



Journal of Interdisciplinary Conflict Science

Volume 1
Issue 2 November

Article 2


12-1-2015

Understanding Transitional Justice and its Two Major Dilemmas

Jared Bell

Nova Southeastern University, jb2303@nova.edu

Follow this and additional works at: <http://nsuworks.nova.edu/jics>

 Part of the [American Politics Commons](#), [Comparative Politics Commons](#), [International and Area Studies Commons](#), [International Relations Commons](#), [Models and Methods Commons](#), [Other Political Science Commons](#), [Peace and Conflict Studies Commons](#), and the [Political Theory Commons](#)

Recommended Citation

Bell, J. (2015). Understanding Transitional Justice and its Two Major Dilemmas. *Journal of Interdisciplinary Conflict Science*, 1(2), 115-. Retrieved from <http://nsuworks.nova.edu/jics/vol1/iss2/2>

This Theory, Methodology and Practice Review is brought to you for free and open access by the CAHSS Journals at NSUWorks. It has been accepted for inclusion in Journal of Interdisciplinary Conflict Science by an authorized administrator of NSUWorks. For more information, please contact nsuworks@nova.edu.

Abstract

Transitional justice is an ever growing field and greatly intersects with conflict science and peace studies. With the horrific crimes committed during World War II and the latter half of the 20th century societies now more than ever before are devising processes, mechanisms, and policies to move past gross human rights violations or communal violence. However, these mechanisms much like anything else are not perfect and come with a variety of dilemmas. In particular two main dilemmas plague transitional justice which this paper aims to deal with: **Getting to Truth** and **Reality versus Expectation**. Within the context of a theoretical analysis methodology, this paper explores these two by dilemmas explicating and analyzing them while looking at definitions of transitional justice, its processes, their pros and cons, its history, as well as how they impact transitioning societies.

Introduction

For societies that have been gripped by national atrocities ranging from war, genocide, mass rape, political repression, etc, there remains the daunting task of not only rebuilding their lives, blasted homes and institutions, but also mending a social fabric ruined by distrust and betrayal (Weinstein and Stover, 2004). In addition to this, these societies also face an even more daunting task of how to confront the past, counter the present and prepare for the future. Societies must ask how much should we remember? Who's to blame? Should perpetrators be prosecuted? If so will prosecution of these individual divide the country even further and undermine peace? Should there be amnesty? If so what should the conditions be?

Such questions are wrought in a moral quagmire that is rooted in a search for justice and healing. And are the bases for developing transitional justice methods in post conflict societies. Notions and concepts of justice are pluralistic and intersect with a variety of ideas, philosophies, and values. Justice, like beauty is in the eye of the beholder and can be interpreted in a myriad of ways. "For some, justice could be having a job and an income, or testifying in criminal trials against the perpetrators, for others it could be an apology, or confession" (Weinstein and Stover, 2004). Along these sentiments, post-conflict societies are faced with many vital dilemmas as how to move on. As explained in the abstract this article will discuss two main dilemmas: **Getting to the Truth and Reality versus Expectation**. Getting to the truth is an important part of being able to move on because, how can societies deal with the past if there is no collective knowledge of what happened and why it happened. However, this is often the most difficult part. The Reality Versus Expectation deals with the realities of assigning justice after a conflict compared to how those in society expect justice to be assigned, when, by whom, and for whom.

What is Transitional Justice?

Transitional justice is an emerging field within an array of inter-disciplinary studies ranging from conflict resolution to international development. Transitional justice refers to a wide array of approaches that states may use to address past human rights violations and includes both judicial and non-judicial mechanism (Cobban, 2007). Transitional justice mechanisms include a series of actions or policies, which may be enacted at a point of political transition from violence and repression to societal stability (Cobban, 2007). According to the International Center for Transitional Justice (2009) in the wake of gross human rights violations, victims have well established rights to see the perpetrators punished, to find out the truth, and to be compensated for their losses and suffering. The Center further explains that “because systemic human rights violations affect not just the direct victims, but society as a whole, in addition to satisfying these obligations, states have duties to guarantee that the violations will not recur, and therefore, a special duty to reform institutions that were either involved in or incapable of preventing the abuses” (para. 4).

