure and Functions

The South African TRC was set up under the 1995 Promotion of National Unity and Reconciliation Act (hereinafter “the PNURC Act”). The Act established a commission with the objective of promoting national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past.³⁷ The said objective was to be achieved, *inter alia*, in the following ways-

- The establishment of as complete a picture as possible of the causes, nature and extent of the gross violations of human rights including the antecedents, circumstances, factors and context of such violations, as well as the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations, by conducting investigations and holding hearings.³⁸ The Committee on Human Rights Violations was set up primarily for this purpose.³⁹
- Facilitating the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a “political objective”.⁴⁰ An Amnesty Committee was set up for this purpose.⁴¹

³⁷ PNURCA, 2005, Art. 3(1).

³⁸ PNURCA, 2005, Art. 3(1)(a).

³⁹ Chapter III of NURC deals with the Committee on Human Rights Violations.

⁴⁰ PNURCA, Art. 3(1)(b).

⁴¹ Chapter IV of NURC deals with matters pertaining to amnesty.

- Establishing and making known the fate or whereabouts of victims and by restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims, and by recommending reparation measures in respect of them.⁴² A Committee on Reparations and Rehabilitations was set up for this purpose.⁴³
- Compiling a report providing a comprehensive account of the activities and findings of the Commission and which contains recommendations of measures to prevent the future violations of human rights.⁴⁴

The Human Rights Violations Committee conducted victim hearings and took over 21000 statements.⁴⁵ The Reparations and Rehabilitation Committee facilitated the reconciliation process and promised to pay reparations to all the designated victims. Over 7000 applications for amnesty were submitted for crimes committed between 1960 and 1994.⁴⁶ The TRC submitted its five-volume report to President Nelson Mandela detailing the nature and extent of the gross human rights violations that South Africa suffered from 1960 until 1994, during the apartheid regime.

ii. Evaluation of the South African TRC

The strongest criticism of truth commissions has been that their amnesty processes represent “a fundamental subversion of the rule of law”.⁴⁷ For some, truth-telling was synonymous with impunity for gross violation of human rights and, therefore, undermined respect for the law and legal institutions. The South African TRC was the first initiative that attempted to answer this criticism by laying down a unique process for amnesty, reparations and truth-telling.

First, it was the only the TRC that had the power to grant amnesty to individual perpetrators, subject to certain conditions. No blanket impunity was created. It forged a middle ground between blanket group-based amnesty and

⁴² PNURCA, Article 3(1)(c).

⁴³ Chapter V of NURC deals with the Committee on Reparation and Rehabilitation.

⁴⁴ PNURCA, Article 3(1)(e).

⁴⁵ THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA, THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT (1999) at Chapter 6, ¶ 5.

⁴⁶ Anurima Bhargava, *Defining Political Crimes: A Case Study of the South African Truth and Reconciliation Commission*, 102(4) COLUM. L. REV. 1309 (2002) [hereinafter Bhargava].

⁴⁷ *Id.*

the infeasibility of prosecuting all offenders of a previously unjust regime. The amnesty process sought to establish the truth about past offences, especially with regard to the motives of the perpetrators; deter future violence by creating a clear picture of all those who engaged in political violence; and even in the absence of formal punishment, it sought to establish accountability of perpetrators for crimes they committed.

Secondly, the TRC, unlike other initiatives, conducted its hearings in public before a panel of commissioners. These hearings served to educate the public about the past.⁴⁸ Also, individual persons were required to come forward on their own accord and publicly acknowledge their responsibility for past crimes. In a sense, the shame, guilt, embarrassment and social ostracization that accompanied such confessions can themselves be viewed as serious consequences attaching to past wrongs.

Thirdly, the TRC was represented as a quasi-judicial institution. Unlike past truth commissions, its mandate was not merely to collect facts and compile them in the form of reports. The amnesty process was conducted in a manner akin to a criminal trial. The committee was given greater evidentiary, search and seizure and investigative powers than most truth commissions. Decisions of the TRC were subject to review by outside courts. The enabling Act itself laid down detailed procedures and standards for the determination of whether amnesty should be granted or not. Many of such standards borrowed from other international law contexts and this lent a certain amount of legitimacy to the process adopted.⁴⁹

While in theory, the TRC was a commendable and ground-breaking achievement, its actual working has come under some criticism. For instance, it is argued that the Amnesty Committee was required to determine which crimes were committed with a 'political objective' based on six different criteria.⁵⁰

⁴⁸ The hearings were also broadcasted on television to enable wider dissemination of the information being gathered by the TRC.

