

TRANSITIONAL JUSTICE: ARE TRUTH AND RECONCILIATION COMMISSIONS WORTH IT?

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Abstract: Truth and reconciliation commissions are becoming an increasingly popular method used by the international community towards promoting transitional justice. However, many victims of human rights violations resort to further means of pursuing justice even after a truth and reconciliation commission has been engaged, which brings the question of whether truth and reconciliation commissions are worth the time and money they require. Incomplete justice and tokenism are among the reasons that it can be argued that a truth and reconciliation commission is not an effective alternative in facilitating reparations after human rights atrocities have occurred. The following analysis explores this question and eventually identifies valuable transitional justice outcomes that are unique to truth and reconciliation commissions.

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Introduction

Transitional justice is an area of law that addresses human rights violations in order to recognize victims and promote rule of law. In addition, transitional justice aims to provide accountability regarding past human rights violators and act as a deterrent to future human rights violations. Yet, transitional justice differs from country to country, depending on the circumstances, history, and types of human rights violations that occurred in the past.

Over the years, two of the most common legal mechanisms used by the international community and national governments to assist victims and their family's needs are truth and reconciliation commissions and criminal prosecutions. Criminal prosecutions have been facilitated by ad hoc courts, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), or permanent courts such as the International Criminal Court. In modern law criminal prosecutions have been a more common form of pursuing justice in comparison to the use of truth and reconciliation commissions.

However, over the last several decades truth and reconciliation commissions have grown in popularity as a mechanism for transitional justice for a variety of reasons. A truth and reconciliation commission is "an official investigative body that documents a pattern of past human rights abuses ... [and] provides an alternative method of addressing a state's violent past when the violence resulted in widespread human rights violations that occurred amidst ethnic, racial, class, or ideological disputes over justice and power."²

2 Daniel J. Hendy, *Is a Truth Commission the Solution to Restoring Peace in Post-Conflict Iraq?* 20 Ohio St. J. on Disp. Resol. 527, 535 (2005).

Although nations in the past have decided to address human rights violations through courts or truth and reconciliation commissions, or even by implementing both legal forums, these mechanisms are not interchangeable and do produce different results.

The following analysis discusses whether the time, money and effort spent on truth and reconciliation commissions are necessary, as opposed to using the more common, traditional methods of pursuing reparations for victims through criminal and civil courts. More specifically, the following analysis asks whether truth and reconciliation commissions are worthwhile, by comparing several aspects of truth and reconciliation commissions to the more recognized forms of retributive and restorative justice. After discussing the pros and cons of these transitional justice mechanisms, the extremely valuable aspects of truth and reconciliations commissions should be obvious; in other words, truth and reconciliation commission are definitely worth the time and effort spent when a country is involved in transitional justice.

Criticisms of Truth and Reconciliation Commissions

While the use of truth and reconciliation commissions has become more popular in recent years, significant criticisms towards truth and reconciliation commissions that are often expressed by the international community revolve around issues such as amnesty and tokenism that create a sense of incomplete justice. Incomplete justice involves the victim feeling as though he or she was denied a retributive aspect of criminal justice or not feeling “whole” after being denied the opportunity to pursue punitive damages through civil or criminal proceedings.

Amnesty

Amnesty laws are used to immunize leaders of a prior regime who have been accused of abusing their power and committing

human rights violations. Amnesty laws are often put into place to facilitate truth and reconciliation commissions so that victims are afforded an accurate and uninhibited account of the human rights violations committed by their abusers.

For example, South Africa's Truth and Reconciliation Commission (TRC), which was established as a fact finding group to investigate human rights violations committed in South Africa between 1960 and 1993,

holds truth and the healing of the nation as more important goals of this system of effecting justice than addressing the individual concerns of those wronged by the crimes. Consequently, the [TRC granted] amnesty to those individuals who voluntarily confess[ed] their crimes, as long as those crimes were committed within a certain time period and were politically motivated.”³

South Africa's TRC demonstrates how amnesty laws are used to assure that an accurate description of past human rights violations is recorded for the benefit of victims and the international community.

Another example of the use of amnesty law during a period of transitional justice occurred in Chile. In 1978, “former Chilean head of state General Augusto Pinochet granted himself and other military officials amnesty for crimes [of torture, disappearances and killing during Pinochet's rule] between 1973 and 1978.”⁴ After Pinochet's fall from power, a truth and reconciliation commission was established to investigate and make recommendations regarding these past human rights violations, but kept the amnesty

3 Paul Lansing, *South Africa's Truth and Reconciliation Commission: the Conflict Between Individual Justice and National Healing in the Post-Apartheid Age*. 15 *Ariz. J. Int'l & Comp. L.* 753, 754 (1998).