Rhot-Arriaza (2006) notes that the term transitional justice itself, maybe misleading simple because the processes themselves may not take place in the immediate period after conflict, as well as the fact that transitions to peace and democracy may take decades. She also notes that some aspects of transition may take longer than others. It is also important to note, as will be discussed further on in this paper, there are no blanket models of transitional justice that can be applied to every post conflict society. Every society and every conflict is different, thus yielding a different set of circumstances for transitioning to peace and stability. Also not every society will and can

adopt methods of transitional justice. Olsen, Payne, and Reiter (2010) explain that the reason for this is that not all countries enjoy the freedom from past constraints and have the political will to adopt transitional justice. Gossman (2010) cites Afghanistan as a major example of this. She explains that with the variety of other major development and security issues still facing Afghan society there is not an immediate rallying cry for transitional justice mechanisms to be implemented.

The Emergence of Transitional Justice

What we now view as transitional justice emerged on the global scene shortly after World War II, when Nazi perpetrators were tried and punished in what has become known as the “Nuremberg Trials” for their crimes against humanity during the Holocaust. While controversy still looms as to the validity and fairness of the trials, it is undeniable that the process at Nuremberg set precedent within the international community then and still today, that no state can commit heinous acts against its people and not face consequences. In the second half of the 20th century the bloody conflicts that gripped Africa and the Balkans made transitional justice increasingly an integral part of international development. States and experts helping states recover had to not only consider economic and political development, but, also how to live with the demons of the past.

Five Different Transition Justice Mechanisms and their pros and cons

The five types of justice this section will discuss are: Trials, Truth Commissions, Amnesties, Reparations, and lustrations. All mechanisms have their pros and cons and are approached by various experts differently. And of course every society must decide what transitional approach works best to move beyond their past and present issues. I will first begin with trials. Trials or

tribunals can take place on a domestic level or at an international level, they are designed to prosecute and punish perpetrators for their crimes. States who are able politically and economically may hold their own trials or tribunals domestically, while states who cannot may turn to the international community. A major pro for those who support trials are that they create a sense of accountability and may serve as a deterrent for human rights abuses others domestically and international. Olsen et al (2010) points out that another major pro that many experts argue for is that without some sort of punishment and trials a culture of impunity may take root and respect for rule of law maybe diminished. A major con of trials is that they are expensive. Court proceedings, investigation, and housing those on trial is extremely costly, which many states emerging from conflict simply cannot afford. Another major con is that trials may cause further division in an already divide society. Especially if it is believed that those conducting the trials are partial to one side of a conflict over another. Two most recent examples of trials are international based in Arusha, Tanzania and The Hague, Netherlands to prosecute war criminals for both the genocides in Rwanda and the countries of the former Yugoslavia.

Next the second mechanism is truth Commissions. Truth commissions are public gatherings where perpetrators confess their crimes or reveal information about the nature of their crimes. Experts who support truth commissions over trials argue that a major con is that truth commissions are centered on bringing together the victims and the perpetrators in an attempt to repair the damage down by the perpetrators crimes. Another pro is truth commissions also are not as expensive as trials. A major con is that truth commissions have no legal standing and can only make recommendations. Another major con is that truth commissions may never actually yield the truth. They are lengthy processes and many become disenchanted with whole idea. The most

notable example of a truth and reconciliation commission is the process adopted in South Africa after Apartheid.

Now we will move onto the third mechanism, Amnesty. Amnesty is a process in which perpetrators do not face punishment for their crimes. Everyone gets a “clean slate” so to speak. According to Olsen Et al (2010) amnesties have been the most common form of transitional justice throughout the globe. A major pro of amnesties are it may help the country move beyond the past by not dwelling in the past. Also another major pro is that amnesties do not carry the financial burden that some of the other forms of transitional justice do. A major con is that victims of past trauma may feel that the perpetrators got off free with no recourse or justice. A major con is that the truth also maybe in jeopardy. If society chooses not to deal with the past and just move on, many who were victims may never get solace as to what happened and why. A prime historical example of Amnesty is when the Spanish government decided not to prosecute members of Francisco Franco’s regime in the mid-1970s for their crimes in purging political opposition (Olsen et al, 2010).

