



## 5. Dealing with the Past and Transitional Justice

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*“Unreconciled issues from past violence never disappear simply by default.”*

David Bloomfield

For those who have lived, researched or supported people in post-war societies that have suffered a history of (mass) violence, addressing the legacies of past violence is of crucial importance. In its many forms, it will help shape both the present and the future. Different ways of doing this have emerged over the past decades, among them transitional justice, reconciliation and dealing with the past. Each of these fields is defined in a slightly

**DEALING WITH THE PAST** | an overarching term referring to a set of measures carried out in relation to past injustice and harm which at the same time create a fair society in the present and better prospects for sustainable peace and development in the future.

**TRANSITIONAL JUSTICE** | a broad range of processes by which countries emerging from periods of conflict and repression address large-scale or systematic human rights violations for which the normal justice system would not be able to provide an adequate response.

**RECONCILIATION** | strives to provide a common frame of reference for societies to acknowledge the past, creating space for individual/national restoration and healing by changing the nature of the relationship between the conflicting parties as part of a long-term communal relationship-(re-)building process.

**TRANSFORMATIVE JUSTICE** | a forward-looking agenda attempting to address a society's grievances expressed in a violent past and drive a transformation of structural inequalities to promote social justice and sustainable peace.

different and somewhat overlapping way, and each has its followers and detractors. Lately, the new paradigm of transformative justice has gained increasing attention from scholars and practitioners alike.

### **Transitional justice, reconciliation, and dealing with the past**

As it is now understood, *transitional justice* refers to a broad range of processes by which countries emerging from periods of conflict and repression address large-scale or systematic human rights violations for which the normal justice system would not be able to provide an adequate response.

Legal experts have extensively published on the development and capacities of international, hybrid or domestic courts, the

most prominent being the international criminal tribunals for Rwanda and the former Yugoslavia, the hybrid courts for Sierra Leone and Lebanon and in more recent years, the use of universal jurisdiction to prosecute war crimes in national jurisdictions. While its focus remains largely on accountability, and the domestic and international legal mechanisms for achieving this, attention is increasingly being paid to the role of other disciplines, such as social sciences and history, as well as fields of practice, such as support services for victims of violence. In addition, conventional forms of justice, memory work, reconciliation initiatives and education reform have been incorporated into the field. These additional practices have broadened the variety of transitional justice approaches that go beyond legal and institutional mechanisms in order to respond to wider political and social processes, without transforming its core.

Local traditions of justice are a valuable addition to the national transitional justice framework. However, these practices should be incorporated and applied with care, as some community-based justice processes may amplify existing discriminatory or abusive practices. An effective example of employing the traditional customs of transitional justice can be found in Mozambique, where “cleansing ceremonies offered ex-combatants a way to reintegrate into communities by renouncing violence, acknowledging wrong-doing and providing victims, or families of victims, with some kind of compensation” (ICTJ and DPKO 2009, 13).

*Reconciliation* is based on the acknowledgement of past injustice, the acceptance of responsibility and steps towards (re-)building trust. It is often understood as going beyond formal conflict resolution to changing the nature of the relationship between the conflicting parties as part of a long-term communal relationship-(re-)building process.

Confronting the past in a reconciliatory way may include a variety of approaches. David Bloomfield and his colleagues acknowledge that while political and national reconciliation may

be achieved through truth-telling (e. g. truth commissions), individual reconciliation is a more personal process that is difficult to achieve. Although the concept is ambivalent and difficult to measure, as Alexander 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. More than an end goal, reconciliation processes provide a common frame of reference for societies to acknowledge the past, creating space for individual/national restoration and healing.

As with other terminology, there is no codified understanding of the phrase “*dealing with the past*”. At the Berghof Foundation, the term is used as an overarching umbrella that refers to a set of measures carried out in relation to past injustice and harm which at the same time create a fair society in the present and better prospects for sustainable peace and development in the future. Dealing with the past has an open “repertoire”, into which both transitional justice and reconciliation mechanisms may fall. It is a holistic process, which may span generations and requires analysis and action on many different levels; both personal and public elements must be addressed along with integration of victims, perpetrators and bystanders. Additionally, feminist research has revealed that a better understanding of the gendered experience of violence and justice, culture and power structures is needed to appropriately analyse the causes, dynamics and consequences of conflict and violence.

### **Transformative justice as a new paradigm?**

The discussions surrounding transitional justice, reconciliation and dealing with the past have embraced a forward-looking agenda in the form of transformative justice. A transformative approach attempts to address a society’s grievances and drive a transformation of structural inequalities to promote social justice and sustainable peace. The trend marks a shift towards comple-

mentarity through integrating official top-down mechanisms with unofficial local initiatives. Paul Gready and Simon Robins suggest that this broadening of transitional justice provides connections with wider notions of peacebuilding and contributes to a holistic approach that is context-driven. It also strengthens local ownership, including that of survivors in an active role, and sustainability as key requirements for less top-down engagement on working through the legacies of past mass violence. A transformative approach also moves away from what Palmer terms the “international orientation” of courts and the impact that this has on the effectiveness and longevity of the “justice” that is achieved.

### **Critical issues in working on the past**

The Berghof Foundation has been active in the *Western Balkans* for many years. In 2013, a comparative study was conducted which looked at initiatives for reconciliation and “dealing with the past” undertaken by international organisations, legal institutions and local civil society actors in response to the wars of the 1990s. Among the many avenues of exploration, the study found that advancement in justice and truth recovery is aided by close cooperation with civil society actors and local communities. Although rule of law and functioning institutions for its implementation are essential for creating a sense of fairness and justice, retributive approaches need to be complemented with restorative, community-centred strategies from the very beginning. Often this includes both victims/survivors and perpetrators. Also, our work in the Caucasus has shown the importance of storytelling and exploring biographical story-sharing across divides after violent conflict.

The Berghof Foundation’s long-standing work with *Resistance and Liberation Movements* engaged in peace processes has also touched upon the issue of transitional justice and the role of victims. Our work focuses on enabling peer exchange and providing tailor-made input and capacity building on various topics, including transitional justice.

A 2017 meeting of Resistance and Liberation Movements focused on transitional justice in the field, the link between justice, stability of peace and long-term reconciliation, and possible models/designs, key tools and practical measures. The meeting enabled discussions on the advantages and disadvantages of participating in transitional justice processes as well as on how inclusivity may be broadened through participation by victims. Discussions also considered the role of prisoners in dealing with the past, and that of strategic communication on all sides of the peace process. Crucial aspects highlighted by the participating groups were strategic communication, sequencing and connecting the national-international and the traditional-universal approaches to transitional justice.

While there is growing critical analysis of transitional justice theory and its practical implementation, the tendency is still to focus on the long-debated dichotomies of peace vs. justice, and accountability vs. reconciliation, as well as the debates on the place of transitional justice in peace processes. We suggest that instead, greater attention should be paid to the practical application of transitional justice and its integration into peace processes for the benefit of those most affected by the outcomes.

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#### References and Further Reading

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### Online Resources

- FriEnt (Working Group on Peace and Development)**, <https://www.frient.de/en/topics-and-competencies/transitional-justice-and-development/>
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