⁴⁹ Kapur, *supra* note 13.

⁵⁰ PNRUCA, Art. 20(3) sets out the six criteria for determining whether a particular act was associated with a political objective as follows:

- (a) The motive of the person who committed the act, omission or offence;
- (b) the context in which the act, omission or offence took place, and in particular whether the act, omission or offence was committed in the course of or as part of a political uprising, disturbance or event, or in reaction thereto;
- (c) the legal and factual nature of the act, omission or offence, including the gravity of the act, omission or offence;

However, the Committee focused exclusively on the criteria of “whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organization, institution, liberation movement or body of which the person who committed the act was a member, an agent or a supporter”. It is contended that this undermined the goals of the amnesty process since it clouded inquiry into the truth about the perpetrators’ motives, politicized the process of creating a common record of apartheid’s past and also failed to take into account the totality of circumstances (beyond the relationship of the perpetrator to his political organization) to better reflect the larger context in which the crimes were committed.⁵¹ Various other grounds have also been used by various scholars of transitional justice to criticize the working of the TRC.⁵² A detailed enquiry into the validity, or lack thereof, of such criticism is not the concern of this article. It is only intended that in examining the South African TRC as a possible model of transitional justice to be applied to other situations of conflict such as Gujarat, one should be aware that the neither the adoption of the TRC model nor its later functioning were entirely uncontroversial, and such criticisms must be considered while designing subsequent models of transitional justice.

However, the question of whether the TRC, notwithstanding some serious critiques, was at all successful in promoting the goals of transitional justice is indeed of great relevance to the present enquiry. In this regard, there is a fair

(d) the object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals;

(e) whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, an agent or a supporter; and

(f) the relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued, but does not include any act, omission or offence committed by any person who acted-

(i) for personal gain: Provided that an act, omission or offence by any person who acted and received money or anything of value as an informer of the State or a former state, political organisation or liberation movement, shall not be excluded only on the grounds of that person having received money or anything of value for his or her information; or

(ii) out of personal malice, ill-will or spite, directed against the victim of the acts committed.

⁵¹ See Bhargava, *supra* note 47.

⁵² See generally, Rakate, *supra* note 15, for a critique of the TRC from an international law standpoint.

degree of consensus that the TRC has been fairly successful in at least two ways. First, in its “backward-looking function” of documenting and dealing with the gross human rights violations of the past. Secondly, in its “forward looking function” of building a culture that is respectful of human rights and thereby preventing future tyranny.⁵³ This means that the TRC has not only impacted institutional actors in their attitudes towards human rights but has also impacted the beliefs, values and attitudes of ordinary citizens. As Kader Asmal rightly points out, “[f]or countries like South Africa, where the legacy is a particularly appalling institutionalized and society-wide one, the real value of truth commissions lies in their impact on the social consensus”⁵⁴.

It is apt to add here, as a matter of caution, the reminder that the TRC must not be viewed as a panacea for the complex problems that persist in societies emerging from violent conflict. Its mandate is to help in the immediate transition of society from war/conflict to peace by enabling a society to effectively deal with its past. It is, therefore, unreasonable to burden its already heavy mandate with an expectation of an overall and lasting solution to conflict. It cannot be a substitute to long term measures such as education, memory sustenance and so on. I hope, however, that a more humble case has been made- that the TRC has the potential to confront past abuses of human rights and prevent, to some extent future tyranny.

IV. “Conflicted Democracies” vis-à-vis “Paradigm Transitions” – Unique Concerns for Transitional Justice

The previous section described the model of the South African TRC which evolved in the context of a paradigm transition. This immediately raises the question of the applicability of any such mechanism of transitional justice to Gujarat since the latter is located within a democratic state that purportedly has institutions such as an independent and impartial judiciary, a free press and the rule of law which can deal effectively with human rights violations. This

⁵³ See generally, James L. Gibson, *Truth, Reconciliation, and the Creation of a Human Rights Culture in South Africa*, 38(1) LAW & SOC’Y REV. 7 (2004). The author focuses on one particular aspect of human rights namely, the commitment to universalism (versus particularism) in the application of the rule of law. He concludes, through theoretical and empirical analysis, that although South Africa remains quite a distance from a culture in which human rights are highly regarded among all segments of the mass public, the truth and reconciliation process may well have contributed to creating a human rights culture in the country.

