

# Reconciliation in Transitional and Post-conflict Societies: Healing or Impunity?

Written by Yvonne Manzi

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## Reconciliation in Transitional and Post-conflict Societies: Healing or Impunity?

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### 1. INTRODUCTION

The relationship between reconciliation and justice/impunity is an intricate theoretical one in the transitional justice literature. The question does, however, come out of a disappointing factual reality; namely the Latin American experience of transitional justice in the 1980s, where reconciliation came to be synonymous with impunity and doing almost nothing. If we take the transitional justice field from the perspective of Ruti Teitel's genealogy, we can fit the greater part and especially the origin of this debate inside what she identifies as the second phase.[1] Through her analysis, it becomes evident that the conceptual tensions which I examine in this essay are characteristic of this period. The South African experience, which I often use as an example, on the other hand stands apart as the attempt which tried to give real meaning to reconciliation both in its conception and implementation.

Teitel defines transitional justice as "the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes".[2] She identifies a general trend toward "increased pragmatism in and politicization of the law", which I discuss as a potentially positive occurrence towards the end of the essay.[3] In fact, I argue that one of the main issues with reconciliation is that it must include more than just a strictly legal response, and should involve a process of societal transformation. What Teitel identifies as the second phase of transitional justice is the post-Cold War period, "associated with the wave of democratic transition and modernisation".[4] This model saw a move away from traditional retributive and punitive notions of justice, to include debates about the importance of customary law and restrictive political conditions when military juntas still posed a serious threat to the stability of newly elected governments. Importantly, Teitel identifies the wave of democratisation as part of a broader structural international process; she writes

while these changes are often described as isolated developments or as a series of civil wars, many of these conflicts were fostered or supported by international power politics and were therefore affected by the Soviet collapse, which ended the Cold War period of political equilibrium.[5]

I posit that this structural element must be taken into consideration and addressed in transitional justice societies if reconciliation is to be meaningful and long-lasting.

This essay is divided into five parts of which this introduction is the first. I continue with a discussion of ideas of reconciliation as an attempt to bring about clarity to a rather convoluted subject, and enter a brief discussion of truth commissions. In the third part of this essay, I discuss the major debates and conceptual tensions in the broader question of reconciliation. These are issues that have been debated in the broader field of transitional justice, which shows that the issue of reconciliation is indeed an essential one. In the fourth part of this essay I argue that reconciliation understood as transformation is not just another word for impunity, and I examine McEvoy's call for a

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thicker understanding of transitional justice.[6] I end by identifying the key elements which must be considered for reconciliation to be a meaningful process that is more than just a cover of impunity. In part five I summarise my discussion and conclude.

## 2. DEFINING RECONCILIATION

Reconciliation is a widely disputed term, there is no consensus in the literature on what reconciliation means, what it requires, what it leads to, and whether it is even desirable at all. The word's Latin root *re-conciliare* (to unite again) indicates that it involves the restoration of a previously existing relationship. In some contexts where the term is used today this is not exactly the case. For example, in South Africa the groups to reconcile are "the four main racial groups in the country – Africans, whites, Coloured people, and South Africans of Asian origin",[7] and given the colonial history of the country, their relationship was never an amicable one. It is therefore appropriate to consider that the use of the term has since evolved to mean a variety of things. It is both a process and an outcome, and a distinction can be made between individual level and national level reconciliation. As aforementioned, the literature is quite varied on the subject, but there are some points where authors do converge. The first point of agreement is that reconciliation involves "peaceful coexistence" between former enemies.[8] This does not necessarily have to mean that this coexistence becomes friendly, but at the basic level there is agreement on the central factor of reconciliation that is "the long-term setting aside of disputes".[9]

On the basis that reconciliation is simply the absence of conflict, there is agreement that reconciliation is desirable. When the concept is expanded and becomes more elaborate, however, there are a number of points which are contended by scholars. One issue is the fact that the word itself is associated with religious ideals, especially Christian ones. This has both positive and negative outcomes. Susan Dwyer writes that in South Africa "Christian conceptions of reconciliation are deeply implicated" in its context,[10] largely due to the influence of Archbishop Desmond Tutu who chaired the Truth and Reconciliation Commission and strongly promoted a policy of forgiveness.[11] However at the same time, some are alienated by these religious overtones often because Christianity embodies "an ambitious and slightly mysterious picture of reconciliation" which often implies that "love and faith in God are required", or in some instances because religious institutions were associated with the gross violations of human rights and, as in Argentina, were strongly pushing for impunity disguised as reconciliation.[12] A second point of contention is the question of forgiveness. Some argue that reconciliation does not require forgiveness of perpetrators from victims, but merely acceptance of their mutual right to exist. Van Zyl Slabbert writes that "the assumption that truth leads to reconciliation or that it is a necessary prerequisite is based on sentimental theological assumptions that very often bear no relation to reality",[13] which also elucidates the connection with religion. On the other hand, Alex Boraine argues that a measure of forgiveness is to be included, and he mentions Hannah Arendt "who was certainly not a devotee of the Judeo-Christian faith" but who

nevertheless argues that there are two major components in any attempt to bring about reconciliation. The first is dealing with those circumstances that are irreversible... [and she] points to the possibility of forgiveness... then she speaks of the problem of rebuilding.[14]

This second component is another disputed one; those who argue that reconciliation is more than the absence of conflict maintain that it must include an element of reparation for victims. The past cannot be changed, but post-conflict societies are usually in need of rebuilding and victims find themselves on the losing end of inequality. According to Mendez,

it follows that the reconciliation to be sought is not a strained and hypocritical truce between victimizers and victims. Nor should reconciliation between previously warring factions take place at the expense of the victims' right to see justice.[15]

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This, however, warrants the question of what 'justice' exactly means. And which approach can truly achieve this more 'meaningful' reconciliation. Priscilla Hayner writes a specific set of processes which are necessary for reconciliation to be the outcome; they are an end to the threat of violence, acknowledgment and reparations, binding forces, addressing structural inequalities and material needs, and time.[16] Within those guidelines, one can understand reconciliation as *transformation*, both a process and an outcome, where a once-divided society is able to unite and eventually reach a state of equality and harmony. The most common structure which has been associated to this process of reconciliation is the truth commission.

