

# ARTICLE 370 ISSUE CLOSED, BUT TERROR VICTIMS NEED CLOSURE

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'If a truth and reconciliation commission is constituted by the Central government (or authorised by Parliament) to undertake structural investigation of human rights violation in the Kashmir Valley, the parameters need to be defined carefully and clearly' | Photo Credit: Getty Images/iStockphoto

While delivering the judgment on Article 370 of the Constitution, Justice Sanjay Kishan Kaul of the Supreme Court of India also recommended the constitution of a truth and reconciliation commission to heal the wounds and suffering of the victims of the insurgency that gripped the Kashmir Valley, particularly in 1989-90. Justice Kaul wrote that this may help to 'achieve collective understanding of the human rights' violations perpetrated by State and non-State actors, against people of the region'. Since truth-telling provides an opportunity for victims to narrate their stories which may facilitate an acknowledgement from those responsible for perpetrating the wrongs, and from society as a whole, this may pave the way for reconciliation, he wrote separately in the Epilogue. At the same time, he cautioned that the commission, if constituted, should not turn into a criminal court.

The purpose of a truth and reconciliation commission is to facilitate the process of reconciliation in societies that are divided during periods of violence and grave human rights abuses. While Uganda had a truth commission constituted (Uganda 1: Commission of Inquiry into Disappearances of People of Uganda, 1974) in 1974 — said to be the world's first — to investigate and report on hundreds of disappearances that occurred during the earlier regime, most of such commissions have been constituted to study the pattern of human rights violations that took place either during an earlier regime or military dictatorship or arising out of insurgency or similar grave acts of violence. Justice Kaul, for instance, referred to the South African truth and reconciliation commission, which was set up to investigate rights violations during the apartheid regime.

Priscilla B. Hayner, known for her expertise on truth commissions and transitional justice, in her book, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, has delineated the five main characteristics of truth commissions.

First, they focus on the past, rather than ongoing events. Second, a truth commission investigates a pattern of events that took place over a period of time. Third, it engages directly and broadly with the affected population, gathering information on their experiences. Fourth, a

truth commission is a temporary body, with the aim of concluding with a final report. Fifth, a truth commission is officially authorised or empowered by the state.

However, truth commissions are known to have also been appointed by the United Nations (such as in Timor-Leste or East Timor) and a non-governmental organisation (NGO) such as the World Council of Churches, in Brazil as well. The International Center for Transitional Justice (ICTJ), an NGO established in March 2001 (Hayner is also a founding member) to propagate truth commissions and help to transfer the expertise, is still working in many countries.

Therefore, if a truth and reconciliation commission is constituted by the Central government (or authorised by Parliament) to undertake structural investigation of human rights violation in the Kashmir Valley, the parameters need to be defined carefully and clearly. Much will depend on the composition of the commission because it is the members who provide impartiality and objectivity to the pious work they are entrusted with. In South Africa, two members (out of 17) could also be appointed as non-South African commission members.

The most important function of a truth and reconciliation commission is to hold public hearings and record patterns of rights violations, as narrated by the victims as well as by the perpetrators. The South African commission, for instance, had the power to grant amnesty in exchange for full disclosure by applicants. Such a provision could attract controversy in India if applied uniformly to state and non-state actors. Non-state actors in the Valley were terror groups, mostly financed by actors active across the border. Even home-grown terror groups are known to have been brain-washed and trained by them.

But as far as state actors are concerned, levelling imputations against the Indian Army (and/or the Jammu and Kashmir security forces) which have been holding fort since the late 1940s may not go down well with the government, as the Army's presence in the Valley is still required to further normalise the situation. Also, it is important to note that the central government has denied permission in the past to prosecute certain members of the defence forces for alleged offences and rights violations. The Supreme Court of India, in *General Officer Commanding (Army) vs CBI & Anr.* (2012), held that the government's sanction is necessary if there is a 'reasonable nexus' between action and the lawful discharge of duties of the official.

Therefore, while collective understanding of rights violations, perpetrated by state and non-state actors may be necessary — as observed by Justice Kaul — the mandate needs to be chosen carefully without having an adverse impact on the overall credibility of the security forces, including the armed forces.

Determining reparation for victims is one of the essential mandates of a truth and reconciliation commission even if the perpetrators are not identified.

As mentioned by Justice Kaul, the phase of involuntary migration (of Kashmiri Pandits) that took place in 1989-90 due to the second round of insurgency is the one that awaits rightful redress. It is quite understandable that many victims might not be alive to seek closure of their loss and violations. The truth and reconciliation commissions, if constituted immediately after the change of regime or end of hostilities or insurgency, would be most useful in reconciliation and in rebuilding fractured societies. Therefore, the truth and reconciliation commission, even if constituted without further delay, will have only limited utility.

Nevertheless, the victims of rights violations still reserve the right of reparation (recognised even by the UN) which may take all or any of the five forms, i.e., restitution; compensation; rehabilitation; satisfaction, and guarantees of non-repetition. Restitution includes all measures aimed at re-establishing the original situation before the rights violations happened. Examples

include return to one's place of residence or the return of property. This, though it appears to be problematic, is still the most crucial step for most migrants who need to be given a fair chance without further aggravating their agony. Monetary compensation for damages and pension may solve some problems of the poor victims, though the neediest might not be alive to the situation to get due benefits. Rehabilitation could restore reputation and may include legal services if needed. Satisfaction may assume the form of a public apology, commemoration, tribute to victims and so on. The guarantee of a non-repetition may include measures contributing to the prevention of further violations as well as training for armed and other security forces. Despite Jammu and Kashmir being a case of delayed reparation, some relief can still be given to the victims within each parameters given above to rebuild their lives.

The fact remains that the (Kashmiri Pandit) victims of mass exodus, who have roots in the Valley, still feel aggrieved, and need authoritative acknowledgement and closure for the violation of their rights. The chapter of Article 370 of the Constitution has been authoritatively closed by the Supreme Court, but the sufferers of insurgency must also get a rightful closure. Justice Sanjay Kaul, who knew well the limitations of his recommendation, chose to air his views on behalf of all victims, which must not go unheeded.

***R.K. Vij is a retired Indian Police Service officer. The views expressed are personal***

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