

Transitional Justice

Transitional justice emerges from endeavors to confront widespread human rights violations and heinous acts in nations undergoing a shift from times of conflict, authoritarian rule, or suppression to a state of peace, democracy, or stability. The origins of this can be traced back to the period following World War II, particularly with the Nuremberg Trials, in which the leaders of the Nazi regime were legally tried for committing war crimes, crimes against humanity, and genocide. These initial events established a standard for how the international community should respond to severe violations of human rights, with a focus on holding individuals accountable, seeking the truth, and providing compensation.

The understanding of transitional justice underwent substantial evolution in the late 20th and early 21st centuries, as many nations sought methods to address their history of violence and reconstruct their societies. Prominent instances include the Truth and Reconciliation Commission (TRC) in South Africa after apartheid, the transitions from military dictatorships in Latin America throughout the 1980s and 1990s, and the Balkan states in the aftermath of the Yugoslav conflicts. These occurrences emphasized the necessity of implementing systems to tackle the enduring consequences of human rights violations, guarantee retribution for victims, and establish the foundation for reconciliation and enduring tranquility.

The term "transitional justice" is attributed to the legal scholar Ruti Teitel. Since the early 1990s, transitional justice has been defined by the United Nations as "the full range of diverse processes and mechanisms used by a society to address massive past abuses, with a view to establishing accountability, providing justice and enabling reconciliation" (2004). Transitional justice is a way of dealing with the past (Teitel,2000).

The first principle is the **right to know**. Every person has the inalienable right to know the truth about past events relating to the commission of heinous crimes. It also carries a duty to remember, that is the knowledge by people of the history of their oppression and preservation of collective memory (Mendez,1998). Finally, the right to know is especially recognised for victims, their families or their relatives. It is about knowing the truth about the circumstances of the crimes.

The second principle is the **right to justice**. This right is the obligation of States to conduct, prompt, thorough, independent and impartial judicial investigations into violations of human rights and international humanitarian law. This right to justice also extends to the obligation of states to take adequate measures with regard to the perpetrators of human rights violations. For instance, in the area of criminal justice, to ensure that those responsible for serious crimes under international law are prosecuted, trailed and sentenced to appropriate penalties (Teitel,2000).

The third principle is the **right to reparation and compensation** for victims or their families, not only financially, but also symbolically, by evaluating the prejudice and giving victims and their families due consideration.

The right to non-repetition is the fourth principle. The right to non-repetition of serious human rights violations reflects the obligation of states to protect victims from re-victimization (Rosenthal,2005).

Thereby, measures are taken to meet these principles. In this context, ad hoc commissions of enquiry are often established to investigate large-scale or systematic human rights violations. In addition, the envisaged legislative, administrative, and institutional reform of the state must be accompanied by measures such as the disbanding of non-state armed groups, the demobilisation, disarmament, and social reintegration of children who have been associated with the holders of armed force, and finally, the reform of laws and institutions that contribute to the maintenance of impunity. Thus, the four core measures of transitional justice, namely trials, truth-telling, reparations and administrative reforms, are aimed at recognition, trust, rule of law and ultimately reconciliation (Lanegran,2005).

Transitional justice is based on the consensus that justice is necessary for - not opposed to - peace and stability (De Greiff,2006). By addressing the needs and rights of victims, it promotes a process of reconciliation and transformation of the state system and supports the achievement of the ultimate goals of transition (Boraine,2006).

Transitional justice employs various mechanisms to address the aftermath of human rights abuses and to foster a move towards reconciliation and democracy.

One of the key strategies is the establishment of Truth Commissions. These temporary bodies delve into the history of widespread violations, aiming to uncover the truth behind the abuses. By documenting victims' testimonies and experiences, they not only acknowledge the pain suffered but also pave the way for national healing and reconciliation.