4 Gwen K. Young, *All the Truth and As Much Justice As Possible*. 9 *U.C. Davis J. Int'l L. & Pol'y* 209, 218 (2003).

laws in place. “The purpose of the amnesty was stated to be for the ‘general tranquility, peace and order’ of the nation.”⁵ Again, these amnesty laws were used to facilitate peace and achieve what was thought to be best for the victims, the country and the overall international community.

However, “[d]etermining whether to grant amnesty requires careful consideration of the impact on truth-telling.”⁶ It can be argued that amnesty laws create a sense of incomplete justice for the victims or family members of victims of human right violations. As a result, a nation’s period of transitional justice can consist of a lengthy and expensive truth and reconciliation commission, only to be followed by allegations of human rights violations or civil lawsuits brought by individuals because the amnesty laws allowed oppressive dictators to avoid punishment. For example, cases in Chile, including *Chanfreau Orayce & Others v. Chile* and the recent Pinochet case, as well as cases in South Africa, such as *Azanian Peoples Org. v. The President of the Republic of South Africa* (Azapo) and *Khulumani v. Barclays*, demonstrate a sense of incomplete justice that resulted in a repetitious use of transitional justice mechanisms.

In *Chanfreau Orayce*, the Inter-American Commission on Human Rights (IACHR) posits that Chile’s amnesty law should be repealed because granting amnesty for specific human rights violators does not allow for adequate justice and relief experienced by the victims and society. The IACHR challenged the amnesty law by stating that it further inhibits victims’ legal rights as it

gave rise to juridical inefficacy with respect to crimes; the victims and their families were left with no legal recourse by which perpetrators of human rights violations committed under the military dic-

5 *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, 3 W.L.R. 1456, 4 All E.R. 897, reprinted in 37 I.L.M. 1302, 1317 (H.L. 1998-99) (Nov. 25, 1998) (opinion of Lord Lloyd of Berwick).

6 Young at 243.

tatorship could be identified and the corresponding punishment imposed. By promulgating and ensuring compliance of [the amnesty decree], the Chilean State ceased to guarantee the rights to legal protection provided for under Article 25 of the Convention.⁷

The amnesty law in Chile was eventually repealed, and as a result the Chilean Supreme Court declared that Pinochet no longer had immunity. Thus, charges were brought against Pinochet in the late 1990's even though a truth and reconciliation commission addressing these issues had already occurred years earlier. In addition, the Pinochet case indicates that a state may have the obligation to prosecute because "[a]n amnesty law that prevents both civil and criminal proceedings may violate international law if it covers specific crimes such as torture, extralegal executions, disappearances, and crimes against humanity."⁸ Therefore, there will always be an option of criminal or civil prosecution for certain types of crimes after a truth and reconciliation commission has been conducted. Hence, the question remains: why include a truth and reconciliation commission at all?

Similarly, *Azapo* and *Khulumani* demonstrate a sense of incomplete justice and reparations because of amnesty laws that were put into place to facilitate the TRC in South Africa. For example, after the TRC was completed, the charges in the *Azapo* case were subsequently brought to court, in which

the Constitutional Court of South Africa considered a challenge to the amnesty provision set out in the Truth and Reconciliation Act. Families of apartheid-era victims... challenged the provision that authorized the TRC to grant amnesty on the ground that amnesty to apartheid perpetrators precluded the ri-

7 *Chanfreau Orayce & Others v. Chile*, Cases 11.505 et al., Inter-Am. C.H.R. 512, P 50 OEA/ser.L/V/II.98, doc.7 rev. (1997).

8 Young at 240.

ght of the victims to insist that the wrongdoers be prosecuted and punished, and that victims be compensated [and] that [s]ection 22 of the South Africa Constitution states that ‘every person shall have the right to have justiciable disputes settled by a court of law...or impartial forum.’⁹

In addition, the *Khulumani* case involves victims of the apartheid era who are suing international banks for monetary reparations due to the banks making investments in the former South African apartheid government. In *Azapo* and *Khulumani*, victims of human rights violations had an opportunity to participate in the transitional justice process and to facilitate peace by ushering in the new rule of law through the TRC. Yet in both instances the plaintiffs pursued restorative measures that were not offered through the TRC, as the plaintiffs in *Azapo* attempted to criminalize apartheid government officials and the plaintiffs in *Khulumani* pursued monetary reparations through a civil lawsuit.

