Peace or Justice? Transitional Justice in Afghanistan

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The three decades of conflict in Afghanistan have taken the lives of more than a million people and the country and its people have suffered the gravest violations of human rights. There is a strong desire for justice among the Afghanis, but since the fall of the Taliban, the transitional government with its base of international support has intentionally ignored the calls to deal with these past injustices.

While Afghanistan has come a long way towards establishing democratic institutions, such as parliament, failure to deal with the crimes of the past threatens the legitimacy and democratic foundation of these institutions.

The country has started on a path dealing with these past injustices by conducting a comprehensive national consultation and developing a transitional justice strategy that is coherent, multidimensional and based on the views of the public. The success of this resulting strategy remains precarious, however, due to both the ongoing insecurity in the country as well as its dependence upon the unreliable political will of Afghanistan's leadership.

Early one morning in October 2005, a large number of community elders along with the cleric of the Sray Qala village, gathered in the northern region of the village after the morning prayer. Everybody looked nervous. Everybody was quiet. Ghafar, the eldest among them, raised his hand and called out a prayer for the souls of the more than 500 unknown bodies buried during the civil war in 1989 in the mass grave in the Sharin district of Paktika province of Afghanistan. He called for justice to be done in order to return the dignity of those buried at the site.

In today's Afghanistan, thousands of such gravesites can be found, and hundreds of thousands of stories can be heard of loved ones and family members who have not been seen since they were arrested by the former regime.

The conflict in Afghanistan had three phases. The first started with a top down bloody revolution in 1978 that was followed by foreign occupation by the then-Soviet Union in December 1979. This then facilitated a decade and a half of rule by two factions of the authoritarian pro-communist People's Democratic Party of Afghanistan. Most of the atrocities, including forced disappearances, mass killings and forced displacement of ordinary civilians and political opponents, occurred during this period of the conflict.

The second phase started with the collapse of the Soviet-backed regime of Najib Ullah and the formation of the Mujahedeen governments, where most of the military factions who were fighting against the Soviet troops and the pro-communist regime took power and started to fight each other. In this period, chaos erupted and another round of serious human rights violations occurred in the country.
The third phase began with the emergence of the Taliban and its control over Afghanistan from 1995 to 2001. While every Afghan citizen suffered under the Taliban regime, the primary victims of their rule were women and ethnic and religious minorities.

More than a million Afghans lost their lives, approximately two million were disabled by the conflict, and thousands more were detained and tortured for their political beliefs. Almost all the cities of the country were destroyed and the agricultural fields were burned. During the course of the three decades of war, more than seven million people were forced to leave their villages and towns and take refuge in Iran, Pakistan and other parts of the world.

It was only after the Bonn Peace Accord in December 2001 that the path was paved for Afghans to put an end to these years of conflict. The nature of the conflict, both an international armed conflict and an internal conflict, has left behind a legacy of the most brutal violations and human rights abuses in the history of Afghanistan. The legacy of past abuses is noticeable in all aspects of Afghan society, psychologically and physically.

While the conflict has ended, the question of justice and dealing with past atrocities remains unanswered. The Bonn Peace Accord, unlike other peace agreements carried out by the United Nations, did not address the issue of transitional justice and no mechanism was established to deal with the abuses of the past. A key reason for this was that all parties to the peace agreement were involved in serious human rights abuses during the course of the conflict. The peace talks did not take place between a winner and loser of a war; the talks were between different ‘loser’ groups who regained control of some parts of Afghanistan after the US-led coalition attacks on Afghanistan against the Taliban.

The voices of victims demanding justice were echoed neither by the new Afghan authorities nor by the international community, both of whom promoted ‘peace first, justice later.’