Another critical aspect of transitional justice is Criminal Prosecutions. This mechanism seeks to hold individuals accountable for their actions through legal proceedings, either in national or international courts. The process underscores the importance of accountability and the rule of law, serving as a deterrent against future violations by demonstrating that such actions will have consequences. The pursuit of justice for severe international offenses, including genocide, crimes against humanity, and war crimes, reinforces the rule of law by imposing criminal penalties on lawbreakers. This process underscores a zero-tolerance policy towards crime and ensures accountability for violators of human rights. Tracing back to the Nuremberg Trials, the fight against impunity has evolved to include various judicial bodies such as the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the former Yugoslavia, and hybrid courts like the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia, among others. Furthermore, the establishment of the International Criminal Court (ICC) in 1998, as mandated by the Rome Statute, marked a significant advancement. As the first permanent international court, the ICC focuses on prosecuting high-ranking individuals responsible for egregious crimes, stepping in when national jurisdictions fail to act. The ICC, along with hybrid courts and tribunals, plays a crucial role in global efforts to hold perpetrators of grave crimes accountable, embodying the international community's commitment to justice and the protection of human rights.

Reparations Programs offer another avenue for addressing the past, providing direct compensation to victims of human rights abuses. These programs might include financial payments, access to health services, or even symbolic gestures such as public apologies. The aim is to repair, as much as possible, the damage inflicted upon individuals and communities, helping them to rebuild their lives.

Institutional Reform is crucial for preventing future abuses. This involves overhauling state institutions that may have been complicit in abuses, such as the police, military, and judiciary. The goal is to ensure that these institutions can function in a manner that respects human rights, upholds the rule of law, and safeguards against corruption and abuse.

Vetting and Lustration processes are implemented to ensure that those who take on public roles are individuals of integrity, who have not been involved in human rights abuses or corrupt practices. This is essential for restoring public trust in institutions and building a governance framework that promotes justice and human rights.

Lastly, Memorialization Efforts play a significant role in the healing process. By establishing memorials or museums, and organizing commemorative events, societies can honor the memories of victims, ensuring that the atrocities are not forgotten. These efforts contribute to a collective memory, fostering an environment where such abuses are less likely to recur.

The link between justice, reconciliation and remembrance

“Impunity represents the triumph of lies, silence and forgetting. It violates and poisons the memory of individuals and communities” (Joinet,2002). This idea asserts that a society that has gone through massive human rights violations must look back at its past to achieve reconciliation.

As the International Center for Transitional Justice states 'in the context of conflict resolution, remembrance is a crucial element of the healing process' (McDowell,2014). Reconciliation now requires a pact to remember, not a pact to forget. The creation of the UN ad hoc tribunals for the former Yugoslavia and Rwanda (Selimovic,2013), the semi-international tribunals in Sierra Leone, Bosnia- Herzegovina, Kosovo, Timor Leste and Cambodia, as well as the thirty or so truth commissions in the space of fifteen years are signs of this new approach to reconciliation (Hazan,2008).

Transitional justice defends the idea that truth and memory work are necessary and that reconciliation cannot be achieved by denying the past (Tutu,1999). The establishment of South Africa's Truth and Reconciliation Commission is a case in point (Mamdani,2002). Remembrance and justice are thus intrinsically linked. Justice is achieved through memory. Indeed, according to Pierre Nora (2002) “to claim the right to memory is, at the bottom, to call for justice”.

Reconciliation

The term “reconciliation” originates from the Latin word *reconciliatio*, which combines *re*, “again” and *conciliare*, meaning “to bring together” or “to unite”. Therefore, at its core, reconciliation refers to the act of bringing things together once again, repairing what has been fractured, and fostering a renewed sense of unity.

In the common understanding, reconciliation transcends mere agreement or compromise. It entails a profound transition - a sincere acknowledgment of disparities, a readiness to comprehend alternative perspectives, and a dedication to mending scars or restoring relationships. It frequently necessitates empathy, forgiveness, and a readiness to progress despite previous complaints.

