



## 19 Transitional Justice & Dealing with the Past

*Violent conflicts destroy the confidence in a social contract ...  
The process of reconciliation has to ... rebuild trust and confidence.*  
Dan Bar-On

Over the past two decades, scholars and practitioners have focused increasing attention on the question of how countries and societies can come to terms with a history of violence, war and oppression. The concept of transitional justice (TJ), originally introduced by the human rights movement, has come to play a prominent role in such debates. The concept initially referred to the judicial process of addressing human rights violations committed by repressive regimes in the course of democratic transition. Later on the term also came to be used for the pro-

cess of dealing with crimes and massive human rights abuses committed in violent conflicts. Along the way, it has gradually extended its meaning. Today, it covers the establishment of tribunals, truth commissions, lustration of state administrations and settlement on reparations as well as political and societal initiatives devoted to fact-finding, reconciliation and cultures of remembrance. However, the TJ literature has a strong focus on *accountability*. Law experts have extensively published on the development and capacities of international, hybrid or domestic courts. Most attention was given to the international tribunals for the former Yugoslavia, Rwanda, Sierra Leone and Lebanon and to the International Criminal Court. Furthermore, a relevant part of the literature has centred on the dichotomy of *peace vs. justice* and *truth vs. justice*.

### Debates around dichotomies

In the *peace vs. justice debate*, at least in its early stage, amnesties, rather than prosecutions, were often seen as the best way to achieve peace because of the need to contain “spoilers” in many post-war regions. Since then, most advocates of transitional justice have come to reject the idea of impunity and emphasise that amnesties, if applied at all, should be introduced as partial and conditional. Advocates of the legalist approach have strongly emphasised criminal justice as a means to deter future human rights violations. Furthermore, they argued that by separating individual from collective guilt, tribunals help in breaking the cycle of violence. While legalists assume that the courts’ activities are a general contribution to peacebuilding, sceptics doubt that criminal justice can achieve all of this. The effects of international criminal justice in particular remain contested. Some experts would go for domestic prosecutions based on the conviction that justice should follow rather than precede the consolidation of peace; others see legal accountability as a precondition for peaceful development.

The *truth vs. justice debate* has balanced the merits of trials against other accountability mechanisms. The 1990s in particular were marked by this dichotomy, due to the creation of the South African Truth and Reconciliation Commission (TRC) and the International Criminal Tribunal for the former Yugoslavia (ICTY). Truth commissions had initially been promoted as an alternative to prosecutions. It was assumed that public exposure of truth provides redress for victims, counteracts cultures of denial, contributes to individual and social healing and supports reconciliation of divided communities by engaging all of society in a → dialogue. Having seen the early truth commissions in Latin America as a major advance in terms of accountability, the human rights community has since come to view these instruments much more sceptically. One reason for this was the enormous chasm between the commissions' mandates to develop detailed recommendations on societal reforms and the non-implementation of these proposals by the governments that received them. Disillusionment about truth commissions has contributed to broadening the discourse and to overcoming the fixation on dichotomies.

### **Towards a holistic approach to dealing with the past**

Today, many more people agree that societies recovering from war and oppression need both legal instruments and incentives for healing and relationship-building. It has been suggested that retributive justice should be complemented with restorative approaches. Alexander Boraine (former member of the South African TRC and founder of the International Center for Transitional Justice, ICTJ) strongly advocates a holistic interpretation of TJ that is based on five key pillars: accountability, truth recovery, reparations, institutional reform and reconciliation.

*Accountability* derives from the fact that no society can claim to be free or democratic without adherence to the rule of law; there are mass atrocities that have been so devastating that civilisation cannot tolerate their being ignored. Yet in cases of large-scale

human rights violations it is impossible to prosecute everyone, and additional activities are needed that focus on truth recovery.

Within *truth recovery*, four different notions are covered: *objective and forensic truth* (evidence and facts about human rights violations and missing persons), *narrative truth* (story-telling by victims and perpetrators and communicating personal experiences to a wider public), *social or dialogical truth* (established by interaction or debate) and *restorative truth* (documentation of facts and acknowledgement) to give dignity to the victims and survivors and to support healing.

*Reparations* also play an important role for the victims, but need to be connected to the above-mentioned processes of truth recovery.

*Institutional reforms* are a prerequisite for truth recovery and reconciliation; therefore truth commissions should not just be designed as individual hearings but aim to call to account and modify those institutions responsible for the breakdown of a state or human rights violations.

*Reconciliation* has to be based on acknowledgement of past injustice, the acceptance of responsibility and steps towards (re-) building trust. Although the concept is ambivalent (and regarded with some scepticism, due to its Christian connotation), as Boraine argues, there is a need to achieve at least a measure of reconciliation by creating a “common memory” that can be acknowledged by those who have implemented an unjust system, those who fought against it, and those who were bystanders.

### **Need for further development in theory and practice**

Most scholars and practitioners would now agree that combining retributive and restorative elements of justice is a must for war to peace transitions. In addition, some suggest that a “gender lens” should be applied. Feminist research has revealed that a bet-

ter understanding of → gender, culture and power structures is needed to appropriately analyse the causes, dynamics and consequences of conflict and violence. The International Center for Transitional Justice calls for increased consultation of women in the design of TJ mechanisms and makes a strong case for structuring post-war societal programmes, especially programmes of compensation, in a gender-sensitive way.

Although it is widely assumed that TJ mechanisms contribute to peacebuilding, there is still little empirical basis for reaching strong conclusions about what impact they have on victims, perpetrators, and societies as a whole. Therefore Berghof Foundation has conducted a project on “Dealing with the Past and Peacebuilding in the Western Balkans” that has analysed the legitimacy of TJ mechanisms and looks at the interaction of different actors working for reconciliation in Bosnia-Herzegovina, Serbia and Croatia.

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### References and Further Reading

- Boraine, Alexander (2006).** *Transitional Justice. A Holistic Interpretation*, in: Journal of International Affairs, Vol. 60, No. 1, 17–27.
- Kritz, Neil J. (ed.) (1995).** *Transitional Justice. How Emerging Democracies Reckon with Former Regimes*. (3 volumes.) Washington, DC: USIP.
- Thoms, Oskar N.T. et al. (2008).** *The Effects of Transitional Justice Mechanisms. A Summary of Empirical Research Findings and Implications for Analysts and Practitioners*. Working Paper. University of Ottawa (CIPS).

### Online Resources

- David Bloomfield (2006).** *On Good Terms. Clarifying Reconciliation*. (Berghof Report No. 14.), [www.berghof-foundation.org](http://www.berghof-foundation.org) > Publications > Conflict Research Publications
- Martina Fischer (2011).** *Transitional Justice and Reconciliation – Theory and Practice*, in: Berghof Handbook for Conflict Transformation, online version, [www.berghof-foundation.org](http://www.berghof-foundation.org) > Publications > Berghof Handbook
- Peace Research Institute Middle East (2009).** *Das Historische Narrativ des Anderen kennen lernen. Israelis und Palästinenser*, [www.berghof-foundation.org](http://www.berghof-foundation.org) > Publications > Conflict Research Publications

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