For example, the plaintiffs in *Khulumani* brought a class action suit on behalf of four different classes, which included the following:

- a) An “extrajudicial killing class” of all surviving personal representatives of persons who were subject to extrajudicial killing by South African security forces between 1960 and 1994;
- b) A “torture class” of all persons who were subject to torture and rape by South African security forces between 1960 and 1994;
- c) A “detention class” of all persons who were subject to prolonged unlawful detention by South African security forces between 1960 and 1994; and
- d) A “cruel treatment class” consisting of all persons who were subject to cruel, inhuman, and

9 Young at 237.

degrading treatment by South African security forces between 1960 and 1994.¹⁰

The concern is that these four classes had an opportunity to acquire reparations and achieve retribution through the TRC, but were unable to do so because of amnesty laws that likely caused this type of restorative justice to appear unappealing or ineffective. Thus, these cases in Chile and South Africa could suggest that courts are a more effective means of restoring justice and providing reparations for victims, while truth and reconciliation commissions are a less effective form of transitional justice that can be considered to be a waste of time and resources.

Tokenism

Another criticism that truth and reconciliation commissions encounter is that this form of transitional justice is considered merely as tokenism. The concept of tokenism suggests that truth and reconciliation commissions are just a symbolic gesture of justice, and as a result this method of transitional justice is less effective than criminal and civil courts. Tokenism is defined as the policy or practice of making only a symbolic effort¹¹ and it can be argued “that the most extreme form of tokenism in transitional justice is to set up a truth commission as an alternative to criminal prosecution, rather than as a step toward accountability.”¹² In addition, some scholars feel that “the only reason that the [TRC] has been as effective as it has in eliciting thousands of confessions of apartheid-era crimes is because the threat of prosecution remains real... [and] [m]ere resort to [t]ruth [c]ommissions may not be

10 *In re South African Apartheid Litigation*, 617 F.Supp.2d 228, 242, S.D.N.Y. (2009).

11 The Merriam-Webster Dictionary 759 (Merriam-Webster, Incorporated) (1997).

12 Aeyal M. Gross, *The Constitution, Reconciliation and, Transitional Justice: Lessons from South Africa and Israel*. 40 Stan. J. Int'l L. 47, n.138 (2004).

sufficient to discharge a State's duties under various instruments of international law."¹³

Thus, there is the sentiment by some in the legal community that truth and reconciliation commissions are just a stepping-stone to trials because of their tokenistic nature, which leaves victims unsatisfied with the results. In addition, scholars may consider truth and reconciliation commissions to be tokenistic because they provide limited forms of restorative justice, such as a less personal, community-based scheme of achieving reparations.

In contrast, traditional legal mechanisms, such as courts, provide the community and victims of crimes with a more concrete form of punishment for past crimes. Punishment facilitates transitional justice and promotes rule of law because it provides legal redress, specific and general deterrence of future crimes, condemnation of the crimes, support for the rule of law, restoration of faith in the judiciary, judicial resolution for past wounds, expresses who is a criminal, and separates the military from the public realm.¹⁴

Therefore, the question still remains that asks why transitional justice should include truth and reconciliation commissions when it can be argued that most victims of human rights violations should just cut to the chase by taking their grievances to the courts. The Pinochet case, *Azapo* and *Khulumani* all demonstrate the lingering feeling of incomplete justice that is felt by victims and the international community after a truth and reconciliation commission has already occurred in the country.

13 Mary Margaret Penrose, *Impunity-Inertia, Inaction and Invalidity: A Literature Review*. 17 B.U. Int'l L.J. 269, 305 (1999).

14 Ruti Teitel, How Are the New Democracies of the Southern Cone Dealing With the Legacy of Past Human Rights Abuses? In *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Volume I, 146–153, 149 N.J. Kritz, ed. United States Institute of Peace, 1995.