According to Clogg and Parlevliet (2021), reconciliation is a multifaceted process aimed at (re)building and transforming fractured relationships resulting from violent conflicts or oppressive systems. It concentrates on enhancing both horizontal connections among individuals and groups within society and vertical linkages between individuals and institutions. Its overarching goals encompass envisioning a future founded on fairness, mutual acceptance, and interdependence. This intricate process involves several key elements: firstly, cultivating a shared vision of a just and interlinked future; secondly, confronting and addressing the enduring impacts of historical violence; thirdly, establishing more inclusive institutions and frameworks that facilitate transformed relationships and a revised social compact; finally, fostering profound cultural shifts and attitudinal changes, engendering trust, social unity, and the establishment of new norms within the community. Reconciliation, therefore, embodies a comprehensive endeavor striving towards healed connections, reconstructed institutions, and a shared societal ethos founded on harmony and equity.

Reconciliation aims at “learning to live together in the post-conflict environment” (Kelman, 2010). “Reconciliation is an over-arching process which includes the search for truth, justice, forgiveness, healing, and so on” (Bloomfield, 2003) and coexistence is merely one of three stages of reconciliation. How can we manage to live together after a conflict? Is reconciliation an illusion, a semblance of living together to claim stability for the country?

Yet, reconciliation plays a crucial role in nation-building by promoting the establishment of connections, trust, coexistence, and coherence among disparate groups in society. It also creates an environment where new narratives can arise or many narratives can peacefully coexist (Clogg, Parlevliet, 2021). In this reading, the cases of Nepal and the Philippines showcase how examining grievances and historical injustices prompts a reevaluation of previous methods employed in nation-state formation. Revealing that the notion of a culturally uniform 'national identity' has historically marginalized ethnic or religious minority groups, leading to discrimination and conflict, highlights the necessity of pinpointing actions required to foster an inclusive, harmonious future founded on a civic form of nationalism. The creation of new narratives would contribute to developing a fair and interdependent future. To simplify and allow emerging narratives, the policies may include dialogue, collaborative action to address “urgent needs on the ground, and appropriate and meaningful acts of symbolic reconciliation” (Du Toit, Mendes, 2023). The examples of the post conflict stabilization and ethnic reintegration on the Nineveh Plains of Iraq through civic and religious dialogue at the state level during 2017 and 2018, or the example of fostering dialogue, ethnic coexistence, and trauma healing in Kenya, illustrate how this would help contributing to processes of reconciliation by increasing dialogue.

Reparation

Reparation refers to the measures taken by states or organizations to compensate individuals or communities who have suffered harm as a result of unlawful acts, conflicts, or human rights abuses. The concept of reparation is grounded in the principle that victims of such violations are entitled to measures that address the damage they have suffered, including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. These principles are enshrined in international legal frameworks and documents, such as the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (United Nations General Assembly, 2005).

Reparation can take various forms, each tailored to the specific needs of the victims and the nature of the harm experienced. **Restitution** seeks to restore the victim to the original situation before the violations occurred, which may involve the return of property, restoration of freedom, or reinstatement of employment. **Compensation** is provided for any economically assessable damage, such as physical or mental harm, lost opportunities, and legal or medical expenses. **Rehabilitation** includes medical, psychological, and legal services aimed at addressing the physical and psychological effects of the abuse. **Satisfaction** may involve measures such as public apologies, memorials, and acknowledgments of the facts and acceptance of responsibility. Finally, **guarantees of non-repetition** involve ensuring that the violations will not occur again, which may include legal and institutional reforms, military and police training, and the protection of human rights defenders (de Greiff, 2006).

The implementation of reparations faces numerous challenges, including the identification of victims, determination of the appropriate form and scope of reparation, and the sourcing of adequate funding. Moreover, in post-conflict settings or in the aftermath of widespread abuses, the sheer scale of violations can make it difficult to provide individualized reparations, leading to the adoption of collective reparation programs aimed at affected communities (Torpey, 2006).