## *Truth Commissions*

Critics of reconciliation are often criticising truth and reconciliation commissions for failing to actually bring about 'meaningful' reconciliation. Truth commissions "differ from tribunals in giving priority to hearings in which the victims can tell their own stories, rather than seeking the prosecution and punishment of perpetrators".[17] It is important to note that reconciliation and truth commissions are not synonymous, even if the latter are in service of the former. Therefore, while criticisms of truth commissions are indeed warranted, they should not be simply transferred to the concept of reconciliation as a whole. Du Toit also argues that truth commissions serve "to generate and consolidate new and distinctive conceptions of political morality",[18] which is an essential role in transitional societies where the concept of morality and faith in the political system have been corrupted for decades.

Ruti Teitel writes in her "Genealogy of Transitional Justice" that while a truth commission was first used in Argentina, "the investigatory model is now associated with the response adopted in post-apartheid South Africa in the 1990s".[19] Indeed the South African Truth and Reconciliation Commission (TRC) has been the more solid attempt at promoting a reconciliation in a meaningful way in the history of truth commissions. It was much more powerful than previous commissions in Latin America, such as the Argentinian National Commission on the Disappeared (CONADEP), the Chilean National Truth and Reconciliation Commission (CNVR), or the Guatemalan Commission for Historical Clarification (CEH). The TRC had "the power to grant individualised amnesty, search premises and seize evidence, subpoena witness, and run a sophisticated witness-protection program".[20] Its capacity to *grant individualised amnesty* was precisely one of the greatest departures from previous truth commissions which operated after blanket amnesty laws had already been passed nationwide. This was its greatest source of power but also its most controversial aspect. The TRC has nevertheless been limited, just as Latin American truth commissions were. Villa-Vicencio writes that the TRC "could do no more than *recommend* reparation to victims";[21] it was up to the government to find a way for victims to receive reparation. The most it could provide in terms of reparation was

by 'establishing and making known the fate and whereabouts of the victims'... and by 'restoring the human and civil dignity' of surviving victims by giving them an opportunity to relate their own accounts of the violations they suffered.[22]

In Guatemala, even though the CEH's findings included the very important claim that "agents of the State... committed acts of genocide against groups of Mayan people",[23] it was limited in that it could not name individual perpetrators and was to finish its investigation within six months plus an additional six.[24] In Chile, the CNVR was created after the military junta had passed an amnesty law which president Aylwin was not able to nullify, but it had no subpoena power and "received little cooperation from armed forces",[25] which enjoyed impunity and thus had no incentive to participate in the process.

Given the limitations and shortcomings of truth commissions, it is understandable that one would be wary of calling for reconciliation among so much evidence of impunity. But perhaps the point is that what is needed is for a more complete policy of reconciliation to actually be implemented by the government, which does not see justice in strict legalistic terms. As I will discuss, it is a concept which pervades all aspects of society, and this is because transitional justice itself also pervades all aspects of society.

### 3. DEBATES AND TENSIONS

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In this section I will consider the largest debates and conceptual tensions in the literature. One is peace *versus* justice because the political constraints in Latin American countries are the reason why impunity was allowed to remain for years, and the reason why those who argue against reconciliation and the use of amnesties claim that the pursuit of justice is being abandoned. Second, debates are largely built on different conceptions of justice (retributive *versus* restorative), which is important because one's judgment of whether justice is being pursued is based on what one believes justice to be in the first place. Third, the debate around the legality and moral justification for amnesties is strongly tied to this point as well, for a retributive notion of justice finds punishment to be imperative. Fourth, notions of truth, acknowledgment, forgiveness, and the relationship between the three are also strong points of contention. Some argue that truth and forgiveness are not necessary for reconciliation to take place, some argue that truth must be understood as acknowledgment, but that acceptance rather than forgiveness is the necessary element. Lastly, a point I consider to be key to reconciliation is the dissolution of existing structures of oppression which perpetuate violence even after the conflict has ended – *structural* violence. Several authors have discussed the problem of socioeconomic inequality and the dangers of allowing human rights to take primacy in transitional justice.

## *Peace v Justice*

Reconciliation is unquestionably connected to the wider debate of peace *versus* justice. In situations with political constraints – such as Guatemala, where the military, responsible for 93% of violations of human rights,[26] was still strong and posed a considerable threat to the stability of new civilian rule – the decision was made to not immediately repeal blanket amnesties and instead opt for a policy of truth searching. Similarly with regards to Chile, Correa writes,

in this environment of political restrictions, Chile's new democratic government believed that its basic moral obligations of prevention, compensation for the victims, and reconciliation could be met through an official disclosure of the truth.[27]

The process was extremely difficult; Hayner mentions how the commissioners had to venture on foot to distant villages to collect testimonies from individuals who were suspicious of them and who often did not know the war had ended. She also writes that perpetrators largely emerged unscathed from the process, not having been identified individually and often not having any real incentive to collaborate. With regards to CONADEP, Hayner mentions how the "Commission received almost no cooperation from armed forces".[28] It is thus understandable for many to be wary of calls for reconciliation as a trade-off with justice. Juan Mendez is one such critic, who writes that "even if reconciliation is a worthy goal, it should not be the centrepiece of any policy of truth and justice... [these] are all objectives of the policy, and no one of them should be considered instrumental to the others".[29]

The question which arises is, of course, what does one *mean* by 'justice'? Are impunity and justice polar opposites? To determine whether reconciliation is indeed masking impunity, one must first have an appropriate understanding of 'impunity' itself as a concept.

