

## Application of the Concept of Reparation in Transitional Justice in Sri Lanka

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**Abstract** - This study discusses the application of the concept of Reparation as an element of Transitional Justice (TJ) in the social transformation process especially after fragile circumstances in the society. The objective of this study is to analyze the application of Reparation in TJ processes in Sri Lanka in the post-conflict context. The term reparation refers to the measures to satisfy victims, such as revealing the truth, holding perpetrators accountable, and ceasing ongoing violations. Sri Lanka recognizes the concept of reparation aiming to assist victims by way of providing material and symbolic support. This recognition empowers affected communities to claim their legal rights as equal citizens. The study, therefore, emphasizes the needs of a Victim Centric Approach and the need to restrict politically initiated administrative measures in the reparation process. Introduction of the Reparation Act No 34 of 2018 to establish the Reparations Office can be regarded as a significant move to synchronize the reparations process in Sri Lanka with international standards. However, inconsistency in the application of the concept of reparation is still noticeable. This study is a library study based on the secondary sources of domestic and international legal instruments, scholarly articles, and judicial decisions. The study elaborates International standards on the concept of Transitional Justice (ICTJ) to find a gap in the Sri Lankan process of reparation in the light of the Victim Centric Approach. The study emphasizes issues related to international standards and domestic applications within the concept of reparations. Finally, this study suggests that the reparation process in Sri Lanka should adopt the Victimcentric Approach, thereby able to addr

ess the individual cases equally and effectively rather than addressing the grievances of specific communities.

**Key Words** - *Transitional Justice Reparation, Victim Centric Approach*

### I. INTRODUCTION

Transitional Justice (TJ) consists of Judicial and non – Judicial processes in order to address public grievances by way of Criminal Prosecution, Truth Commissions, Reparations and different kinds of Institutional Reforms. The concept of TJ came into practice in the aftermath of World War Two (WWII). Further, it has been applied in the case of organized genocide, ethnic cleansing, or apartheid of South Africa. Reparations are often a piece of the corrective recommendations made in the TJ processes. It has been used systematically and alternatively to correct certain well-orchestrated injustices by one community over other communities in the form of forcible family separations, systematic sexual abuse, systematic genocide or mass killing and prolong colonialism. The International Centre for Transitional Justice defines reparations as “measures to satisfy victims, such as revealing the truth, holding perpetrators accountable, and ceasing ongoing violations” in cases of massive or systemic rights violations. Therefore, reparation is an essential part of TJ and assists victims by way of providing material and symbolic support which helps to treat victims as equal citizens and build trust among discriminated and marginalized communities with others. Sri Lanka had applied the concept as a tool to assist victims of both man-made and natural disasters. The effort to provide justice to the victims of the three-decades -long war and reformation in the Meetotamulla garbag

e dump tragedy, resettlement and restitution provided to victims of the 2004 Tsunami and the Meeriyabedda landslide are a few examples of that. Further, an institution such as the Rehabilitation of Persons, Properties and Industries Authority (REPPIA) and other government entities had also worked to grant reparations for the people. However, Sri Lanka has never dealt with the entire gamut of reparations but merely addressed particular aspects of it by providing inconsistent forms of compensation or restitution. Reparation is a multi-faceted process which is not restricted to financial payment but includes acknowledgment of previous abuses, rehabilitation of victims, and moreover, recognizes their dignity with rights. The Sri Lankan application of the concept of reparation for victims of ethnic or religious-based violence had further escalated the fragile situation of its execution challenging the equal application of the concept among all communities.

## II. METHODOLOGY

This research is mainly a qualitative research carried out by the reference of scholarly textbooks, journals, conference papers, and statutes. Open domain data were used for the analysis. This is a reform-oriented legal research. Further, the study has referred to the present Constitution of Sri Lanka, administration circulars and national policies especially the Office for Reparations Act No 34 of 2018. Moreover, international standards, international legal instruments like the United National Principles of Reparation, reports of the United Nations Human Rights Council, and International Law Commission reports were used for the comparative analysis of the study.

## III. DISCUSSION

Reparation is a critical component in TJ within a transition expectation to correct previous wrongs and prevent future repeats. If designed and implemented in a holistic, comprehensive, and complete manner, reparations treat all citizens equally and direct the transition

towards a peaceful and just society treating victims at its foremost. Therefore, victim-centric approach with equal and fair application of the concept is at a greater challenge.