In Defense of Truth and Reconciliation Commissions

Although there are legitimate criticisms regarding the use of truth and reconciliation commissions,

truth and reconciliation commissions are [] an increasingly popular transitional justice option for post-conflict societies. Between 1974 and 1994 twenty had been created and in 2004 there were more than thirty worldwide. In Timor Leste, the work of the truth commission was intended to complement the prosecutorial process. In contrast, the South African truth commission operated as an alternative to criminal trials in the national courts.¹⁵

Truth and reconciliation commissions are cheaper and more manageable than expensive ad hoc criminal tribunals and also provide a more local form of transitional justice in comparison to foreign-based criminal tribunals. A third positive aspect of truth and reconciliation commissions is that they provide psychological benefits for victims of human rights violations that are not acquired through courts. The following analysis discusses how these three benefits demonstrate the value and importance of truth and reconciliation commissions in the realm of transitional justice.

Cost

The need for transitional justice often follows a war or an oppressive government that has greatly deteriorated the country's infrastructure and economic stability. Countries in a transitional justice period are likely to be too ill-equipped to house an independent criminal tribunal with the task of prosecuting human rights violators and making reparations. As a result

¹⁵ Natalie Pierce, *Picking up the Pieces: Truth and Justice in Sierra Leone*. 6 N.Z. J. Pub. & Int'l L. 117, 143 (2008).

[m]any of the problems associated with domestic trials arise from the fragile condition of a majority of these regions in the aftermath of conflict. Often times, a state's entire judicial system is either too compromised, too weak, or simply lacking the infrastructure or resources to conduct large-scale criminal trials. Criminal prosecutions are also incredibly time-consuming and expensive ... [f]urthermore, this caseload would overwhelm state judiciaries' already limited infrastructure, resulting in overbooked dockets, gratuitous plea bargains, and, therefore, minimal accountability for many significant criminals.¹⁶

For example,

[i]n South Africa, the choice of criminally prosecuting the leaders of the apartheid regime was bluntly presented to the citizens: the [approximately US \$1.3 million] 'in taxpayer-supported court costs' that were spent to prosecute the former Minister of Defense yielded an acquittal. Punishment for wrongs is important, but so are electricity, medical care, jobs programs, education, housing, and so on.¹⁷

Moreover, "[i]n countries where prosecutions are not feasible, due most often to a lack of resources, a recognized threat to democracy or a lack of political will, [t]ruth [c]ommissions may provide supplementary justice until such time as full justice may be achieved."¹⁸ Therefore, truth and reconciliations commissions are extremely valuable, as this legal mechanism is a cheaper option that provides a method of achieving accountability and restorative justice in a country depleted of its judicial and economic resources.

16 Hendy at 549.

17 Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*. 12 *Int'l Legal Persp.* 73, 104 (2002).

18 Penrose at 305.

Local Transitional Justice

Transitional justice has evolved from acting as a tool for addressing international conflicts to currently being applied to internal conflicts as well. For example, the Nuremberg trials were one of the earliest forms of transitional justice, which focused on an international conflict consisting of war crimes committed by Nazi Germans during World War II. Yet, more recently transitional justice has extended its jurisdiction into matters that were arguably internal affairs. In response to the horrific events that occurred in former Yugoslavia and Rwanda during the 1990's, the United Nations set up the ICTY and the ICTR, both of which were considered to be mainly focused upon internal affairs.

However, regardless of whether the conflict was internal or international, the needs experienced by victims of human rights violations remains the same: a demand for reparations and the documentation of their persecution. Additionally, countries that surround these conflicts are interested in rule of law in order to stabilize the region and to prevent the conflict from crossing into their own territory. Therefore, an important aspect of transitional justice involves the country of concern taking part in the process of resolving the conflict. Yet, "[t]here are several conundrums in applying human rights to local places [and]... [a]ctivists who use human rights for local social movements face a paradox. Rights need to be presented in local cultural terms in order to be persuasive, but they must challenge existing relations of power in order to be effective."¹⁹

When establishing a transitional justice mechanism, it is imperative to keep in mind the issue of sovereignty and how it can both impede and help develop the process of restoring peace and reconciliation in the country. It is also important to consider deeply

19 Henry J. Steiner, Philip Alston & Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* 524-25 (Oxford University Press 1996) (3d ed. 2007).

rooted cultural beliefs that exist in isolated and rural communities that can be particularly difficult to affect through transitional justice mechanisms. Therefore, local transitional justice mechanisms must be able to break through the current, malignant establishment, such as an oppressive government or detrimental cultural norms, in order to confront the in-country problems. There are several recent examples that demonstrate how truth and reconciliation commissions are well-suited to break through these norms. In addition and as mentioned previously, countries experiencing transitional justice are often in a deteriorated condition, meaning that establishing an expensive, local criminal court to address human rights violations is not a possibility. Thus, the cheaper and more manageable truth and reconciliation commission is a more realistic option for a country striving to facilitate local transitional justice.