The Latin root for impunity, *im-punitas*, indicates that its meaning is non-punishment, or the absence of punishment. If one understands impunity in this strict sense, the conclusion is indeed not just that reconciliation disguises impunity, but that impunity is actually a significant component of any policy of reconciliation. This, however, warrants the questions of whether we are to equate justice with the absence of impunity. I will discuss ideas of punishment and pardon in the following sections of this essay, but I first want to make the case that if we are to understand impunity as the absence of any measure of accountability as opposed to punishment, then it becomes much more difficult to uphold the *peace v justice* dichotomy.

The issue is much more complex, and it is difficult to make a case for strict retributive justice when this entails the possibility of a return to civil war and the potential for these gross violations of human rights to continue unrestricted. Du Toit writes that the "enabling *political conditions*" which allow for peace to be present in the first place must be taken into serious consideration when devising a policy of transitional justice; "the political compromise" he adds,

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“may or may not be a moral compromise”.<sup>[30]</sup> This means that reconciliation does not necessarily have to involve a trade-off with justice, and largely depends on one’s understanding of justice. Susan Dwyer, who acknowledges the limited capacity of forgiveness which is possessed by the average individual, argues for a ‘realist’ conception of reconciliation and writes that “political leaders should not pretend that reconciliation is the same as justice. But, again, this does not mean that reconciliation is a second-best option”.<sup>[31]</sup> She makes the point that justice is not the only element of value for a transitional society. Indeed what matters is the society’s capacity to move forward and rebuild a sustainable political, economic and moral reality, and justice is part of this process.

This debate is especially important when one considers the issue of international obligations – should it be a requirement of international law for states to prosecute gross violators of human rights? Or should states be allowed more independence in their choice of dealing with transitions? This issue of local agency *versus* international standards is a difficult one as it is easy to fall into extremes at either end; allowing gross violations of human rights to occur without much redress, or imposing an ethnocentric approach to societies and cultures which may have entirely different understandings of justice and healing in times of transition. Victims themselves may sometimes opt for more traditional ways of dealing with the past. For example, although there was much disagreement overall, a portion of the South African population did believe in the *ubuntu* philosophy, which includes a measure of forgiveness. Would it have been appropriate for largely Western-led international institutions to impose a retributive notion of justice? Diane Orentlicher mentions the 1988 Aspen Institute seminar where scholars and practitioners of transitional justice came together for debate, and she writes that there was broad agreement on two principles; first “even those who favoured broad scope for local determination said that states must comply with their international obligations”, and second “successor governments ideally should undertake at least some prosecutions of a prior regime’s atrocious crimes”.<sup>[32]</sup> In spite of this, she argues for a revision of her initial conclusions in a previous article and states that there should indeed be considerable space for local agency. The core of this conclusion is the importance of norms and values, and the international community as the keepers of these. In Chile, after the military junta passed a self-amnesty law, Correa writes that President

Aylwin’s problem was not an easy one. On the one hand, he had a moral obligation to disclose the truth and punish human rights violators. On the other, he could only achieve the final results he desired by breaking the very rules that had brought him into power.<sup>[33]</sup>

He opted for a truth commission, and can one argue that he should have been obliged to prosecute all perpetrators? Paul Van Zyl argues that the norms and obligations should exist as guidelines, but that there should be a way for states to justify their reasons for not complying when circumstances such as political constraints or a different traditional understanding of justice suggest that prosecutions for *all perpetrators* may not be the best approach.<sup>[34]</sup> Jose Zalaquett, although he argues for the idea of finding a balance and thus agrees with this perspective, still sees it as a trade-off with justice; what is necessary, he writes, is “the whole truth and as much justice as possible”.<sup>[35]</sup>

## *Justice: Retributive or Restorative?*

As I discussed above, the answer to the question of whether reconciliation is a cover for impunity is inescapably tied to one’s understanding of justice. The debate between retributive and restorative justice is a much wider one in the transitional justice literature but I will attempt to clarify the concepts and elucidate the tensions in a succinct manner below.

Broadly speaking, retributive justice primarily involves the carrying out of punishment in a prosecutorial setting, while restorative justice focuses more on the victims’ experience and therefore involves elements of reparation for victims and restoration of relationships to enable the society to move forward. This is especially relevant in transitional societies where two sectors of the population must live together peacefully. An argument which might be made in favour of prosecutions is that they prevent future crime by limiting the ability of perpetrators to repeat them and by deterring others who see that they will be punished if they engage in similar activities. However, Charles Villa-Vicencio writes that recidivism rates in criminal justice are extremely high and “in politically driven conflicts... it seems even less likely that the threat of punishment is sufficient to curtail human rights abuses”.<sup>[36]</sup> Juan Mendez, who displays a preference for retributive justice, also argues that this theory “relies too heavily on predictions” about the