⁵⁴ Asmal, *supra* note 11, at 10.

section examines the concept of a “conflicted democracy” and seeks to establish the need for mechanisms for transitional justice, such as the TRC, in such democracies. In essence the argument is that in non-paradigm transitions such as Gujarat, the state itself is often inextricably linked to the violation of human rights and this necessitates a different approach towards transition to peace in such democracies.

i. “Conflicted Democracies” distinguished

An important distinction must be drawn between transitions involving a shift from an authoritarian regime to a democratic regime on the one hand and transitions from war/conflict to peace, not necessitating a regime change, on the other. These are two distinct processes although in most “paradigm transitions”,⁵⁵ they tend to go hand in hand. The discourse on transitional justice as a whole has been almost exclusively focused on the former variety of transitions. This, it is submitted, can be attributed to an underlying assumption that systematic human right violations are committed by states in authoritarian regimes and, therefore, a transition to democracy must necessarily accompany a transition to peace. However, this is a partly flawed assumption. A similar legacy may manifest itself in states that have experienced prolonged structured, communal, political violence, even when the political structures could be broadly considered democratic. Such states have been termed as “conflicted democracies”⁵⁶. They are usually characterized by sharp divisions, ethnic, religious, racial and so on, in the body politic. These divisions are so acute that they have resulted in significant political violence. Transition in a conflicted democracy will involve a transition from war to peace but not straightforwardly, one from authoritarianism to democracy.

ii. The paradox of transition in a “conflicted democracy”

The distinction between “paradigm transitions” and “conflicted democracies” is pertinent since conflicted democracies present a number of paradoxes that create different issues for legal and political transformation.⁵⁷ The core paradox is that conflicted democracies, like paradigm transitions, aim at the achievement of a stable and peaceful democracy and are, therefore, faced with a program of action that their self-definition renders unnecessary. This is

⁵⁵ Paradigm transitions are transitions occurring from a violent, authoritarian regime to a stable and democratic one. The democratization of South Africa in 1994 is one example. See Campbell, *supra* note 4.

⁵⁶ Campbell, *supra* note 4.

⁵⁷ Campbell, *supra* note 4.

because conflicted democracies already proclaim an ideological commitment to democracy.

As a result, at the time of transition in conflicted democracies, there is much less international pressure on the State to bring about radical political, legal and social transformation as compared to paradigm transitions where there is enormous international pressure for transformation. Furthermore, owing to its democratic self-conception, there is less pressure on the institutions of a conflicted democracy that were responsible for human rights violations to transform; these institutions can far more effectively resist change. The problem is further exacerbated by the fact that change in conflicted democracies is slow and incremental while change in paradigm transitions is perceived as happening in one monumental burst, corresponding to a transfer of power or the signing of a peace settlement- when the State “turns over a new leaf”⁵⁸. The democratic nature of the State may, thus, make it more difficult for the authorities to acknowledge past failings, and to recognize the problem of institutional failure. This is also why the response of such states to genocidal conflict has usually been to let the criminal law of the land take its course. The transition is purely retributive since there is no demand for ‘transformation’ of institutions and society.

iii. Legitimacy Gap & Deepening Democracy

Democracy has two dimensions to it- procedural and substantive. Purportedly “democratic” states that conform to some minimal requirements of procedural democracy (conduct of elections, for instance) might still fail to attract the consent of, or repress, significant minorities and might thus fall short in terms of substantive democracy.

Since the deficit in substantive democracy makes it possible for states in conflicted democracies to violate the rights of minorities with impunity in the conflict-situation necessitating transition, a second transition is necessary in conflicted democracies (in addition to the first transition to peace). The second transition is not from authoritarianism to democracy but from procedural or nominal to substantive democracy; not by way of introducing democracy but in deepening it.

This is of crucial importance because the failure of the State to prevent human rights violations and its complicity in the same creates an “is”

⁵⁸ See generally, THE ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY (2004).

legitimacy crisis i.e. legitimacy gap in the sociological sense.⁵⁹ In the conflicted democracy, law's legitimacy no longer remains axiomatic. Rather, the law's complicity in human rights abuses (whether through the facilitation of abuse, or in its failure to provide redress), can create a situation where, for communities at the sharp end of violent conflict, confidence in law and in legal institutions collapses.