Then the forth mechanism is reparations. Reparations are systematic compensations for those who have suffered from wide spread human rights abuses or victims of armed violence. A major pro of reparations is that it may help those who have been disenfranchised by structural and physical violence begin to rebuild their lives and move on from conflict. Another pro of reparations is that it provides acknowledgement and validation to victims that the state recognizes that said grievances did in fact happen. However, a major con of reparation is that it may be heavy financial burden for states just emerging out of conflict, which must also have to re-vitalize the economy and rebuild institutions. Another major con is deciding who gets what and how much. How does a society or government quantify pain and suffering? An example of reparations in recent years

has been Morocco, who has given financial compensation to victims and victims' families who were persecuted during years of political violence and repression.

The fifth and last mechanism is lustration. Lustrations are policies that seek to cleanse or purge the government structures and institutions of the individuals or parties that were responsible for a conflict, repression, or human rights abuses. The pros of lustration policies are that they may help in wide spread institutional reform and that past abuses are not repeated (Stover, Megally, and Mufti, 2010). A major con of lustration policies is that they may remove individuals who have the knowledge and experience (politically and economically) to move the country forward. Linkute (2012) points that another major pro lustrations is that it separates the present from the past, allowing for society to feel more confidently about moving forward. Another major con is that it does not individualized guilt and making it unfair to punish an entire professional for following simply following the orders of their superiors. An example of lustration policies has been de-ba'thification after the ousting of Saddam Hussein (Stover et al, 2010).

Also states emerging from conflict may choose to take a hybrid approach to transitional justice utilizing the various methods discussed above and more. An example of a hybrid transitional justice process is Rwanda. Rwanda used both truth and reconciliation commissions at local levels called Gacaca Courts and as was discussed earlier tribunals based in Tanzania. Along these lines Sriram and Pillay, (2005) explain that there must be an awareness of the distinction between national and individual reconciliation, particularly since different types of transitional justice mechanisms can advance one type of reconciliation more than another . The authors further add that if reconciliation is reached on one level, but not on another, instability and insecurity can result (Sriram and Pillay, 2005).

Methodology

The methodology I used to conduct the research in this article was a theoretical analysis. In a theoretical analysis the author draws upon current research to further theoretical work in a particular field (University of Sydney, 2015). In discussing dilemmas in transitional justice, of course one can find more than two to discuss. However, I chose to focus solely on these two dilemmas, because from the literature I read these continued to be two resounding themes. In this analysis I explored literature from both theories centered in transitional justice and other disciplines such as communication. As noted above, transitional justice is an interdisciplinary field so there are many theories outside of the transitional justice field that can be applied. In the first dilemma, Getting to the Truth I explored theory concerning communication. In order to better understand why it is a dilemma for societies to get to the truth, we must understand the outline of how the conversation takes place collectively. In the second dilemma, I largely explored notions of reconciliation, after all the aim of transitional justice mechanisms is to start the process of reconciliation in post conflict societies. These notions of reconciliation lay the foundations for expectations and how realistically transitional justice mechanisms can meet these expectations.

Analysis of the Two Dilemmas of Implementing Transitional Justice

Let us now begin with the first dilemma: Getting to the Truth. Regardless of the transitional justice mechanism a society uses, in order to move on there must be an acknowledgement of what has taken place. And this involves opening up and discussing the truth or what Stone, Patton, and Heen (1999) call the “What Happened” conversation. The “What Happened?” conversation they argue is where people in or who have just emerged from conflict spend much of their time trying to assess what went on and who is to blame for it. Stone et al (1999) present two errors that take

place within the happened conversation that I feel are relevant to the truth in relation to transitional justice. The first is the truth assumption, meaning that as we argue vociferously from our view, we often fail to question one simple assumption, which our whole stance in the conversation is built: “I’m right and, you are wrong “(Stone et al, 1999, p.9). The second is the blame frame; they argue that the most difficult conversations focus significant attention on who is to blame for the mess that has been created. Stone et al (1999) argues that talking about fault is similar to talking about-truth-it produces disagreements, denial, and little learning (p.11). It evokes fears of punishment and insist on an either/or answer. Nobody wants to be blamed, especially unfairly, so our energy goes into defending ourselves (Stone et all, 1999, p.12).