### ***C. International Law Aspect of Reparations in the Transitional Justice Process and Its Issues***

The application of the concept of reparation in International law goes back to the Permanent Court of International Justice (PCIJ) decision in the *Factory of Chorzow Case* and in this case, it was stated that “Reparation must as far as possible wipe out all the consequences of the illegal act and re-establish the situation which would in all probability have”. Further, it is stated that any act contrary to international law would give an obligation to restitution and this dictum has been widely accepted and reaffirmed in later ICJ decision in the cases of *Gabcikovo – Nagaymaros, the Armed Activities on the Territory of the Congo* and *Papamichalopoulos v.*

*Greece*. Later, the United Nations Commission on Human Rights also recognized the right to remedy and reparation for victims in its guidelines in 2005. Further, the annual session of the General Assembly adopted these principles in March 2006. Accordingly, reparation mechanisms include restitution, compensation, rehabilitation, satisfaction and guarantee of non – repetition. These principles were adopted in the Roman Statute of the International Criminal Court (ICC) and the International Convention on the Protection of All Persons from Enforced Disappearances later.

Restitution refers to actions restore the victim to the original situation before the gross violation of International Human Rights Law and International Humanitarian Law. Compensation refers to providing any economically assessable damages as proper and proportional to the gravity of the violation and circumstances of each case. Rehabilitation refers to medical and psychological care as well as legal and social services. Satisfaction refers to a

broad range of measures such as verification of facts and full and public disclosure of the truth. Finally, Non – Repetition refers to include broad structural measures of a policy nature such as institutional reforms to avoid the recurrence of such incidents.

Accordingly, certain countries legally established the concept of reparation through Truth Commissions such as the Truth Commission of South Africa, Colombia, and Sierra Leone. Moreover, the concept of reparation included in the regional Human rights treaties such as the European Convention on Human Rights and American Convention on Human Rights and the South African Coalition for Transitional Justice ( SACJT). They affirm the rights to legal remedy and state that right to remedy and fair compensation in the form of reparations. SACJT includes reparations, prosecutions, pardons, and truth-seeking and payment by way of urgent interim reparation for health, education, and economical loses. Further, reparation actions were empowered with the introduction of the National Unity and Reconciliation Act.

However, international legal instruments do not clearly articulate or interpret the term victim for reparations. It is therefore flexible in application to different contexts. For example, the International Humanitarian Law does not define the term victim while some legal regimes prefers to use the term survivor instead of a victim. Further, the four pillars of TJ are interdependent on each other. Therefore, efforts at truth and justice are meaningless if victims find no answers to their issues, and their perpetrators are not being punished. Therefore, reparations on their own can be seen as merely paying off victims if they are not complemented with efforts to provide meaningful measures of truth and justice. These insights of international legal instruments reflect that reparation helps victims to rebuild their lives in a situation where the state gets its obligation towards its

people. Therefore, reparation focuses on the victims as its foremost consideration.

**D. The Reparations Policies in Sri Lanka and identified issues.**

**1. Ad hoc Reparations Initiatives**

Since the end of the war, several man-made and natural disasters have resulted in death, displacement, and devastation, consequently leading to the provision of compensation. Further, authorities involved in that have used inconsistent schemes. Although reparations are largely focused around the war, ethno-religious conflict, and other forms of violence, it has been used in the post-disaster situations to avoid discrepancies creating discrimination and inequities of victims. Ad hoc in nature compensation could be observed in both man-made and natural disasters in Sri Lanka as illustrated in Table 1 below.

Table: Different Reparations Schemes in Sri Lanka.

Incident	Damage	Compansation
Aluthgama and Beruwala Incident in June 2014	4 Deaths, 80 injured and 23 homes were fully damaged and 2,017 homes partially damaged	Rs. 2 million each as compensation for deaths, while those who sustained injuries during the clashes would receive Rs. 500,000.
Koslanda Landslide in October 2014	39 deaths and nearly 100 homes buried	Rs.100,000 for death and Rs.10,000 each for school children
Explosion in the Armory at the Salawa Army Camp in	1 death and several others injured, 174	Rs.100,000 provided for the deaths and Rs.25,000

June 2016	houses completely destroyed, 1,032 houses partially damaged and 1,325 residents displaced	each for injuries
Meethotamulla garbage tragedy in April 2017	32 deaths and 145 houses and destroyed or damaged	Rs.100,000 as compensation for a death which was subsequently increased to Rs.1,000,000 with cabinet approval after protests by the victims
Ethno-religious violence in areas in Kandy in March 2018	3 deaths and property of 465 persons damaged	Rs.100, 000 was paid for each death
Easter Sunday attacks in April 2019	290 deaths and over 500 persons injured	Government promised to pay Rs 1 million each for a victim and Rs 100000 each for funeral expenses.