Reparations play a critical role in the process of transitional justice, serving not only as a recognition of the suffering of victims but also as a means of promoting healing and reconciliation within societies torn apart by violence and conflict. By addressing the material and moral damage caused by human rights violations, reparations contribute to the restoration of dignity and the rebuilding of trust in state institutions. Furthermore, reparations are essential for fostering a culture of accountability and for deterring future violations, thereby laying the groundwork for sustainable peace and justice (Laplante, 2007).

Restitution

Restitution, as part of transitional justice, serves as a reparative measure to restore victims of human rights violations to their original state before the harm was done. This aspect of justice is crucial for addressing the immediate effects of injustices, enabling a concrete restitution of rights, property, and social standing that were lost as a result of conflict or repression. Restitution can take on diverse manifestations, encompassing the restitution of property, the resumption of employment, the restoration of legal rights, and the provision of previously deprived services such as education and healthcare (United Nations General Assembly, 2005). Restitution primarily involves the return of property to individuals or communities who were dispossessed during conflicts or under oppressive regimes. The objective is to tackle the problems related to involuntary displacement and confiscation of property, with the aim of compensating for the actual damages endured (United Nations General Assembly, 2005). Likewise, the objective of restoring employment and legal rights is to rectify unjust terminations and discriminatory actions, guaranteeing that affected individuals are reinstated to their previous positions or have their civil and political rights reinstated. The significance of equality and non-discrimination in the post-conflict recovery process is highlighted by the need for access to basic services, with the goal of fully reintegrating victims into society.

The execution of restitution is filled with difficulties, encompassing practical problems and legal obstacles, as well as the possibility of conflicting demands and the intricacies of verification procedures. These issues require a sophisticated approach to compensation, one

that can navigate the complexities of communities after conflicts and ensure fair outcomes for all parties involved (Stanley, 2001).

Restitution is a crucial aspect of transitional justice, fulfilling several roles that go beyond simple compensation. It has a vital function in upholding justice and dignity for victims, dealing with the concrete effects of violations, and creating a favorable atmosphere for preventing future occurrences and promoting reconciliation (De Greiff, 2006). Restitution plays a crucial role in rebuilding trust in state institutions and establishing a foundation for enduring peace and justice by aggressively addressing and correcting injustices.

The effectiveness of restitution is greatly improved when combined with other transitional justice procedures, such as truth commissions, reparations programs, and institutional reforms. This comprehensive approach guarantees that both the underlying factors and the outcomes of human rights violations are thoroughly addressed, so fostering a stronger basis for peace and reconciliation (United Nations Secretary-General, 2004).

Restitution is a fundamental aspect of transitional justice, crucial for resolving the immediate consequences of human rights abuses and enabling the complete recovery of victims. The successful execution of this task, albeit difficult, is crucial for guaranteeing fairness, respect, and a lasting state of harmony in civilizations that have experienced conflict.

Truth

If the word “truth” can be opposed to the word “lie,” its contrary should be understood as “absence of truth.” This absence echoes silence, the fact of not telling, intentionally or unintentionally, in order to conceal something, and therefore constitutes an indirect or passive action. It could also be considered a denial of memory, or a willful action. Silence is conscious. Conversely, the word “truth” evokes direct action. Truth comes through speech and the search for truth. This quest gives the impression of having to dig deep, to uncover what is true and to emerge from falsehood and ignorance. Yasmin Naqvi (2006) notes the word “truth” in Arabic, “Al-Iaqq”, which also means “right” or “justice”. This triple interpretation shows how these words are interconnected and intrinsically linked. The interrelationship between the right to truth and the right to access to justice is notably acknowledged by Resolution 9/11 of the Human Rights Council in 2009.

The “right to the truth” pertains to a developing principle that imposes a duty on a state to furnish victims and their relatives with pertinent factual details regarding human rights violations perpetrated in times of conflict (Simpson, Hodzic & Bickford, 2012). This inalienable right to truth is defined by Louis Joinet, in his final report of 1997 identified an inalienable right to the truth as:

“Every people has the inalienable right to know the truth about past events and about the circumstances and reasons which led, through the consistent pattern of gross violations of human rights, to the perpetration of aberrant crimes. Full and effective exercise of the right to the truth is essential to avoid any recurrence of such acts in the future.”