In these two concepts, we see the struggles societies face in initiating productive discussion or conversation on the truth after wide spread conflict. For many the truth becomes blurry, based on emotions, past experiences, and also a collective identity in which one shares with those, who too have had the same experiences. As the authors note, it becomes difficult to see past one’s own perceptions and ideas, because for many of us our version of the truth is very much essential to what the outcome or circumstances maybe be as a result of it. For societies, trying to figure out how to assign justice based on this truth, it becomes messy as to whose version of the truth is viable, logical, and factual. Trying to decipher and translate truth for an entire society, is tricky, because there is a risk of alienating and ignoring one or more parties side of the truth for that of another’s. This then may fuel already hot tensions, between conflicting parties. Furthermore, in terms of blame societies must come to an agreement on an established truth and the intentions of both the purported perpetrators and victims after a conflict. As the authors allude to, blame is never accepted without reservation, because it is often synonymous with punishment. Victimhood is also very subjective and therefore placing blame is not so easy.

For societies emerging from conflict, I would argue that an attempt at establishing the truth should come first in order to decide what should come next. However, as was noted earlier every transitional process is different and not ideal. We can see examples of this with the tribunals in Cambodia aimed at prosecuting crimes from the Khmer Rouge era in the early to late 1970s, the truth of what happened over 30 years ago is still pouring out today. For many who have been victims or who have had loved ones perish through structured state based violence the truth is extremely important. How else can an individual much less a society gain closure? An example that further illustrates this is the exhuming of mass graves after the genocide in Bosnia and Herzegovina, from testimony given at the tribunals, exhumation experts were able to locate the bodies of those who fell victims to the genocide and inform their families. In turn their families were able to get some level of closure by burying their relatives.

Also, for post-conflict societies deciding upon the truth becomes important when trying to figure out what to remember. Memory is important to transitioning societies, because it is linked to social reconstruction. Societies must devise ways to help people heal and move on; and one of those is memorializing the past. Memorializing helps societies create new collective social memories, which become a basis for restructuring and reclamation. Of course I'm not naively arguing that a memorialization process based around established truth is a panacea for fixing a post-conflict society's ills, because the established truth for some will never be the established truth for others. But, deciding what to remember and how to remember is a starting point for gaining common ground. Gaining common ground allows for society and its members to begin to develop a map to chart where they came from, where they are, and where they may be going.

Now let us move onto the second dilemma: Reality versus Expectations. The reality of transitional processes and mechanism are again that they are not perfect, very expensive, and maybe hard to actually implement or enforce. Also, there are often too many goals associated with transitional justice and not enough time or resources maybe given to reach those goals. Mobekk (2005) emphasis that peace and reconciliation takes more time and effort than any time-restricted trial, truth commission or traditional process can achieve. South Africa is a great example where this was the case. According to Borer (2004) many became disillusioned with the truth and reconciliation process, after all as stated earlier, a truth commission's findings or recommendations are not legally binding. There were also those who took advantage of the amnesty offered, but, fled South Africa before participating in the truth commissions. Others did not seek amnesty at all. In the late 90s the South Africa government promised to prosecute those who did not seek Amnesty, but with the other pertinent issues facing a transitioning society such actions never materialized (Borer, 2004).

Another major point along these lines is that transitional justice cannot bring about peace and reconciliation alone; there must be other mechanisms in place. Transitional mechanisms are steps towards reconciliation, not its achievement (Mobekk, 2005). A major con of the Tribunals for the Former Yugoslavia where that transitional justice mechanism were not enough to move the different societies beyond the conflict (in particular Bosnia). Weinstein and Stover(2004) maintain that " UN resolutions creating the ICTY (International Criminal Court for the former Yugoslavia) make no mention of the need to build foundations for social reconstruction in the former Yugoslavia, including consolidations of a national shared history of the way; the creation of domestic legal institutions that promote and respect strict adherence to protection of human rights;

and democratic institutions capable of guaranteeing individual rights and freedoms” (Weinstein and Stover, 2004, p.37).