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rational behaviour of humans; yet he adds “even though we cannot be sure that punishment is a preventive, it is clear that the present state of affairs, dominated by the prospect of impunity, offers no assurances that criminals will end their crimes voluntarily”.<sup>[37]</sup> However, the available options are not simply *punishment* or *no punishment* (impunity in the strict sense). The philosophy behind the *no punishment* option that some advocate is not so simplistic, and so far has often been purposefully misused by political elites or not elaborated upon enough. Through restorative justice, in fact, one can approach reconciliation as *transformation* of a previously broken society. Transformation is not inaction, and many will argue that it pacifies society and caters to victims’ needs more than retribution. Villa-Vicencio writes that there is a failure, among academics and practitioners, “to enquire with sufficient vigour into what transforming purposes are served by punitive forms of justice that fail directly to promote the restoration of both victims and perpetrators”.<sup>[38]</sup> For example in South Africa, while the Eugene de Kock trial was indeed successful and followed due process, it did not address some of the key elements that contributed to the perpetuation of apartheid. Villa-Vicencio argues that it was actually, in some ways, detrimental to the process of transformation. This is because de Kock was mid-level and F. W. de Klerk was therefore able to pick out him and his associates as “rotten eggs” and this “tended to result in ‘ordinary’ white South Africans not taking responsibility for the past”.<sup>[39]</sup> In a later section I will discuss the importance of transforming overarching structures of oppression, a goal that is achieved through the cooperation of the population as a whole. Retributive justice, however, in this case failed “to engender a sense of shared responsibility”.<sup>[40]</sup> The alternative is, of course, not impunity, and Mendez also argues for some aspects of restorative justice to be introduced in conjunction with the importance he places on prosecutions.

Emphasis is placed on the importance of norms once again. Mendez writes that societies punish “to show the importance [they] assign to the norms that prohibit torture, disappearances, rape and murder”.<sup>[41]</sup> In a similar fashion, Correa maintains that “a culture that views [violations of human rights] as highly illegitimate makes it less probable that any political actor in need of popular support would be tempted to violate them” and “criminal sanction best expresses society’s moral repudiation of the human rights violations”.<sup>[42]</sup> There is, therefore, space to argue for the value of prosecutions in that they express the importance which a society assigns to norms that protect human rights. The prospect of prosecutions also provides a substantial threat to perpetrators who may then have the incentive to participate in a truth and reconciliation process. In South Africa, the successful conviction of Eugene de Kock led to an increase in applications for amnesty,<sup>[43]</sup> which perhaps means that the best approach to ‘meaningful’ reconciliation (as opposed to impunity) might be to incorporate an element of punishment coupled with one of pardon in the process. At the same time, unsuccessful trials can have the direct opposite effect. Hayner writes that when the trial of former minister of defence Magnus Malan “ended in acquittal, it was clear that the threat of prosecution would not be strong enough to persuade many senior-level perpetrators to take advantage of the amnesty process”.<sup>[44]</sup>

Victims do often explicitly argue against reconciliation and ask for punishment. This must not be ignored, and yet it does not necessarily have to result in retribution being the primary response in transitional justice. Part of this is that excessively quick judgment precludes any possibility of a true understanding of past events. And a full understanding of events and mechanisms, ideally, is part of what is needed for a society to ensure that the past is not repeated. Carol Prager nevertheless quotes Primo Levi on the subject, who said “perhaps one cannot, what is more, one should not, understand what happened, because to understand is almost to justify... If understanding is impossible, knowing is imperative, because what happened could happen again”.<sup>[45]</sup>

With regards to the Argentinian Dirty War, Hayner quotes Horacio Verbitsky as saying that “the political discourse of reconciliation is profoundly immoral, because it denies the reality of what people have experienced. It isn’t reasonable to expect someone to reconcile after what happened here”.<sup>[46]</sup> While these concerns are certainly justified, they highlight even more the need for a clarification of the concept of reconciliation. It may not be reasonable to expect someone to spontaneously forgive, but it may indeed be reasonable to expect someone to participate in a well-thought out process of reconciliation as restorative justice.

Charles Villa-Vicencio writes that restorative justice

seeks to redefine crime: it shifts the primary focus of crime from the breaking of laws or offences against a faceless state to a perception of crime as violations against human beings... it encourages victims, offenders and the community to be directly involved in resolving conflicts;<sup>[47]</sup>

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in addition, it “can advance a process of social inclusion and empowerment of previously marginalised... sectors of society”. [48] This is not an attempt to justify perpetrators, but rather an attempt to *understand the mechanisms* which were involved so that they can be transformed to ensure no repetition ever takes place. It is also not just expecting victims to forgive and reconcile, rather it actively seeks to empower victims. Andre Du Toit further explains that “compared to the adversarial structure of the criminal justice system and its focus on the accused, truth commissions represent an alternative way of linking truth and justice that puts victims first” which leads to “a more holistic *narrative truth*”. [49] The notion of narratives is particularly important in Susan Dwyer’s understanding of reconciliation for ‘realists’. Because individuals assume that there is a narrative logic to life, she argues, traumatic events are seen as interruptions or anomalies in these otherwise consistent narratives. In this context, reconciliation is simply the elaboration and subsequent incorporation of traumatic events into a narrative unity, so that the society as a whole can move forward. Within the broader frame of reconciliation as restorative justice there is, therefore, ample space for variation according to local needs. What has been identified as important is the strengthening of a culture of morality.