The discrepancy between local and foreign-based transitional justice is glaring when comparing truth and reconciliation commissions to criminal tribunals. For example, the truth and reconciliation commissions for South Africa, Chile, and Argentina, all occurred in the individual countries. In contrast, the ICTY, the ICTR and the Special Court for Sierra Leone, which are several of the leading criminal tribunals in transitional justice, are either based in the Netherlands or consist of domestic courts that are largely run by the United Nations and other foreign resources.

The modes of transitional justice in Timor Leste in comparison to the Sierra Leone demonstrate the important aspects of a local truth and reconciliation commission.

Unlike Sierra Leone, where the status of the Truth and Reconciliation Commission was contested, the status of the Timor Leste truth commission was unequivocally set out in [national law]. Interestingly, a 'Selection Panel' in Timor Leste decided the composition of the truth commission and was comprised of political,

civil and religious groups, as well as the Transitional Administrator for East Timor.²⁰

Assembling a truth and reconciliation commission comprised of local political, civil and religious constituents holds nationals accountable for human rights violations. Furthermore, Timor Leste's truth and reconciliation commission, a transitional justice mechanism made up of locally based participants, helps reduce issues of sovereignty and facilitates reaching and relating to cultural norms that exist in the isolated communities.

Additionally, the Timor Leste model demonstrates how well a locally-based truth and reconciliation commission can work together with courts. The work of the Timor Leste truth and reconciliation commission overlapped with the courts that were set up to prosecute those responsible for serious crimes that occurred in 1999, as the Timor Leste truth commission established a relationship between the Office of the General Prosecutor to promote information-sharing. "In contrast to Sierra Leone, where regrettably no such memorandum was concluded, Timor Leste established a framework to ensure a mutually beneficial working relationship."²¹ Undoubtedly, a locally based truth and reconciliation commission provides a local flavor of transitional justice that an internationally based criminal court cannot replicate on its own.

The process of transitional justice in the former Yugoslavia is another example in which the value of a local truth and reconciliation commission has become apparent. The ICTY, which was established during the war in the former Yugoslavia in the 1990's, demonstrates

the limits of a judicial mechanism's authority in the absence of community. ... [T]he ICTY's procedures ... have created undesirable community tension in Bosnia. The tribunal largely neglected the Bosnian

20 Pierce at 143.

21 *Id.* at 146.

people and appears to have organized its procedures to appeal to the United Nations and NATO donors. Most of the drafters were foreign lawyers trained in adversarial common law, an influence that has had a significant impact on the tribunal's functions.²²

Although the ICTY has effectively prosecuted several major leaders for committing severe human rights violations in the former Yugoslavia during the 1990's, a recent movement in the region instigated the establishment of a truth and reconciliation commission in order to rebuild the community. "Justice is no longer primarily about retribution nor even deterrence. Rather, these aspirations may actually give way to the demand for a kind of accountability suited to fostering peace and security on the ground."²³ The importance of establishing peace in the community cannot be understated, and the creation of the Bosnian Truth and Reconciliation Commission serves as evidence that foreign based criminal tribunals do not fully foster peace in the very community in which the human rights atrocities occurred. Hence, this locally based truth and reconciliation commission was set up to promote peace and facilitate the rebuilding process in the Bosnian community. A further analysis of recent criminal tribunals demonstrates that international courts have recognized the importance of interacting with the national community as well. For example, the Nuremberg courts involved no sovereignty issues and established exclusive jurisdiction, while the ICTY and ICTR defer to the international community but incorporate more regional legal resources and complementary jurisdiction.

Finally, examining human rights mechanisms beyond courts further demonstrates why local truth and reconciliation

22 Jamie Rowen, *Social Reality and Philosophical Ideals in Transitional Justice*. 7 *Cardozo Pub. L. Pol'y & Ethics J.* 93, 105 (2008).