The international community's policy on justice was formulated mainly by the then Special Representative of the Secretary General of the United Nations Lakhdar Brahimi. However, while Brahimi proposed a long-term strategy for securing justice in Afghanistan through political stabilization of the country and judicial reform, his stand on ‘peace first, justice later’ discouraged the development of any foundation for justice efforts in Afghanistan. Transitional justice and the political process have therefore proceeded on separate tracks; four years after the Bonn Conference, this approach has undermined true peace and security.

The paradigm of ‘peace versus justice’ was presented differently by the UN Secretary General Kofi Annan in his report to the Security Council on transitional justice and rule of law in post-conflict countries. He wrote: ‘Justice and peace are not contradictory forces. Rather, properly pursued, they promote and sustain one another. The question, then, can never be whether to pursue justice and accountability ...’. Annan's ideas on peace and justice being mutually reinforcing issues have not taken root in Afghanistan, however. Rather peace at the cost of justice remains the core policy of the UN mission in Afghanistan and of the Afghan government. The argument put forward by these groups is that if Afghanistan moves forward on accountability and justice for past human rights abuses, the country's fragile peace will be challenged and the peace processes will be disrupted.

The international community acted very differently on the issue of transitional justice in Afghanistan compared to its response in other post-conflict countries. In Iraq, the Special Tribunal to prosecute former ruler Saddam Hussein for war crimes and crimes against humanity has conducted trials and already issued verdicts; a process of vetting of Ba'ath party
members remaining in the police was carried out with the strong support of international
actors. In Uganda, dealing with the Lord's Resistance Army has become a priority for the
International Criminal Court. While Afghanistan became a member of the International
Criminal Court, ratifying the Rome statute in March 2003, there is little appetite to deal with
the serious crimes against humanity that continue to take place. As an example, in Bala
Murghab district of Badghis province, a paramilitary group killed more than 30 civilians,
raped women, and set fire to a whole village in May 2003. The UN, despite peoples' cries for
justice, did not go further than to condemn the incident through a public statement.

In addition, to seek their help in the fight against terror in Afghanistan, some members of the
international community went further: they politically and financially supported some of the
most notorious warlords, such as Ali in the east, Zadran and Shairmohmaad in the south,
Amanulah Zairkoh and Khan in the west and General Dostum in the north. Instead of being
marginalized, the support gave them legitimacy.

The policy of ‘peace first, justice later’ encouraged more violence by the local warlords and
promoted a state of impunity. To a large extent, the pursuit of this policy affected the
credibility of Afghanistan's new democratically elected government and the peace process.

Contrary to the outspoken wishes of the public for vetting government officials, some of the
best-known human rights abusers have taken up important official posts. The judiciary has
become politicized and has been staffed with a large number of corrupt and known human
rights violators. If this situation continues, the confidence of the people in government
institutions will decline and this loss of trust will play into the hands of the Taliban and
undermine the democratic changes in Afghanistan. Already, the absence of properly
functioning judicial institutions has facilitated the establishment of unofficial courts by the
Taliban. In some places, people recognize these courts as de facto judicial bodies and bring
their cases before them.

A narrow window of opportunity to look at the past was opened when participants of the first
national human rights workshop gathered in March 2002 with President Hamid Karzai and a
large number of civil society and religious leaders. The purpose of the workshop was to
discuss justice for past human rights abuses. The great demand for justice demonstrated
during the three days of the national human rights workshop resulted in a mandate to the
Afghan Independent Human Rights Commission (AIHRC) to ‘undertake national
consultations and propose a national strategy for transitional justice and for addressing the
abuses of the past.’

In pursuing this goal, the Commission developed a methodology for consultation that was
inclusive of all segments of society in order to increase the level of its legitimacy and people's
ownership of the processes.