This right entails the duty to preserve memory, the victims' right to know, and the guarantees to give effect to the right to know (Orentlicher, 2005). The right to truth must therefore be guaranteed by truth-seeking mechanisms, such as truth and reconciliation commissions to complement the justice system, to investigate and address gross violations of human rights

and serious violations of international humanitarian law (Human Rights Council, Resolution 9/11, 2009).

The establishment of a Truth and Reconciliation Commission symbolizes one of the greatest examples of the right to truth, conveyed through personal and narrative expression. The Commission gives a voice to victims as a way to “restore the human and civil dignity of victims by granting them an opportunity to relate their own accounts of the violations of which they were the victims” (Boraine,2000). Beyond a right to know, it is a right to be acknowledged and taken into consideration. Before conferring potential amnesty, the truth must be heard through the TRC. This procedure opens the way to truth-telling mechanisms, a process through which states and societies tell the stories of a past period of trauma to redress wrongs and build a better future (Simpson, Hodzic, and Bickford, 2012). This process involves fact-finding methods, the creation of spaces for victims to talk about their experiences, and the search for a constructive way to tell differing stories. These truth-telling processes were driven by civil society and leaders like Nelson Mandela, who embodied the very essence of truth (Boraine,2000). The role of victims and civil society is underlined by the fact that the proceedings of the TC were open to the public and documented through the media. This procedure demonstrates that the right to truth is a universal right and guarantees a certain transparency in state and legal institutions (Simpson,1999). Even if the TRC was essentially a means of achieving amnesty, it was able to give victims the role of victims and, above all, “survivors” (Simpson,1999). As such, it ensured that their status was heard and that their trauma was not denied. Rather than the truth-seeking process of a formal, objective search for the truth, the process is one of restoring truth and restorative justice to the victims' experiences.

Restorative Justice/ Retributive Justice

Retributive Justice centers on meting out punishment to individuals who have committed wrongful acts, while restorative Justice seeks to mend the injuries of previous events and restore confidence within the community (Crocker, 1999).

Restorative justice focuses on repairing the harm caused by criminal behavior, prioritizing the needs of victims, and engaging offenders in taking responsibility for their actions. It seeks to facilitate a process whereby all stakeholders affected by a crime can come together to collectively address the aftermath of the offense and its implications for the future. This approach emphasizes healing for victims, accountability for offenders, and the restoration of relationships and community harmony. The principles of restorative justice are rooted in indigenous practices and have gained prominence in contemporary justice systems as an alternative or complement to traditional punitive measures (Zehr, 2002).

This strategy encompasses procedures such as truth commissions, restitution, and reconciliation programs. These mechanisms aim to allow offenders to understand the impact of their actions, make amends, and reintegrate into society, while providing victims with a sense of closure, empowerment, and a voice in the justice process. Restorative justice is associated with higher rates of victim satisfaction and offender accountability than traditional criminal justice approaches (Strang et al., 2013).

Retributive justice, on the other hand, is predicated on the principle of punishment proportionate to the severity of the offense. It operates on the notion that crimes warrant a punitive response, both as a form of societal retribution against the offender and as a means of

detering future wrongdoing. The retributive model is deeply embedded in the legal systems of many societies, where the focus is on establishing guilt and administering punishment according to the law. This model upholds the rule of law and aims to maintain social order by reinforcing the moral boundaries of acceptable behavior (Duff, 2001). Retributive justice is characterized by formal legal procedures, where the state assumes the primary role in prosecuting offenders and determining penalties. Critics of this model argue that it often overlooks the needs of victims and fails to address the underlying causes of criminal behavior. Nonetheless, proponents contend that retributive justice fulfills a crucial societal need for moral condemnation of wrongful acts and serves as a deterrent against future offenses (Moore, 1997).