23 Ruti Teitel, *Transitional Justice Globalized*. *The International Journal of Transitional Justice*, Vol. 0, 4.

commissions are valuable. International human rights mechanisms have an important role to play at the monitoring and supervisory levels, but an issue to be considered is how well these mechanisms are able to play this role. International human rights mechanisms often confront nations that do not provide adequate information or allow an adequate environment for foreign entities to thoroughly investigate human rights violations. For instance, it has been documented that the Special Rapporteur on Torture is sometimes delayed before being allowed to conduct human rights investigations in certain countries, which allows for human rights violations to be concealed or changed before the investigation begins.²⁴

A reoccurring problem for international organizations based in Western cities, such as Geneva and The Hague, involves the need to persuade countries to become more accepting of international human rights mechanisms. Therefore, perhaps international human rights mechanisms are more influential as a deterrent rather than as devices that offer a sense of national justice. This is starkly different than locally based truth and reconciliation commissions that involve the community and incorporate cultural norms.

Psychological Benefits

Imagine the mental anguish and sense of loss felt by The Mothers of the Playa de Mayo, a group of protestors who were dedicated to holding the former Argentine government accountable for its actions. The Mothers of the Playa de Mayo initiated the investigations into human rights violations that occurred during the dirty war in Argentina from 1976 to 1983. The Mothers of the Playa de Mayo were engaged in marches and demanded a full return to what it was like when their children were still alive, even demanding the release of live bodies that they continued to believe were being kept captive by the government. The Mothers of the Playa de Mayo

²⁴ Steiner, Alston & Goodman at 751.

represent the extreme psychological harm that is caused by severe human rights violations. The truth and reconciliation commission known as *Nunca Mas* was the compromise to the Mothers of the Playa de Mayo's demands. The Mothers of the Playa de Mayo needed to find out what happened to their children and why, and the *Nunca Mas* model was the best method toward easing their pain and initiating the healing process.

The Mothers of the Playa de Mayo are just one example of the debilitating psychological effects that is the aftermath of oppressive political regimes and warfare. The South African apartheid government and the oppressive governmental regime in Chile provide further instances of extreme psychological damage that had to be redressed through transitional justice mechanisms.

"Transitional reparatory practices are infused by mixed, backward and forward-looking, moral, economic, and political justifications."²⁵ Truth and reconciliation commissions are particularly focused on enabling people to live together in peace and documenting past events and are therefore best equipped to achieve the moral aspect of transitional justice. In the *Azapo* case, truth telling is described as a "critical tool to enabling a state, and the international community, to move beyond the atrocities committed ... [a]dditionally, telling promotes the truth."²⁶

Furthermore, truth and reconciliation commissions offer unique and creative methods towards facilitating restorative justice by tapping into the emotions of victims and family members of victims. For example,

Chile's Truth and Reconciliation Commission recommended moral reparations 'to publicly restore the good name of those who perished from the stigma of having been falsely accused as enemies of the

25 Ruti Teitel, *Transitional Justice* 124 (Oxford University Press 2000).

26 Young at 243.

state.' In keeping with this mandate, just days after taking office, President Patricio Aylwin addressed the Chilean people in a public commemoration event held in the very stadium where, under the military junta, political prisoners had been detained. As the president recited names of the disappeared in a national public address, their names simultaneously flashed on the stadium's electronic scoreboard in publication of retraction and apology to the victims of governmental wrongdoing.²⁷

"The TRC in South Africa also demonstrated that reparation [] involves much more than simply monetary payments. Reparations [] involves acknowledging the atrocity as well as the dignity of the victims. Reparation can occur through commemorations, medical care, and formal public recognition by the state of its responsibility for atrocities."²⁸ Acknowledging the dignity of the victims and appeasing cultural beliefs helps to rebut the argument that amnesty laws are a harmful form of transitional justice, because "[f]amily members of those disappeared want to know what happened to the victims and be able to bury their dead [and need the acknowledgement] that what the perpetrators did to them was wrong and an admission of official culpability."²⁹ Hence, the open forum provided by truth and reconciliation commissions offers psychological benefits that an adversarial court system cannot achieve.

Undoubtedly, the fact that truth and reconciliations commissions tend to establish a written record also plays a part in the healing process for victims of human rights violations. In contrast,

domestic trials do not provide a comprehensive version of the truth. Establishing a full record of the truth surrounding the motives and actual

²⁷ Teitel, *Transitional Justice* at 126.

²⁸ Young at 245.

²⁹ *Id.* at 244.

commission of the human rights abuses provides a necessary tool for new governments in post-conflict states. A full account of the truth can facilitate the victims' healing process (reconciliation) and help new government prevent future violence (deterrence).³⁰

When Do Reparations End?