The widespread consultation included a survey designed to capture quantitative data and
examine preferences; it was completed by 4151 respondents. The Commission convened more
than 200 focus group discussions with over 2000 participants designed to capture qualitative
data and assess perceptions. The consultation took eight months and covered 32 of
Afghanistan's 34 provinces as well as refugee populations in Iran and Pakistan. Although the
Commission used social science methodology, this was not intended to be a scientific study,
but rather an attempt to reflect the opinions of the population as an outcome of this
consultation.²
Although the consultation was conducted in a very difficult security situation, the population was enthusiastic and supportive of the process. In each focus group discussion, people were overwhelmingly willing to discuss these issues. There seemed to be a sense of gratitude at the very concept of being consulted. A man in Salang district of Parwan became quite emotional while responding to the survey questions: ‘Now I feel that I am a part of this society. Nobody ever asked our view on such important decisions.’ A man in Kandahar said: ‘So far, no one has asked us: what do you, victims, want? Do you desire revenge? Do you want housing? Food?’ In one of the village focus groups, participants said they considered the consultation an extraordinary opportunity for the people of Afghanistan; they noted that no one since King Amanullah Khan has consulted with people on a national level.

The quotes above demonstrate that the national consultation itself was considered a first step towards the realization of the hopes of the vast majority of Afghans that they could regain their trust in public institutions.

The consultation and the subsequent publication of the ‘A Call for Justice’ report initiated a national debate and discourse around transitional justice issues in the country. It provided an opportunity for victims to speak out; it also provoked some well-known political leaders, who were involved in the civil war and who were known as the faces behind the human rights atrocities, to speak strongly against the transitional justice process.

These political leaders who were involved in the struggle against the former Soviet Union during the occupation of Afghanistan in the 1980s also have claimed that they are religious leaders who represent the Mujahedeen (those who took part in the holy war against the invasion of the country by the Soviet Union). They suggest that the transitional justice initiatives are aimed at good Muslims and the Mujahedeen. They called for an immediate reaction against the AIHRC and have labeled members of the commission ‘not good Muslims.’ However, the reaction of the former political leaders has created momentum for the media to discuss the issue in a broader context and has helped bring more clerics and Mullahs to talk about justice as one of the main pillars of Islam. But it also discouraged victims from speaking out openly. Victims saw the public attack by the warlords and former political leaders as a direct intimidation. This also diminished the political will of the President and his team to support transitional justice initiatives.

The report ‘A Call for Justice’ was accepted by President Karzai on 29 January 2005. His acceptance of the report and his commitment to implement the recommendations in the presence of Louise Arbor, the UN High Commissioner for Human Rights, became an important tool to challenge those actors in the international community and the Afghan government on their policy of ‘peace first, justice later.’

The report also brought together a large number of elders from different provinces, civil society activists and religious figures around the issue of transitional justice. Since then the debate on transitional justice has widened its constituency and brought an enormous amount of public discussion and support around the concept.

Contrary to some perceptions, mullahs strongly support the idea of justice for past atrocities. Unlike other transitional justice experiences where religious leaders have played an important role in advocacy to demand justice, in Afghanistan, these leaders have had very low levels of involvement in advocacy and campaigning for transitional justice. This is mainly due to the stand taken against transitional justice by some of the former Mujahedeen leaders (who claim religious leadership) and fear among the clerics and mullahs of being seen as anti-
Mujahedeen. However, civil society, clerics and mullahs were the most outspoken at the focus group discussion and closed-door meeting during the pre-consultation processes in different parts of the country and they were very radical in pursuing criminal justice for past human rights atrocities. The political move by the warlords seriously affected the involvement of the moderate religious leaders. A lesson that can be drawn from the transitional justice experience in Afghanistan is that in a very politically complicated post-conflict situation like Afghanistan's, where religion plays an important role in sociopolitical developments, religious leaders should be involved in pursuing justice from the outset in order to avoid any misjudgment and misinterpretation of the transitional justice processes with regard to religious values and figures.

In response to the views expressed in the AIHRC's public consultation regarding the urgency of moving accountability forward, the President appointed a three-member panel, including his senior advisor. The task of the panel was to consider the report's findings and recommendations and to develop, in collaboration with the AIHRC and the United Nations Assistance Mission in Afghanistan (UNAMA), an action plan to implement a national strategy for peace, reconciliation and justice.