The implications of this legitimacy gap or "legitimation paradox" for the rule of law in conflicted democracies can be particularly acute.⁶⁰ Hence, a successful transition requires the building of the legitimacy of law and legal communities amongst communities where the experience of exclusion has been most pronounced.

iv. A demand for institutional transformation

It follows from the preceding discussion that there must be pressure- from national and international quarters- for the state to undertake institutional transformation instead of merely engaging with slow and incremental democratic reform. It is as imperative in the context of transitions in conflicted democracies as it is in the context of paradigm transitions.

In Section III the process of reconciliation was discussed as being a process of 'transformation'. The TRC model was further presented in Section IV as being a mechanism to effect or facilitate this transformation. The author therefore, submits that the TRC model ought to be seriously considered while conflicted democracies are undergoing transition as a useful mechanism for transformation. Only this will restore the legal and institutional legitimacy, that has been displaced on account of their being co-opted by the State during the conflict.

V. Truth and Reconciliation in Gujarat

Having established the utility of considering transformative mechanisms such as the TRC as ways of effecting conflict-to-peace transitions within "conflicted democracies", this section focuses on Gujarat and explores "truth

⁵⁹ There is a distinction between legitimacy in a normative sense- what is called "ought" legitimacy- and legitimacy in the sociological sense- what is called "is" legitimacy. In "ought" legitimacy, the state's adherence to democratic standards (for instance its employment of regular elections) may be taken to guarantee the legitimacy of its laws and institutions. In the sociological sense, law's legitimacy is tested by the perceptions of people and society towards the law. See Campbell, *supra* note 4, at 189.

⁶⁰ Campbell, *supra* note 4, at 190.

and reconciliation” as a means of effecting its transition to peace and stability following the carnage of 2002. First, I argue that Gujarat is indeed a “conflicted democracy”, based upon the theoretical discussion in the preceding section. Secondly, the fact that the communal carnage was largely facilitated by the state is established. Thirdly, the legitimacy crisis in Gujarat that has been created as a consequence is examined. Finally, the proposal of establishing a TRC in Gujarat is put forth.

i. Gujarat- a “conflicted democracy”

Gujarat is part of the Indian state that is avowedly democratic. The Constitution of India⁶¹, and several other treaties and declarations that India is a signatory to, affirms its ideological commitment towards democracy.⁶² It displays the two major characteristics of a “conflicted democracy”. First, its polity is deeply divided along communal lines. This is partly attributable to the agenda of right-wing political organizations such as the Vishwa Hindu Parishad. Through sustained and systematic propaganda, these fascist forces have been at play for the past few decades and have risen to political power in the nineties. They have been largely responsible for the rise of ‘Hindutva’ and a division of the population along communal lines.⁶³ The genocidal carnage of 2002 was not a spontaneous outburst. It was a reflection of pre-existing and rapidly deepening fissures in society along communal lines.⁶⁴

Second, these divisions were so acute as to result in significant violence. Gujarat has a long history of communal riots, some of which have caused significant loss of life and property. However, the extent of the damage became visible only in 2002, in the unprecedented violation of human rights that took place in Gujarat. Thus, Gujarat has seen the fulfillment of this criterion both in the manner in which the violence has extended over a long period and in the intensity it has demonstrated on occasion.

⁶¹ The Preamble to the Indian Constitution states:

“We the people of India, having solemnly resolved to constitute India into a sovereign, socialist, secular, democratic republic...” (emphasis added).

⁶² See, for e.g., Article 29, *Universal Declaration of Human Rights*; Articles 21 and 22, *International Covenant for Civil and Political Rights*.

⁶³ Batuk Vora, *Horrendous Killings in Hindutva Lab after Godhra Carnage*, 10 MAINSTREAM 5 (2002).