An important aspect of transitional justice involves determining when reparations finally end. Perhaps the answer is that reparations should end when there is finally psychological healing. If so, then the psychological benefits gained from truth and reconciliations commissions should be viewed as an irreplaceable component of the transitional justice process.

There are several examples in American history that demonstrate how reparations issues can continue to arise for years after the human rights violations actually occurred. First,

[c]onsider the contemporary controversies over race-based affirmative action as an as yet unresolved problem of transitional reparatory justice. Grave official persecution of African Americans was perpetuated in the United States over different centuries, first, though government-tolerated slavery and, then, through official segregation ... [but] as of yet, there has not even been any formal acknowledgment of state wrongdoing for reparations for past rights violations, though the question remains a matter of contemporary controversy and debate.³¹

Second, consider *Korematsu v. United States*, a case in which the court upheld the constitutionality of the Japanese internments

³⁰ Hendy at 550.

³¹ Teitel, *Transitional Justice* at 141.

camps that existed in the United States during World War II. As a result of this holding, Mr. Korematsu lived in confusion about whether he was an American citizen or not, as he was quoted as saying, “it bothered me. I got married to Kathryn, and we had two children. We were active and joined the Boy Scouts and Girl Scouts, and I’ve been in the Lion’s Club for a long time. And also there is the church group we were active in. [But] I still had in my mind, “Are we Americans or not? Are they kidding us?”³² Approximately forty years later in 1983, Mr. Korematsu reopened his case to clear his name and establish that he was indeed a United States citizen.

However, after Mr. Korematsu’s conviction was overturned, it became apparent that reopening the case was about something more than just gaining individual vindication.

[Mr. Korematsu’s] conviction had been cleared, but he had taken his stance against the internment not solely because he felt personally wronged. He sought more than personal vindication; he had taken his stance on the principle that the internment of a group solely based on race was wrong. In 1983, he seemed to have a premonition that, even with the clearing of his name, that principle had not yet been settled. [Mr. Korematsu’s] work for justice had only just begun.³³

The work towards achieving justice that Mr. Korematsu mentions included lobbying for Congress’ creation of the Commission on Wartime Relocation and Internment of Civilians, which played a large role in distributing compensation and issuing formal apologies to Japanese Americans who were incarcerated in the World War II internment camps. These two examples involving

32 Lorraine K. Bannai, *Taking the Stand: The Lessons of Three Men Who Took the Japanese American Internment to Court*. 4 Seattle J. for Soc. Just. 1, 15 (2005).

33 *Id.* at 32.

African American slavery and Japanese internment camps suggest that complex human rights violations require complex methods of redress that courts alone cannot satisfy and that years of redress in the future is necessary. Therefore, truth and reconciliation commissions are a valuable tool that should be used as a part of transitional justice.

A Hybrid System

Transitional justice attempts to bring about a variety of results, including deterrence of future human rights violations, retribution and redress for victims, and facilitating the transition into a new government and norm changes. It is important to keep in mind that each situation is different, but perhaps reparations finally come to an end when all aspects of transitional justice that are listed above are achieved. Therefore, it seems that a hybrid system is the most effective method of transitional justice because utilizing multiple legal mechanisms for achieving justice includes other forms of reparation that a single transitional justice mechanism does not cover alone.

For example,

[w]hen confronting past atrocities, states typically have two goals in mind: reconciliation and deterrence. Proponents of transitional justice argue that pure retribution, in the form of domestic or international criminal trials, simply does not provide normative solutions to achieving the state's goals. They argue that because of the unique situations typically confronting states in transition, states must implement a "transformative agenda" tailored to the needs of that particular state. Truth commissions can play a significant part in this transformative agenda.³⁴

³⁴ Hendy at 537.

This analysis demonstrates how incorporating both an international criminal tribunal and a truth and reconciliation commission into a period of transitional justice helps achieve goals of deterrence and retribution, which allows for a more complete form of transitional justice because the two combined provide a greater array of reparations.

Conclusion

Truth and reconciliation commissions are a vital component of transitional justice. While there are criticisms against truth and reconciliation commissions, such as their involvement with amnesty laws and tokenistic nature that lead to a feeling of incomplete justice, they offer practical and necessary benefits as well. This less expensive and locally based mechanism offers psychological benefits to victims of human rights violations that are of such importance that truth and reconciliation commissions should definitely be considered to be worthwhile, as they are a vital form of transitional justice.

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