The plan, titled ‘Action Plan of the Islamic Republic of Afghanistan for peace, justice and reconciliation’ was presented in June 2005 to an international conference in The Hague. It was then presented to President Karzai and adopted by the Afghan cabinet in December 2005.

The term ‘transitional justice’ is new to Afghans and is often misunderstood as addressing only questions of criminal responsibility. While developing the action plan, efforts have been made to explain that, as a first step, transitional justice strategies aim to realize peace and national reconciliation, to restore co-existence and cooperation, to heal the wounds and pain of the victims and to reintegrate citizens into a peaceful society. Reparations, healing of the physical and psychological suffering and reintegration in the community of citizens whose social relationships have been damaged, are all interventions that go beyond such concepts as courts, prisons, and revenge. The political situation and sensitivities around the issue of transitional justice in Afghanistan required establishing, as the basic principle of the action plan, a culture of forgiveness, brotherhood/sisterhood, and the strengthening of solidarity between the country's present and future generations. The positive experience of countries that have passed beyond violent crises shows that a transitional justice strategy should balance a variety of goals, including: truth seeking; victim recovery; reintegration of the perpetrators of minor crimes into society; reparations; the preservation of peace and stability; the strengthening of democracy, the rule of law and the administration of justice.

However, within political circles, there has been an emphasis on forgiveness and reconciliation without a corresponding consideration for restoring the dignity of victims and respecting their desires. But the victims, while favoring political reconciliation for the sake of security, continue to demand accountability for past crimes.

Unfortunately, there is no organized victims' group or organization established in Afghanistan to formulate the requests of victims and to conduct advocacy for their legitimate demands. While formulating the Action Plan, the AIHRC attempted to represent the victims' views through consultation with the victims' families.

The Action Plan takes into account the realities of the country; it relies on the religious values of Afghanistan and the need to maintain stability and security. The Plan attempts to incorporate all these facets within five key areas: symbolic measures, institutional reform,
truth seeking and documentation, reconciliation and strategies for criminal justice. These five areas are not isolated options, but are mutually reinforcing elements. Taking into consideration the current security situation in Afghanistan, the importance of reconciliation is particularly acute, as durable peace requires social reintegration and reconciliation. It is also important to take measures that make possible the return and reintegration of all hostile groups into society and reduce tensions and bloodshed. This peace and justice perspective does not imply impunity for genocide, war crimes, crimes against humanity and other gross violations of human rights. On the contrary, bold action against these crimes is itself a universally accepted moral principle, which Afghanistan needs to respect in order to fulfil its responsibility under international law.

The Action Plan, carefully designed as a strategy to deal with transitional justice in the sensitive environment of Afghanistan has to date been constrained by a lack of political will. It has yet to be implemented. Ignorance of justice in Afghanistan has promoted a state of impunity and resulted in more violence and insecurity in the last two years. It further demonstrates that a durable peace will not be achieved in a post-conflict environment unless the past is addressed and justice is done.

Afghanistan has developed a unique strategy in dealing with past human rights abuses by building its proposed transitional justice strategy from an assessment of the peoples' will and views, using a bottom-up approach and systematic consultation while avoiding prearranged and preselected processes. Should there be a follow through on the recent commitment made by the President to implementing the Action Plan, Afghanistan has the potential to become a successful transitional justice case study where a nationally informed policy of transitional justice is effectively implemented and assists in averting further cycles of conflict.

Notes

1 The Khalq and Parcham factions.


3 Further information on the methodology, such as the selection process of interviewees and data analysis can be found at http://aihrc.org.af/rep_Eng_29_01_05.htm.

4 In December 2006, President Karzai finally announced the launch of the Action Plan. The plan will be carried out over a three-year-period. It remains to be seen however whether implementation will actually take place and how.