⁶⁴ Rajkumar Siwach, *Social Tension and Communal Conflicts: Lessons from Gujarat*, 48(3) INDIAN J. OF PUB. ADMIN. 435 (2002) [hereinafter Siwach].

ii. State role- the failure of Governance

The National Human Rights Commission signalled the role of the State in the 2002 carnage in the following terms – “[t]here has been a comprehensive failure of the State to protect the constitutional rights of the people of Gujarat, starting with the tragedy in Godhra on 27 February 2002 and continuing with the violence that ensued in the weeks that followed.”⁶⁵ The role of the various arms of the State machinery in allowing and actively contributing to engineering and carrying out an operation of this sort has now been conclusively established. The judgment of the Indian Supreme Court as well as the reports of various non-governmental organisations and fact-finding agencies have severely indicted the State for its complicity in carrying out genocidal violence against its minority population, which it is constitutionally mandated to protect.⁶⁶

The role of the State was pervasive and visible in every aspect of the carnage and in the sorry treatment meted out to the victims in the aftermath of the genocide. Some examples are listed below to throw light on the role played by the State forces in the ugly drama. The NHRC observed that in the light of the history of communal violence in Gujarat, there was a failure of intelligence and action by the State Government that marked the events leading to the Godhra tragedy and the subsequent deaths and destruction that occurred.⁶⁷ Before confirming the facts, the State Government released misinformation implicating “Muslim frenetic mobs” in the tragedy. Groups of well-organized persons were seen, armed with mobile telephones and addresses, singling out certain homes and properties for death and destruction in certain districts — sometimes within view of police stations and personnel.⁶⁸ FIRs in various instances were distorted or poorly recorded, and senior political personalities were seeking to ‘influence’ the working of police stations by their presence within them. For example, the police in several cases recorded “group FIRs”—an omnibus of all the offences committed over a long period of time involving several different victims and perpetrators. This made pinning individual

⁶⁵ NHRC REPORT, *supra* note 7.

⁶⁶ NHRC REPORT, *supra* note 7; *see also* IJ REPORT, *supra* note 8; Asghar Ali Engineer, *Gujarat Riots: Rushing to Judgment* 38(16) ECON. & POL. WKLY 2115 (2003). The Supreme Court has indicted the Gujarat government for its role in engineering the genocide in *Zahira Sheikh v. State of Gujarat*, (2004) 4 S.C.C. 158.

⁶⁷ NHRC REPORT, *supra* note 7, at 23.

⁶⁸ Siwach, *supra* note 65, at 437.

criminal responsibility close to impossible.⁶⁹ The compensation rate fixed by the State was grossly inadequate in most cases in addition to being highly discriminatory. An amount of Rs.2 lakhs was announced as compensation to the next-of-kin of the Hindu *kar sevaks* who died at Godhra while an amount of Rs.1 lakh was announced for those Muslims who died in the subsequent violence.⁷⁰

Thus, it is clear that the State was responsible for committing systematic violations of human rights in Gujarat. Dealing with this violent past gets complicated by the fact that Gujarat is part of a “conflicted democracy”, that is, the projected self-image of India as being the largest democracy in the world. This impacted its transition in several ways.

First, there was very little international pressure for institutional transformation. The serious nature of the attacks and their contravention of international standards of human rights warrant an international response. Yet the response from the international governments and other international agencies like the UN and Special Rapporteurs has been almost absent. Very few international governments and independent human rights bodies criticized the Indian State in failing to provide for the victims of the violence. The image of India as a “functioning democracy” has at times not allowed this intervention and at other times the government of the day actively sought to dissuade any ‘external intervention’. Bodies like Amnesty International published reports⁷¹ on the carnage but were not permitted by the Central Government to conduct fact-finding missions in Gujarat. Many appeals were made to the concerned UN Special Rapporteurs and the UN High Commissioner from various human rights groups but there has been no effective response to this. { reference} The main reason for such inaction is the pressure exerted by the Indian government on the UN mechanisms to not interfere in the ‘internal issues’ of India. For instance, the then Chairperson of the NHRC met the then UN High Commissioner for Human Rights and informed her that it was not necessary for her to visit India in the context of the violence in Gujarat. Moreover, since most of these agencies can act only with

⁶⁹ NHRC REPORT, *supra* note 7, at 292.

⁷⁰ NHRC REPORT, *supra* note 7, at 215.