Source: National News Papers in Sri Lanka

Other than that REPPA was established in 1987 as a consequence of the 1983 July riots with the objective to assist affected people with financial assistance. It had several schemes - one was the 'Most Affected Persons Compensation Scheme for General Public'. The maximum compensation amount granted for a death under this scheme was Rs.100,000 and Rs.50,000 was given for an injury. On the other hand under the scheme

'Most Affected Persons Compensation Scheme for Government Servants', the maximum compensation amount granted for a death was Rs.200,000 and Rs.100,000 was granted for an injury where lack of uniformity could be observed. The examples mentioned above show the lack of uniformity in terms of compensation to the victims. Reasons for this lack of uniformity could be identified as public outcry, pressure, and political influence etc. These influences decided the final outcome of the reparation effort. However, the National Involuntary Resettlement Policy (NIRP) was introduced to discuss shortcomings related to resettlement and compensation. Finally, the Lessons Learnt and Reconciliation Commission (LLRC) also stated "restitution and compensatory relief", which emphasizes the adoption of a Victim-Centric Approach while ensuring the transparency and equality in the reparation process despite the ethnic background of the people.

## 2. Office for Reparations

The present constitution of Sri Lanka guarantees the equal right and equal protection before the law under its fundamental right chapter. Further, statutory protection of the breach of such right also provided with effective remedy dignity of all victims of past conflicts and protection of their rights is also available in the Sri Lankan legal system. Further, Sri Lanka accepted and recognized the right to reparation as a component of the Sri Lanka transitional justice process in line with the United Nations Human Rights Council Resolution 30/1 in 2015. Accordingly, the Office for Reparations was established under Act No 34 of 2018 as an independent authority. Accordingly, the Office is empowered to formulate, design and implement reparations policies in Sri Lanka. The Office receives the applications from an aggrieved person of a wide range such as children, youth, women and disabled. The Act refers to both individual and collective reparations. However, reparations will not be

granted to individuals or groups because they belong to a certain political party, movement, state institution, or formation. Section 12(2) and (3) of the Act states that reparations shall not prevent victims from pursuing legal remedy against violations and such victims shall be advised by the Office's outreach units of their ability to appear before any other proper authority, person or body.

Further, section 10(2) of the Act, states that the office for reparations may set up a number of (temporary or mobile) regional units as deemed necessary to ensure that reparations are accessible to all aggrieved persons. Therefore, it is important to keep the Office for Reparations under the central government to discharge fair and equal execution of its duties to the people. However, the execution of the work through the provincial council is possible under the present framework. However, there were several criticisms against the office for reparation as it was mainly focused on the matter of rehabilitation of ex - combatants.

Further, there were other issues relating to the planning and budgeting stages. Other than that this study highlights several existing actors including REPPIA and others who have a role in administering some forms of reparation. As this paper has repeatedly highlighted, reparations in Sri Lanka are administered through numerous policies and bodies, resulting in an ad hoc system that does not meet the needs of victims in any comprehensive manner. Other than that those decisions are subject to change based on public outcry and political interests which always damage the trust and confidence of the people about the conduct of the reparation office. Some inconsistency in the government efforts at reparations also raise questions as to whether successive governments provided reparations as a substitute to genuine attempts at truth and justice in Sri Lanka. The main issue of the reparation in Sri Lanka is nothing else but public outcry and political interests where those reparation schemes come as an attractive political promise or political agenda in the election

manifesto. The schemes introduced have the indirect ethno religious interest which contributes to lose public confidence.

### ***E. Comparative Study with International Standard.***

International legal instruments have accepted that reparation is a state responsibility in which it gets a legal obligation to provide reparation for its actions. International Coalition of Justice Process (ICJT) has recognized that different victims have different needs and those needs can be changed over time. Therefore types of reparation also vary according to the victim's economic status, social class, gender, age, and identity. For example, women and children's needs differ from the needs of a disabled person as the need additional care. Accordingly, the Sri Lankan application of the concept of reparation is far distant from this understanding of the Victim-Centered Approach. A victim-centered reparations program ensures that victims and their needs, interests, and rights are always at the center of attention and constitute the goal of each policy. Here, "victims" are not just a homogeneous group or specific ethno-religious groups. Sometimes victims can be a certain people or community in general.