It is worth noting that often, the evidence against ‘reconciliation’ in general does not show something inherently wrong in the philosophy behind it, but something wrong in the implementation of it. Either because certain issues have not been considered enough (such as the role of businesses in the maintenance of apartheid, or the legacy of colonialism), or sometimes because elites have manipulated these ideas to their advantage (as in Latin America). It is therefore important to consider whether there *is* a place for measures of pardon and amnesty in transitional justice. Villa-Vicencio interestingly claims that

prison was traditionally ‘regarded as a place for detention of people and not for their punishment.’ Customary law in pre-colonial South Africa similarly made no allowance for imprisonment as a form of punishment... an unintentional side effect of prosecution and detention has become an end in itself. [50]

## *Amnesty*

The most controversial aspect of reconciliation is the role of amnesties. In Latin America these were self-granted by military juntas before leaving power, and resulted in widespread impunity in the sense that there was an absence of any form of accountability for those who had committed gross violations of human rights. Lisa Laplante offers three arguments against amnesties of any kind, include those she calls ‘qualified amnesties’. These are first, that

international law creates a state duty to investigate, prosecute, and punish those responsible for serious violations of human rights; second, international law also provides victims a fundamental right to justice; and third, post-conflict policy recognises that criminal justice is good for democracy and the rule of law. [51]

It is true that amnesties in the Latin American context were characteristic of total impunity, but one must recognise that there might be a place for amnesties as they were conceived in the South African case. In addition, because of the political nature of transitional societies it is unlikely that states will be able to comply with international obligations if they entirely forbid the possibility of using amnesties. As was argued before, this does not mean that international obligations to prosecute should not exist, but it does mean that a measure of self-determination should be included for states to justify their need for their use within specific contexts. Each transitional society is unique and therefore analyses cannot be stretched to cover all past and future cases, but there is still significant value in the consideration of the South African model of using amnesties in that it was the most meaningful attempt at achieving reconciliation to-date.

Antonio Cassese argues for international criminal law and against amnesties based on three principles. [52] First, he argues, there is a need to establish a public record of events “as an acknowledgment of people’s suffering, and to offer them some sense of relief”; second, “failure to prosecute atrocities leads to a desire for revenge, and it also allows future leaders to act with impunity”; third, firm international criminal law “establishes individual responsibility for the crimes, rather than the collective assignation of the guilt”. [53] However, one could argue that the first point can be achieved through the use of truth commissions; the second point could be achieved perhaps even more successfully through a process of reconciliation as transformation; lastly, one could argue that the third point might

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not even be desirable alone – if one considers the importance of the role of structural violence and the part indirectly played by the beneficiaries of the apartheid system, and if one considers the fact that these beneficiaries collectively could have significant influence in overturning these inequalities, then there is a case to be made that collective responsibility for past abuses is actually desirable. None of this, still, can be achieved through the passing of blanket amnesties. In the Barrios Altos case, the Inter-American Court on Human Rights ruled “immunity measures such as amnesty laws to be contrary to state obligations under international human rights law”,<sup>[54]</sup> and Laplante argues that this “can be interpreted to outlaw all amnesties for acts that constitute human rights crimes”.<sup>[55]</sup> Indeed Linda Van de Vijver also asks us

to be mindful of what such perceived condonation of violence means in the long term... a dangerous precedent for future political advocacy, and a dangerous signal to a society that is trying to establish popular legitimacy based on the rule of law.<sup>[56]</sup>

But this remains problematic when institutions remain corrupted as in Chile. Correa writes about the judiciary being biased during the transitional period so that it applied the broadest possible reading to the amnesty law; it follows that trials through those same institutions would likely have ended in too many acquittals. The Barrios Altos case was in the context of blanket amnesties, but one should give appropriate consideration to the South African model, where amnesties were conditional on the full disclosure of the truth, thus aiding in the process of accountability and truth telling, and therefore also reconciliation. Kader Asmal quotes Ignacio Martin-Baro from El Salvador as saying “the justness of amnesty depends on the process by which it has been granted”.<sup>[57]</sup> In South Africa the TRC had the power to grant amnesties for *politically motivated crimes*, on the condition that the perpetrator fully disclosed the truth to the best of his ability. This works well with the reconciliation process as understood by Villa-Vicencio where the aim is to “restore the human dignity and the material wellbeing of victims and survivors, while enabling perpetrators to become re-integrated into society”.<sup>[58]</sup> However, not every aspect of these amnesty powers was at the best service of reconciliation. No indication of remorse or apology was necessary, and once amnesty was granted

no other person [could] be held vicariously liable for the act amnestied. Neither the state nor any other body organisation (e.g. the ANC) which would normally have been vicariously liable for the acts of its servants or agents [would] be liable to compensate victims of the act amnestied... protecting not only the perpetrator from both criminal and civil liability, but also any body or organisation which may have been behind him, including the State itself.<sup>[59]</sup>

This means that to a considerable degree the work of the TRC *could* end with impunity as opposed to meaningful reconciliation. While some kind of amnesty measure must be considered for transitional societies, there is evidently a need to appropriately delineate the terms under which this is justifiable.

### *Truth, Acknowledgment, Forgiveness*

Although in the transitional justice literature truth is considered as a central element of reconciliation and justice in post-conflict societies, there is by no means consensus on what this means. Importantly, there is disagreement on whether forgiveness is required for reconciliation to take place. Alex Boraine, who served as deputy chair of the South African TRC, writes “while truth may not always lead to reconciliation, there can be no genuine, lasting reconciliation without truth”.<sup>[60]</sup> Indeed it is difficult to imagine that any kind of meaningful reconciliation can take place in a climate where the truth has been obfuscated for decades. Frederik Van Zyl Slabbert however claims that truth does not lead to reconciliation, and cites Spain as an example of a society which chose not to uncover the past and yet appears more reconciled than many others. Priscilla Hayner makes a good point in saying that “a root problem has sometimes been a fundamental difference in perceptions of the past...there is never just one truth: we each carry our own distinct memories, and they sometimes contradict each other”,<sup>[61]</sup> but if a national effort is made at settling on one or more accurate and publicly accepted versions, then it is much more unlikely that clashes will arise on factual disagreements. It is however important to distinguish between *truth* and *acknowledgment*. Truth alone may not be enough, which is why Andre Du Toit argues for an understanding of *truth as acknowledgment*. He understands truth as factual knowledge, and truth commissions, which do not require the confessor to show any remorse, simply add to the knowledge of crimes. However, where the knowledge/awareness was already there