While restorative justice seeks to heal and rebuild, retributive justice focuses on punishment and deterrence. The restorative approach is more holistic, involving direct dialogue and mutual agreement among all parties affected by a crime, thereby fostering reconciliation and community cohesion. Conversely, retributive justice operates within a more adversarial framework, emphasizing the legal processing of crimes and the imposition of sanctions determined by the state.

Accountability

Accountability is the obligation of individuals, entities, and governments to answer for their actions, particularly those that violate legal and ethical standards. This concept is fundamental to the rule of law and is essential for ensuring that perpetrators of human rights abuses are held responsible for their actions, victims receive justice, and future violations are deterred. Accountability mechanisms include judicial and non-judicial processes designed to investigate, prosecute, and punish those responsible for human rights violations, as well as to provide remedies to victims. These mechanisms are grounded in international law and norms, as articulated in various international instruments and conventions (United Nations, 2004).

Judicial mechanisms for ensuring accountability typically involve formal legal processes, including domestic and international trials. International courts and tribunals, such as the International Criminal Court (ICC) and ad hoc tribunals like the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), exemplify the international community's commitment to prosecuting serious crimes that affect the international community as a whole (Schabas, 2007). Domestic trials, on the other hand, are conducted within a country's own legal system, possibly with international support or oversight to ensure fairness and adherence to international standards.

Non-judicial mechanisms may include truth commissions, reparations programs, and institutional reforms. These approaches can complement judicial mechanisms by addressing broader issues related to human rights violations, such as uncovering historical truths, providing comprehensive reparations to victims, and reforming institutions implicated in abuses to prevent recurrence. Truth commissions have been utilized in various countries as a means of documenting violations, acknowledging the suffering of victims, and recommending measures for reparations and institutional reform (Hayner, 2011).

The link between Art and Transitional Justice

The convergence of transitional justice is marked by creative expressions and initiatives play an important part in processes of healing, remembering, and reconciliation in communities

recovering from conflict. Art in the context of transitional justice encourages reflection on the past, improves public discourse, and fosters understanding and empathy among varied communities.

Art as a tool of truth-telling and memory

Artistic undertakings are effective instruments for conveying truth and preserving memory. Through the production of memorials, installations, performances, and exhibitions, artists create venues for reflection, commemoration, and awareness of historical injustices. These artistic representations can reflect the complexity and nuances of victims' experiences, frequently expressing emotional depth and personal narratives that official transitional justice procedures, such as tribunals and commissions, may overlook. Art's role in preserving memory and building a collective understanding of the past is critical for civilizations that want to confront and reconcile with their history (Clark, 2013).

Example of Lebanon: Faced with the absence of official memory, the duty to remember and narrate is carried out entirely by civil society represented by historians, intellectuals, artists or associations. These entities are the memory-makers – those who are concerned with memorialising the war in a social and aristocratic manner and are part of the logic of memory culture (Haugbolle, 2010). Memory culture emanates from individual experiences that are socially constructed, imagined and represented. Artistic expression is transformed as an original expression, and in the case of Lebanon, as the only expression of memory within society (Candau, 1996). Art thus assumes a “narrative function” (Brockmeier, 2001) and attempts to produce a general narrative that reaches a larger number of people.

Art and Reconciliation

Art can also help to facilitate communication and develop understanding between communities who are divided. Through participatory art projects and community-based initiatives, artists can bring people from various backgrounds together to share their stories, express their feelings, and work together to heal. This inclusive strategy helps to bridge the gap between victims and perpetrators, different ethnic or political groups, and generations, so contributing to the social cohesiveness required for long-term peace (Payne, 2008).

Art and Healing

Art has significant therapeutic value in transitional justice settings. Engaging with art can help individuals and communities process trauma, express loss, and envision possibilities beyond victimhood. Artistic activities provide safe venues for emotional expression and personal catharsis, which aids in individual and collective healing processes. The act of making or interacting with art can be an effective technique for healing psychological scars and building resilience (Cohen, Gutiérrez Varea, & Walker, 2011).

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