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## The Constraints of Transitional Justice in Promoting Intergroup Reconciliation

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PHAM QUANG DUNG, APR 15 2020

Transitional justice, both as a field of practice and a field of study, has expanded dramatically to encompass not only addressing mass violations of human rights but also more normative issues, such as peace-building, reconciliation, and inter-state grievances. Indeed, one of the stated goals of transitional justice is to promote reconciliation so as to build and rebuild relationships after long periods of gross human rights abuses (Seils, 2017). This is especially pertinent in post-conflict societies that are deeply divided along ethno-nationalist, religious, or racial lines. In those instances, how have transitional justice mechanisms, namely criminal prosecution, truth commissions, and more grassroots, local initiatives, promoted (or not promoted) intergroup reconciliation?

This paper attempts to answer this question by drawing on secondary sources of case studies of the effects of different transitional justice mechanisms on intergroup reconciliation in post-conflict societies. It found that criminal prosecutions and truth commissions exerted limited reconciliatory effects on intergroup relationships and in certain instances exacerbated intergroup tensions because of the socio-political context of the post-transition societies. In contrast, more grassroots, local initiatives that are organically conceived and implemented fared better in promoting reconciliation but, nonetheless, suffered the same limitations as criminal trials and truth commissions. Notwithstanding the theoretical debate surrounding truth versus justice and top-down versus bottom-up, this paper contributes to the field by providing empirical evidence to see whether or not these theoretical claims hold up in practice.

### Limiting the Scope of Analysis

Reconciliation can be conceptualized on many different levels and with varying degrees of implementation. “Thin” or “weak” reconciliation refers to the cessation of violence where both parties to the conflict coexist, but profound and intractable differences remain and continue to shape intergroup dynamics (Meernik et al., 2016; Seils, 2017; Wittlinger, 2018). “Thick” or “strong” reconciliation, on the other hand, is more long-term and transformative. It attempts to build sustainable peace by addressing the social and structural causes that are the source of conflict and fundamentally transforming intergroup relationship from an antagonistic to a peaceful one (Aiken, 2010; Hughes, 2018; Rouhana, 2018). This particular conception of reconciliation is a societal level definition. Seils (2017), for example, identified four different levels of reconciliation: individual, interpersonal, socio-political, and institutional reconciliation. Scholars studying reconciliation have frequently failed to mention the level of analysis they were operating on.

For the purpose of this paper, I am looking at intergroup reconciliation. Therefore, I examined case studies that analyzed intergroup reconciliation following the end of conflict and/or mass human rights abuses. I excluded cases of intergroup conflicts not based on ethno-nationalist, religious, or racial identities. This limits my examination to only two mechanisms of the transitional justice toolkit – criminal prosecution and truth commission – because lustration and material reparation account more for institutional and interpersonal reconciliation respectively. I also looked at more local, grass-roots initiatives and their reconciliatory benefits as informal forms of transitional justice that juxtapose with the formal model of criminal prosecution and truth-seeking. In terms of measuring the impact of transitional justice mechanisms on intergroup reconciliation, I relied on the judgments of the scholars whose case

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studies I referenced in this paper. However, I considered successful reconciliation simply as the psychological process that reduces identity-based hostility between groups where identities become less reified and essentialized, giving way for more nuanced and sympathetic perception of the people of the opposite groups. Reconciliation also entails the removal of structural inequalities that act as barriers to psychological reconciliation (See in particular, Hughes, 2018).

## **Transitional Justice: Promoting or Constraining Reconciliation?**

The field of transitional justice has long engaged in the truth versus justice debate (or the retributive versus restorative debate) that pitch criminal prosecutions against truth commissions. Proponents of international, domestic, or hybrid tribunal and courts emphasize the establishment of an official record about the past, acknowledgement of wrongdoings, and the individualization of guilt as means of promoting reconciliation (Clarke, 2008; Minow, 2016). In contrast, advocates of truth commission highlight the fact that it is more inclusive and closer in proximity to the victims which can deliver a more meaningful and effective rapprochement (Minow, 2016). Yet, others have argued that more grassroots, local initiatives can better foster reconciliation as they are perceived to be more legitimate, inclusive, and more responsive to local needs (Lundy and McGovern, 2008). However, the empirical evidence seems to not lend support to either criminal trials or truth commissions for reconciling relationships. This is because transitional justice does not operate in a social vacuum but is embedded within a particular socio-political context.