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the issue is not so much that of a lack of *knowledge* as of the refusal to *acknowledge* the existence of these political atrocities... precisely because, at one level, the reality of the atrocities and violations will be known only too well by those concerned, the effective refusal to acknowledge them in public amounts to a basic demonstration of political power

and it amounts to “a denial of the human and civic dignity of the victims”.[62]

Although a form of acknowledgment is certainly needed, truth as factual knowledge is still of value. Correa writes that the Chilean “Commission stated concerning disappearance: this kind of human rights violation is ‘a method of repression which, by its very nature, rests on secrecy and perpetuates its pernicious effects as long as truth remains hidden’.”[63] The search for truth is therefore a necessary first step to provide clarity after decades of fear in the dark. Victims also recognise the relief that truth itself can bring, and Correa quotes the relative of one victim in Chile as saying “I want to cry out to the world, and with pride, that my father died because of his ideals. I want society to finally understand that the sons and daughters of those they killed are not dangerous people”.[64] This is not to say the truth process is then complete; acknowledgment is certainly an important component. Van Zyl Slabbert argues, in addition to acknowledgment, also an element of remorse or apology. During the South African TRC individuals could obtain amnesty on purely ‘technical grounds’ and victims were expected to forgive individuals who had showed no remorse. The TRC also failed to ensure that top-level decision makers would also participate in the process of truth telling; this meant that “the security forces were... upset because the politicians pretended they had been totally unaware of the work [they] had to do at the coal-face of oppression to keep the system alive”[65], yet this only serves to further the emphasis which must be placed on uncovering the *whole* truth. The whole truth involves also recognising the wider structures and mechanisms that allowed for apartheid to last for so long. Du Toit adds that coupled with truth as acknowledgment, there must be an understanding of *justice as recognition* in terms of “the restoration of the human and civic dignity of victims, from both that of *criminal and retributive justice* and that of *social and distributive justice*”.[66] He therefore considers that an element of criminal justice must be included in a process of reconciliation, as well as a policy of socioeconomic restructuring of society. This restructuring cannot be easily achieved without a public involvement and understanding by a great majority of the population. This also includes the ‘passive’ beneficiaries of the old system of oppression who must, as Trudy Govier argues, collectively acknowledge their shared responsibility because they “are linked significantly to the institutions that are responsible for their pain and need” and because “collectively, we have the power to improve their [the victims’] situation”.[67]

On the role of forgiveness there is far more disagreement. Critics will discuss how it is nearly impossible for victims to forgive or reconcile with the perpetrators of such atrocious abuses, but it must be recognised that by the very nature of what reconciliation is and means, one must do it with enemies. On this note Susan Dwyer explains that forgiveness also has a paradoxical nature;

on the one hand, we think we ought to forgive all... those wrongdoers who deserve to be forgiven; on the other, the more deserving of forgiveness a person is, the less like a wrongdoer he seems, and forgiveness seems to lose its point.[68]

It is helpful at this point to distinguish between individual-level and national-level reconciliation. While the former is a very personal process which does not have to happen quickly and at all costs, the latter can be approached in a more structured fashion. Dwyer argues that for this second type of reconciliation, forgiveness is not necessary at all. As I discussed in a previous section, she sees reconciliation as the incorporation of traumatic events into narrative unity, as well as the acceptance of this reality and of the need for society to move forward. This does not mean that forgiveness on a personal level *must* happen at all costs and therefore provides a rather ‘realist’ approach to reconciliation. Alex Boraine in fact recognises that forgiveness can hardly be an imposition of policy. While discussing the TRC he writes “we soon realised that we had no right to demand of those who came to us that they should forgive. Our job was to create a climate and the circumstances in which this could become a real possibility”.[69] Forgiveness and reconciliation, however, cannot happen when ultimately the socioeconomic reality which reigned during the oppressive regime continues to exist.

## *Structural Injustice*

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Perhaps one could argue that reconciliation as it has been approached so far is not far from essentially impunity because no strong enough effort has been made to address the structural inequalities that lie at the heart of these conflicts. Kader Asmal states that “the real value of truth commissions lies in their impact on the social consensus” because of the “real atrocity of the system itself”.[70] During apartheid, infant mortality rose to above 400 per thousand,[71] and society continues to be defined by socioeconomic inequality. The value which truth commissions bring to the process of reconciliation has indeed been established, but it is not enough. In 2012, over a decade after the TRC completed its report, “the gap between rich and poor in South Africa is worse than Honduras and the Central African Republic, according to the World Bank.... White South Africans, who make up nine percent of the population, earn on average eight times more than blacks,” who make up 80% of the population.[72] If reconciliation is the transformation of a society into a situation where former conflicting groups can coexist peacefully, the process by which it is achieved must involve much more than just truth commissions, and much more than just retributive justice. Orentlicher writes that there has increasingly been “unprecedented, if still inadequate, attention to the special concerns of women, children and marginalised minority communities in programmes of transitional justice”.[73] Perhaps this indicates that the issue is becoming considered more. The notion of justice as inequality has, however, hardly received the attention it needs. Individuals will only be committed to reconciliation when they see their day-to-day reality actually changing. The conviction of a man’s killer does not improve the livelihood of his wife, and economically speaking, neither does the confession at a TRC hearing. This is why reparations are a central component of the reconciliation process, which unfortunately, as aforementioned, have not been taken seriously enough. The TRC found that “business was central to the economy that sustained the South African state during the apartheid years” and “business failed in the hearings to take responsibility for its involvement in state security initiatives specifically designed to sustain apartheid rule”.[74] Businesses therefore not only benefited from the regime but also actively helped “*design and implement*” strategies to sustain white minority rule.[75] Terreblanche writes that “some of the most respected corporations... were hand in glove with Armscor during the 1980s”.[76] As long as the focus remains on individual responsibility for physically violent abuses, ‘reconciliation’ will be closer to impunity than transformation. Perhaps, as I will discuss in the next section, the problem is the supremacy of human rights which focuses on civil and political rights. This is not only a shortcoming in the transitional justice discipline, as it has been a widely debated issue across other disciplines as well.[77]