When I visited Mostar, Bosnia and Herzegovina in 2008 little did I know that Bosniaks, Croats, and Serbs were still bitterly separated into their own small communities along the Neretva River, only having interaction when absolutely required. Another of the reality versus expectation is that, societies may never actually reconcile at all to the level they were before regardless other peace building of social reconstruction mechanisms used, as noted above, post conflict societies will never be the same. Transitional justice mechanisms do not always bring about forgiveness and reconciliation. Of course reconciliation can take decades. But, just because a truth commission helps foster closure by revealing the exact details of particular event, it necessarily does not help former enemies to trust one another again, nor want to return to a sense of “normalcy”. Reconciliation is pluralistic and has different meanings to different people. Chapman (2010) explains that “one reason for the difficulty in understanding the requirements for reconciliation is that the term refers to a wide variety of types and level of relationships and an equally broad array of initiatives to overcome ruptures in them”. She further argues that “reconciliation is used synonymously with such diverse processes as peace building, mutual accommodation between former antagonists, and reconfiguration of individual group identities, healing, restorative justice, social repair, and community building. Reconciliation is both a goal and a process” (Chapman, 2010, p.145).

Conclusions

In the growing field of transitional justice there are seemingly more questions than answers. I find this very interesting and exciting, because as a scholar of the international conflict resolution field this creates growing opportunities for myself and many others to formulate research to help figure out how to close the gaps of transitional justice. As I discussed above, there's plenty of theories that we can use from other fields to enhance the field of transitional justice. Scholars of transitional just do not have to "re-invent the wheel" so to speak, we have a variety of knowledge at our finger tips, and we just have to apply it. Being able to create theories and ideas essential allow us to develop more options for helping societies close gaps in transitional periods. In doing this we are enabling them to write a better much greater chapter of history for the future of their nation and generations to come.

Works Cited

Borer, T A. (2004). Reconciling South Africa or South Africans? Cautionary notes from the TRC: African Studies Quarterly, 8(1), 28-29.

- Cobban, H. (2007). *AMNESTY AFTER ATROCITY: Healing Nations after Genocide and War Crimes*. Boulder: Paradigm Publishers.
- Gossman, P. (2006). Truth, Justice, and Stability in Afghanistan. In N. Arriaza- Rhot & J. Nariezcurrena (Eds.), *Transitional Justice in the Twenty-First Century*. Cambridge, U.K.: Cambridge University Press.
- International Center for Transitional Justice. (2009). What is Transitional Justice?. In *International Center for Transitional Justice*. Retrieved November 20, 2015.
- Linkute, L. (2012, June 1). Is it Possible to Devise a Fair System of Lustration?. In E- International Relations. Retrieved November 20, 2015.
- Mobekk, E. (2005). Transitional Justice In Post-Conflict Societies. In A. Ebnother & P. Fluri (Eds.), *Approaches to Reconciliation' in After Intervention: Public Security Management in Post-Conflict Societies - From Intervention to Sustainable Local Ownership*. Geneva: Geneva Centre for the Democratic Control of Armed.
- Olsen, T. D., Payne, L. A., & Reiter, A. G. (2010). *Transitional Justice IN Balance: Comparing Processes, Weighing Efficacy*. Washington D.C.: United States Institute of Peace.
- Roht- Arriaza, N. (2006). The New Landscape of Transitional Justice. In N. Arriaza- Rhot & J. Mariezcurrena (Eds.), *Transitional Justice in the Twenty-First Century*. Cambridge, U.K.: Cambridge University Press.
- Stone, D., Patton, B., & Sheen, S. (2000). *Difficult Conversations: How to Discuss what Matters Most*. New York: Penguin.

Stover, E., & Weinstein, H. M. (2004). *My Neighbor, My Enemy Justice and Community in the Aftermath of Mass Atrocity*. Cambridge: Cambridge University Press.

Stover, E., Megally, H., & Mufti, H. (2006). Bremer's "Gordian Knot": Transitional Justice and the US occupation of Iraq. In N. Arriaza- Rhot & J. Mariezcurrena (Eds.), *Transitional Justice in the Twenty- First Century*. Cambridge, U.K.: Cambridge University Press.

Sriram, C L, & Pillay, S. University of KwaZulu-Natal Press, Centre for Conflict Resolution. (2009). *Peace versus justice? The dilemma of transitional justice in Africa*

University of Sydney. (2015, November 9). Theoretical Article structure - rules and common mistakes. In University of Sydney School of Psychology. Retrieved November 20, 2015.