⁷¹ AMNESTY INT’L, INDIA: JUSTICE, THE VICTIM – GUJARAT FAILS TO PROTECT WOMEN FROM VIOLENCE, ASA 20/001/2005, *available at* <http://web.amnesty.org/library/index/engasa200292003>. The report focuses on the consistent failure of the state of Gujarat to fulfill its and obligations under national and international law to exercise due diligence with regard to the state’s Muslim minority, particularly girls and women.

the permission from the respective governments, these options are difficult to exercise when the State itself is complicit in the violence. In a globalized world, international support from governments and civil society is vital for sustained actions demanding accountability of elected governments within countries and this was very inadequate in the case of Gujarat.

Second, the fact that Gujarat was part of a “conflicted democracy” resulted in most demands being presented for reform of the existing systems. In other words, the demands reflected the recognition that the process of change was slow and incremental. Meanwhile, the planners and instigators of the violence enjoyed total impunity; many of them continued to hold senior positions in the police, bureaucracy and government.⁷²

iii. Law and Legitimacy Crisis

The failure of the State to acknowledge past wrongs and the losses suffered by the victims has greatly reduced the legitimacy of law in the state, especially amongst those who have been seriously impacted by the communal violence and have been unsuccessful in obtaining any redress. In fact, the complicity of the State in causing them loss of lives and property and subsequently, in actively denying them redress discourages the victims from banking on the state to protect their rights. Indeed in Gujarat, a deep cynicism has set in as regards the potential of law to be impartial and provide redress and recompense to those whose rights have been violated.⁷³

Legitimacy crisis, if it is deep enough, will sound the death knell of the rule of law in a state. There is no hope of attaining sustainable peace in such societies and the charged environment will give rise to similar events time and again in the future.

Thus, there exists a compelling case for making ‘transformation’ and not ‘reform’ the goal of a system in transition from conflict to peace, even though it is not strictly shifting from an authoritarian rule to a democratic regime. This transformation can only occur with powerful mechanisms for confronting the past and ensuring accountability of individual and state actors for past

⁷² For instance, the then Chief Minister of Gujarat, Narendra Modi, was reelected to office mere months after the carnage. Backed by a significant section of the state administration and even the bureaucrats at the Centre, Modi tried to paint a picture of strong leadership and normalcy in Gujarat by conducting national and international extravaganzas in attempts to woo the business world. See “Gujarat 2002 to 2007: The Aftermath of Genocide”, available at <http://www.sabrang.com/cc/archive/2007/june07/intro.html> (Last visited July 12, 2007).

⁷³ Sumanta Banerjee, *Gujarat Carnage and a Cynical Democracy*, 37(20) *ECON.& POL. WKLY.* 1708 (2002).

atrocities. The TRC, as designed and implemented in South Africa, provides several useful ideas in this regard. It establishes accountability through truth-telling and public confessions and apologies and also helps in achieving restorative justice by awarding compensation and rehabilitation to the victims of the violence. It is also important to remember that South Africa's TRC successfully combined criminal prosecutions of some of the worst offenders with conditional amnesty. Gujarat too would require a similar combined approach.

This is a project of national concern- genocidal incidents, such as the Gujarat carnage, are responsible for the minority community as a whole perceiving a threat from the State and the majority religion. This builds up a consensus on the need to "protect themselves"- building up of the capacity to fight. If the nation as a whole does not face the challenge of reconciliation head on, the legitimacy crisis will render very real the threat of each of our human rights being recklessly violated. While the reconciliation program must be designed at the national level, the international community also ought to exert pressure to ensure that it is done in a transparent and expeditious manner. There is no reason for international bodies exerting their influence on situations of regime change but not similar situations of conflict in democracies.

iv. TRC in Gujarat

There is no pre-determined formula for the creation of a Truth and Reconciliation Commission. This article does not attempt to address the enormous challenge of designing a Truth and Reconciliation Commission that would be suited to the specific socio-economic and political context of Gujarat. Several scholars⁷⁴ and the United Nations⁷⁵ have provided useful guidelines for the construction of TRCs which can be the starting point for the creation of a TRC in Gujarat.

The South African TRC can serve as a model for such a project since it was the first TRC to combine individual accountability (through public hearings, voluntary confessions and so forth) with a strong emphasis on restorative justice (it had powers to award compensation and rehabilitation to the victims). We must, of course, acknowledge the significant difference in the political

⁷⁴ See, e.g., Priscilla Hayner, *International Guidelines for the Creation and Operation of Truth Commissions- A Preliminary Proposal*, 59(4) *LAW AND CONTEMP. PROBS.* 173 (1996).