## **Criminal Prosecutions**

Post-conflict societies are characterized by extreme polarization not only between ethno-nationalist, religious, or racial identities but also between different claims of justice and historical truths. The criminal legal discourse that clearly identifies who are the victims and who are the perpetrators is unlikely to work well in the aftermath of gross human rights abuses where atrocities were committed by both sides and could even increase division over who held responsibility. At the International Criminal Tribunal for the Former Yugoslavia (ICTY), for example, many Bosnians saw the acquittal of the former Bosniak commander Nasir Oric as validation for their claim as the sole victim of the conflict (Haider, 2011). On the other hand, many Serbs considered the decision as another example of the ICTY's bias and their continued victimization (Haider, 2011). Thus, the spatially and procedurally removed nature of the International Criminal Tribunals from the local populations made it more likely that claims of justice will be contested and, therefore, undermine rather than promote intergroup reconciliation (Clarke, 2008). Even when criminal trials are inclusive, such as in domestic settings, the legal criminal system is still intrinsically retributive. The truth finding process as part of the legal investigation, such as that in Northern Ireland after *The Troubles* – a period of violence between the “unionists” and the “nationalists” from the 1960s to the 1990s, were quite adversarial for those involved rather than cathartic (Aiken, 2010).

In other cases, the winning party to the conflict hijacked the legal system to explicitly impose victor's justice on to the losing side. Thomson and Nagy (2011) argued that in the case of Rwanda's gacaca courts, the Hutus and Tutsis performed their roles as perpetrators and victims respectively according to the directives of the Kagame's government who favors the Tutsis over the Hutus. Those who did not follow the script (both Hutus and Tutsis alike) faced formal sanctions, such as fines, incarceration, and even bodily harm (Thomson and Nagy, 2011). As a consequence, the relationship between the Hutus and the Tutsis is unlikely to be transformed by such superficial rituals. While it is true that criminal prosecutions can potentially promote the rule of laws, deter future offenses, and preserve international humanitarian norms, trials have done little for bettering intergroup relationships and even intensified intergroup tensions in the former Yugoslavia, Rwanda, and Northern Ireland.

## **Truth Commissions**

Similarly, truth commissions have contributed little to the process of intergroup reconciliation. Truth commissions, as the name implied, focus more on truth rather than on reconciliation (Aiken, 2016). Rapprochement, for truth commissions, is a secondary goal. Yet, it is important to recognize that the ability of truth commissions to publish truth-seeking reports and to recommend reforms which can potentially tackle the roots of conflict and increase intergroup harmony. Nevertheless, it would be in vain if truth commissions are unable to perform their functions due

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to the constraints stemming from the socio-political context. For example, the lack of political will and the financial burden left the recommendations of the Solomon Islands' Truth and Reconciliation Commission (TRC) unfulfilled (Jeffery and Mollica, 2017). This has led to an increase in the level of skepticism and pessimism among islanders about the prospect of reconciliation (Jeffery and Mollica, 2017). In other cases, the mandate of the commission determined the truth that was sought (or not sought). In (re)examining the paradigmatic case of the South Africa's TRC, Aiken (2016) found that the commission's failure to adequately tackle socioeconomic injustices (the Commission only investigated physical harms) and to recommend more distributive structural reforms prevented significant interracial reconciliation. The cases of the Solomon Islands' TRC and the South Africa's TRC demonstrated the social and political limitations that can accompany truth commissions.

## Local Initiatives

Apart from criminal trials and truth commissions, many post-conflict societies have opted for more grass-root, local initiatives for promoting reconciliation. In Zimbabwe, for example, *nhimbe/ilima* (community working groups) promoted reconciliation after the Gukurahundi genocide by compelling perpetrators to confess while ploughing with the victims on their family farms where the perpetrators would tell the truth in a non-retributive environment and the victims would, in turn, accept the perpetrators' official apologies (Benyera, 2014). Reconciliation, in this case, worked best because of the sustained social interactions between the perpetrators and the victims while they ploughed the field together for the entire day; and the fact that justice was more easily obtained because perpetrators confessed in a non-retributive environment that was more conducive to admitting guilt than fear of reprisal or imprisonment (Aiken, 2010; Benyera, 2014). Other examples include the Community Relations Unit's financial supports for local initiatives to encourage intergroup interactions and dialogues in Northern Ireland (Aiken, 2010); the Prison Fellowship International's Sycamore Tree Programs for prisoners' reintegration into society in the Solomon Islands, which was praised for successfully reconciling prisoners who were fighters of the opposite sides of the conflict (Jeffery, 2013); and the three programs by the Belgrade-based Non-governmental organization the European Initiative for Democracy and Human Rights – Learning through Research: Local Social (Childhood) Histories, Theater for Ethnic Dialogue, and the Parents' Forum – to promote reconciliation and intergroup understanding (Clarke, 2008). Because these initiatives are organically conceived and implemented, they tended to take the victims' needs into account more than the international trials and truth commissions whose concepts might be alien to whom they purported to help. Yet, the local initiatives should not be romanticized as they also do not operate in a social vacuum. The ability of local, grassroots initiatives to advance intergroup reconciliation is still constrained by the socio-political context of the post-transitional situation.