The TRC report recommended for businesses to participate in reparations, but Terreblanche justly argues that

to expect that business will be prepared to compensate the blacks *voluntarily – and to the necessary degree* – for the injustices committed towards the majority of them for almost a century is not only too idealistic but also rather naïve.[78]

The problem of impunity is therefore not in the concept of reconciliation itself, but in the way it has so far been understood and implemented by various institutions. The debate between retributive and restorative justice is becoming an almost counterproductive one, when one is attempting to enact a transition from “a system that killed far more infants through malnutrition and the unavailability of water than it killed adults with bullets and bombs”.[79] Fortunately, Asmal recognises “in recent times socioeconomic rights have been acknowledged as equally important”,[80] but more emphasis must be placed on the role of structural violence.

The debate would benefit if it could look past strict understandings of criminal justice. For example, an anthropological perspective could add value because it would consider Guatemala’s colonial history and its impact in creating a climate and moral culture where genocide against its native Mayan population could take place. For reconciliation to be meaningful, and for the best assurance that human rights abuses will not reoccur, the legacy of colonialism and the oppressive structures which followed must be addressed. Hayner also recognises this when she considers the “anti-communist national security doctrine of the Cold War, and particularly the United States’ support or the repressive policies of the Guatemalan state”.[81] Truth commissions are therefore an important component of reconciliation, but as Terreblanche explains “the TRC does not explain the *causative* role played by the *systems* of white political dominance, racial capitalism and/or capitalism”.[82] If this is not addressed, it results in the perpetuation of old systems under a different guise, which means the society is not reconciling.

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## 4. RECONCILIATION: DISGUIISING IMPUNITY?

Although the question is justified in that it comes out of the very difficult and disappointing Latin American experience with transitional justice and reconciliation, it would be imprecise to say that reconciliation is just another word for impunity. Just as norms which protect human rights are important and must be upheld by the international community even if states will continue to fall short of its expectations, it is important to have sound conceptual frameworks and positive ideals while knowing that their implementation will continue to be imperfect for a long time. Having established this, one must devise ways to make reconciliation implementable as a meaningful policy process. Truth commissions are a valuable asset; in an empirical study of the South African truth and reconciliation process, Gibson finds that it “has done little to harm race relations... the truth process has actually caused a salutary change in racial attitudes” on the part of whites;<sup>[83]</sup> while the same cannot be said for blacks, Gibson nevertheless holds that “the process has clearly been a net benefit to South Africa” because truth “does not contribute to irreconciliation either”.<sup>[84]</sup> Some elements of successful reconciliation are also shown by Alex Boraine who mentions that when a youth club was opened in Guguleto by two men who received amnesty for killing Amy Biehl, her parents were also present.<sup>[85]</sup> The process was of course not whole and not enough, as I discussed above it fell short of its goals on several occasions, and it can also be said that its goals were not enough. A shift in emphasis which holds much potential can be found in Kieran McEvoy’s call for a ‘thicker understanding’ of transitional justice. Perhaps the issue lies at the very core of transitional justice as a discipline and its initial lack of reflexivity.

### *A ‘Thicker’ Understanding of Transitional Justice*

Part of the problem, according to McEvoy, is that transitional justice as understood by the major institutions and scholars has been too distant from the situation on the ground; rooted in these institutions and international mechanisms rather than the affected communities. He attributes this to the dominance of *legalism* in the field of transitional justice, although he does acknowledge the contribution of other fields. He defines legalism as “a process which separates legal analysis from other social science disciplines”,<sup>[86]</sup> which we can understand as rendering technical and thereby failing to see the nuances which could have been part of a broader understanding of a specific context. He adds that “many lawyers find it difficult to view any social or political process free from ‘legal habits or beliefs’ and... they distrust arguments based on expediency, the public interests or ‘the social good’”.<sup>[87]</sup> This is precisely what is at the core of the peace v justice debate, as well as the question of reconciliation. It is quite understandable as too often has this been a pretext to disguise arbitrary action or impunity. However, the solution is not narrow legalism. McEvoy sees the occurrence of legalism in three forms; legalism as seduction, legalism as the triumph of human rights, and legalism and ‘seeing like a state’. All of these are very pertinent to the question of reconciliation I deal with in this essay, and his proposed solutions offer a potential to overcome the apparent connection between reconciliation and impunity. In legalism as seduction, “law becomes an important practical and symbolic break with the past, an effort to *publicly* demonstrate a newfound legitimacy and accountability”.<sup>[88]</sup> It therefore has a seductive quality because of its technical nature, but this means that it forecloses other important factors in society, and the most important question of *who* is transitional justice for? The answer to this question has serious implications on the way reconciliation is conceived. In legalism as the triumph of human rights, he sees the discourse of human rights as “denying the quintessentially *political* nature of its argumentation and for obfuscating the reality of conflicting rights”.<sup>[89]</sup> The excessive focus on social and political rights and the relatively recent inclusion of socioeconomic rights and gender issues has resulted in reconciliation having a skewed emphasis on certain issues as opposed to others (such as the role of business in apartheid). In addition, as opposed to reconciliation being a watchword for impunity, human rights has been a watchword for retributive justice. In legalism and ‘seeing like a state’, McEvoy recognises “a tendency towards an understanding of transitional justice that is both state-centric and ‘top down’”;<sup>[90]</sup> he adds that

the growth of transitional justice has seen an *institutionalisation* of transitional justice into expensive supra-state and ‘state-like’ structures... [and these] are particularly prone to developing and reproducing their own rationality.<sup>[91]</sup>