⁷⁵ United Nations guidelines on Truth Commissions, *Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, available at <http://www.ictj.org>.

context of the transitions in Gujarat and South Africa. The latter involved a clear regime change and a shift in the power bases whereas the former retained the previous political regime almost in entirety. However, as has been argued while discussing the need for institutional transformation in conflicted democracies, there are sufficient parallels that one can draw between the two kinds of transitions. Also, any such initiative in Gujarat will necessitate a much larger, proactive role of civil society as was needed in South Africa to counter an entrenched political regime in effecting transformation. Moreover, there are some prima-facie indications that truth-telling would not be out of place in the socio-cultural context of Gujarat. The author believes that on account of being one of the epicentres of the freedom movement during colonial rule, Gujarat has an ideological affinity for truth, one of the core philosophies of Gandhi's non-violent struggle. Initiatives for dialogue between the communities undertaken by various non-governmental organizations following the 2002 carnage have reported fair degrees of success⁷⁶ - an indication that silence, as a means of dealing with the past, is not a cultural preference. Even at the height of the communal violence, the only areas to remain incident-free were those in which peace-committees had been formed, comprising members of both communities. These peace-committees ensured that the communication lines were kept open day and night in those areas and provided truthful information about the situation to residents. For instance, Dhokla, a town in Ahmedabad, remained peaceful during the 2002 carnage despite being marked as a communally sensitive area having witnessed communal violence on several occasions in the past. This was possible because the residents formed peace committees and resolved to communicate with each other instead of taking impulsive action by joining divisive forces.⁷⁷

It would be apt to also clarify the necessity for a TRC in the presence of the National Human Rights Commission that has already done a considerable amount of fact-finding. It is submitted that a comparison of the enabling act of the NHRC, The Human Rights Act, 1993, with the National Unity and Reconciliation Act under which the South African TRC was set up, would be useful to indicate that the mandate and the powers of the two commissions is very different. Of course, this does not preclude the TRC from working in association with the NHRC in so far as their functions overlap. The justification for designing a TRC, nevertheless, remains.

⁷⁶ IJ REPORT, *supra* note 8.

⁷⁷ S. Bhatt, *When a Town in Gujarat Refused to Burn*, available at <http://www.rediff.com/news/2002/jul/31spec.htm>.

Conclusion

This article began by highlighting the limitations, both philosophical and pragmatic, of an exclusively retributive approach to transitional justice. Reconciliation has been posited as a more apposite goal of any system undergoing transition since it was seen as offering a real hope of preventing future abuse of human rights on a mass scale. It was also contended that the dichotomy that is often presented between ‘reconciliation’ and ‘justice’ is a false dichotomy by understanding reconciliation as incorporating, not opposing, a wider conception of justice than mere retribution. The Truth and Reconciliation Commission, based on the idea of ‘reconciliation’ discussed above, was examined through the South African TRC model. In evaluating its potential to contribute to peace and deterrence of future human rights violations, it was found that, although not immune from criticism, its contribution in promoting a culture of human rights in South Africa cannot be denied.

The latter half of the article unravelled the distinction between “paradigm transitions” and transitions in “conflicted democracies”, and the implications of that distinction. The core paradox presented by the latter category of transitions is that it aims to fulfil the goal of a peaceful and stable democracy which, in its own self-image, has already been achieved. In short, this means that the democratic nature of “conflicted democracies” was itself an obstacle to the achievement of peace. A nuanced understanding of transitions will allow us to better address the legitimacy crises that are born when states in such democracies make the uneasy transition to peace. This, in turn, will ensure that both the national and international communities demand the ‘transformation’ of institutions instead of “slow and incremental reform” in a self-satisfied democracy.

The foregoing analysis squares up with the issue of communal violence in Gujarat when we understand Gujarat as being a part of a “conflicted democracy”. It justifies the claim that peace and stability can never be restored without a dramatic institutional transformation including a meaningful confrontation with the past. In this context, the possibility of the Truth and Reconciliation Commission performing a transformative role was examined and found to be an initiative worthy of serious consideration. *Prima facie*

indications of the appropriateness of truth-telling in the specific socio-cultural and historical context of Gujarat have been noted.

It is the final proposal of this article that serious thought must be given to designing a Truth and Reconciliation Commission to address the transitional paradoxes in Gujarat since it has serious implications for human rights and Indian democracy as a whole.