In contrast to the main scholarly focus on reconciliation as a psychological process, Hughes (2018) argued that such discourse hides the structural segregations and asymmetrical power relations inherent in some post-conflict societies. Sustained social interactions between the formally hostile groups are one of the most important facets of reconciliation to foster better understanding and reduce intergroup hostility (Aiken, 2010; Meernik et al., 2016). However, segregations, such as in education, residency, cultural practices, and public spaces, reduce or even remove the ability of members of different groups to interact on a daily basis (Hughes, 2018). For example, students who attended mixed school as opposed to schools that had an ethnic majority in the former Yugoslavia were twice as optimistic of the prospect of reconciliation (Meernik et al., 2016). Segregation prevents mutual learning, which ultimately can perpetuate myths and a reified otherness. Furthermore, the prevailing asymmetry of power between groups prevents any psychological reconciliation from taking place. Rouhana (2018) argued that attempts to foster reconciliation between the Israelis and the Palestinians were ineffective because the former are seen by the latter as a colonial force that illegitimately settled on their land. To reconcile with Israel means that Palestine has to recognize and, therefore, give legitimacy to what it perceives to be an illegitimate colonizer. Therefore, distributive reconciliation – the “sustained attempts to reduce structural or material inequalities” as well as “inequitable power relations” – is a crucial antecedent to successful reconciliation (Aiken, 2010, pp. 171). Consequentially, reconciliation necessarily involves efforts both to address negative group stereotypes as well as the material reality that led to them.

## Conclusion

Reconciliation is recognized and emphasized in the transitional justice discourse as an important goal for

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transforming intergroup relationship from an antagonistic to a peaceful one so as to build sustainable peace. In order to do so, post-conflict societies have adopted a variety of measure ranging from the traditional transitional justice toolkit – criminal trials and truth commissions – to more local, grassroots initiatives and informal forms of justice. The transitional justice literature contends that all three mechanisms for dealing with the past is potentially reconciliatory. Yet, in practice, criminal prosecutions and truth commissions have had limited success when it comes to fostering intergroup harmony while more local initiatives fared better in promoting reconciliation. Transitional justice mechanisms do not operate in a vacuum. When implemented, they are embedded within the socio-political context of the post-transition societies. The polarization of society, the issue of victor's justice, and the inherent adversarial nature of criminal prosecution hampered its ability transform intergroup relationship in the former Yugoslavia, Rwanda, and Northern Ireland. On the other hand, the political and economic reality of the Solomon Islands' TRC as well as the limited mandate of the South African TRC diminished the reconciliatory benefits that truth commissions can potentially provide. Finally, while grassroots, local initiatives have mostly been successful in altering negative hostilities, they are, nevertheless, constraint by the material barriers, such as structural segregation, structural inequalities, and asymmetrical power relationships.

This points to a two-track approach to reconciliation that sees a role for both top-down and bottom-up justice. Where transitional justice mechanisms can only promote reconciliation if they are inclusive and speak to the lived experience of those involved, large-scale structural changes are necessary if grass-root attempts at reconciliations are to be possible and sustainable. On the one hand, practitioners of transitional justice should not fall into the trap of romanticizing the local. On the other hand, they should also not discount the importance of states as both an obstacle to and a possible enabler of intergroup reconciliation. What is needed is the principle of "do no harm" that applies conflict sensitivity to the context of the transitional situation in question (Haider, 2017). In this way, it is not criminal prosecutions, truth commissions, or local initiatives per se that has an effect on intergroup reconciliation, but how well these templates are adapted into the local context which ultimately determine the successfulness of reconciliation.

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