An inclusive approach recognizes the political right of every victim in common. However, it is a challenge to find victims in an equal way in a diverse society with the complexity of their situations. For example, the distinction between victim and perpetrator is difficult in the light of the child soldiers. Therefore, the discretion of concerned authorities may lead to inconsistent and non-comprehensive reparation process. Further, the examples mentioned above also show clear discrepancies in response and reparations provided due to factors such as political influence, public outcry, and victimisation. Accordingly, institutions like ICJT affirm that the transitional justice process should give access to victims for legal remedies such as a claim for their Fundamental Rights (FR). Sri Lanka can learn from the South

African Coalition for Transitional Justice (SACJT) model which constitutionally empowered body in order to make sure the efficient function of the newly established office for reparation in this regard other than the expensive and complex process available to claim FR with the help of Article 126(2) of the Sri Lankan constitution.

#### IV. CONCLUSION

Sri Lanka had administered the concept of reparation through numerous policies and administrative institutions. Yet, the absence of the key principles such as equity, non-discrimination, and gender sensitivity in the process still can be observed. Comprehensive application of the TJ, therefore, encourages truth, justice, reparation, and non-recurrence of such events and reparation will be the one major element bringing justice to the victims. Setting up the office for reparations raises expectations which still need care, consideration, and commitment to address the grievances of victims and affected communities in order to direct the reparation process in the victim-centric approach. Moreover, it needs legal and policy frameworks to integrate international law and standards of victim-centric and rights-based framework in the reparation process that avoids the creation of victim hierarchies. Office for reparations should adopt an inclusive process with transparency where all the communities have their trust and confidence towards it. The confidence-building between the institutions and the communities could be done through policy reforms and as well as healthy execution of its duties. Further, continuous application of the concept of reparation in a victim-centric approach when and where needed would generate experiences and lessons learned that further develop the concept. Finally, as the public trust doctrine encourages victims, the affected communities and civil society should monitor the workings of the designated institutions with regular interaction to raise concerns to improve the process.

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#### References

- Factory at Chorzow case , Germany v. Poland, [1928 ],PCIJ, Ser, A ,No .9 p.21.
- Gabcikovo – Nagymaros Project Case (Hungary v. Slovakia) , [1997], ICJ. Report 1997, p.7 , paras 149- 152.
- Armed Activities on the Territory of the Congo Case (Democratic Republic of the Congo v. Uganda),[2005]ICJ, Report 2005,p. 82 , para259.
- Papamichalopoulos v. Greece ,[ 2002] ( Article 50) , ECHR, Ser. A, No 330.
- The Constitution of the Sri Lankan Socialist Republic, 1978, Article 17 and 126 (20).
- Rehabilitations of Persons, Properties and Industries Authority Act No 29 . of 1987.
- National Involuntary Policy No 10 of 2000.
- Lessons Learnt and Reconciliation Commissions – 2011.
- National Policy on Durable Solutions for Conflict Affected Displacement No 05 of 2016.
- Bureau of the Commissioner General Of Rehabilitations Act No 03 of 2006.
- The Disaster management Act No 13 of 2005.
- The Office for Reparations Act No 34 of 2018.
- Consultation Task Force on Reconciliation Mechanisms Act 03 of 2016.
- Report of International Law Commission on Stare Responsibility, Draft Articles , 2001,para11.

Statute of the International Court of Justice - 1946.

Rome Statute on International Criminal Court - 2002.

International Covenant on Civil and Political Rights - 1976.

International Covenant on Economics, Cultural and Social Rights - 1976.

De Greff P, *The Hand Book of Reparations*, Oxford University Press, 2008. P 23.

Hamber, B and Wilson R, *Symbolic Closure through Memory, Reparation and Revenge in Post Conflict Societies*, 2002, p 35- 53.

Rohith A and Mari j, *Transitional Justice in the Twenty First Centaury*, Cambridge University Press, 2006, p 120 - 42.

Louise Arbour, "Economic and Social Justice for Societies in Transition," *New York University Journal of International Law and Politics* 40 (2008):1-27.

Pablo De Greiff (ed.): *The Handbook of Reparations* (Oxford University Press 2006).