Part of this form is what Orentlicher attempted to examine as she evaluated the question of international obligations.

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International institutions risk imposing too much an ethnocentric approach to transitional justice, in partial or total neglect of local practice. Orentlicher rightly wonders

whether prosecutions constituting a crucial pillar in a programme of transitional justice can play their intended role if they operate at a remote distance from the public and speak only in the largely inaccessible language of legal judgment.[92]

McEvoy writes that “these variants of legalism can cumulatively disconnect individuals and communities from any sense of sovereignty over transitional justice”[93], and this is part of the reason why societies are not reconciled; *both* victims and perpetrators (the parties which need to reconcile) need to *own* the process of reconciliation if it is to serve any transformative purposes. McEvoy’s proposed solutions offer a potential to overcome this. He encourages legal humility to avoid “the overselling of the capacity of major legal institutions to deliver forgiveness, reconciliation or other features”,[94] as argued by other previously discussed scholars, McEvoy also states that lawyers and institutions perhaps would best provide frameworks and norms to uphold which can then be adapted to the differing communities with equally differing histories and needs. As a second proposal, he suggests a broader understanding of human rights to include development;

providing that the integrity of the discourse is maintained, [human rights] do provide a disciplined framework for what Habermas has described as the potential for ‘communicative action’ – a space where a dialogue about competing rights claims can occur, where power relationships can be named, and where the needs of the state... do not necessarily trump the needs of individuals and communities.[95]

Such an approach, specifically a dialogic one which gives attention to rights other than civil-political ones, has the potential of involving the entire community (victims and perpetrators who must re-integrate) and addressing the structural inequalities which continue to afflict transitional societies. Lastly, McEvoy suggests that transitional justice make use of inputs from other disciplines so as to avoid rendering technical. He writes of the value of criminology, as “its philosophical and moral curiosity asks the right questions about whom and what transitional justice is actually for”,[96] but I add the value of anthropology, which has the capacity to understand oppressive structures and value the singularity of each specific context or society.[97]

## *Elements of Reconciliation*

In order to avoid the total repudiation of ‘reconciliation’ as a central process of transitional justice, certain minimalist approaches have been formulated, such as Susan Dwyer’s reconciliation for realists. I argue, however, that these are not enough. A minimalist approach to reconciliation allows for previously warring factions to tolerate each other as opposed to integrate into a transformed society. One could equate this with the distinction between negative and positive peace. Where positive peace means actively supporting each other, meaningful reconciliation means individuals collaborating to change structures of oppression. Reconciliation in this sense must therefore address and transform almost every aspect of society which partially caused and entirely allowed for these oppressive regimes to stay in power and commit gross violations of human rights.

There are several aspects, and although scholars favour some over others, ultimately all are important as components of a larger process. As discussed in a previous section, one is the incorporation of narratives. Susan Dwyer suggests that we do not attempt to erase societal tensions, but instead incorporate narrative disruptions.[98] The issue of moral choice is also important. Carol Prager considers this when she argues tribunals cannot always be pushed forward as the ultimate vehicle for justice. Individuals do technically have the freedom of choice, but they can be coerced into actions by a wider system. This is not a justification, but it was taken into consideration by the South African TRC when it decided to grant amnesty only to politically motivated crimes as opposed to gratuitous violence. The issue of moral choice is relevant also when we consider the fact that the focus in South Africa was more on mid-level operatives or commanders as opposed to top-level politicians and policymakers. Prager thus argues that “war crime trials are essential... for bringing leaders, those with the greatest ‘moral choice,’ to justice”.[99] Prosecutions therefore do have a place in transitional justice, and as Paul Van Zyl states “there is consensus that they should try to prosecute high-level perpetrators responsible for authorising, organising or committing heinous crimes”.[100]

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However, there should be allowances for local determination and he mentions two reasons for which a state can legitimately justify its failure to prosecute. The first is if they would threaten the government's stability, because "militaries do present substantial and genuine threats to established democratic governments";[101] and the second is if "a combination of the scale and nature of past crimes, an absence of evidence and a dysfunctional criminal justice system may prevent" it.[102] For example, the trial of P.W. Botha took almost nine months, and in the case of Pinochet's extradition, the United Kingdom's highest court took almost six months to make a decision; Van Zyl asks how much longer larger scale trials would take. Nevertheless, the importance of norms holds true. International law should still set the example of which norms are held to importance by the international community, and both Orentlicher and Van Zyl agree on not "changing the normative default rule of international law in a way that may *encourage* the granting of amnesties".[103] Rather, there should be a solid framework which elucidates the circumstances which allow for the failure to comply. A measure of local choice is therefore widely agreed upon in the literature; there is a danger of instigating even *more* violence as opposed to pursuing justice when set frameworks are imposed without full knowledge of the situation. On the subject, Orentlicher recognises that "professional practitioners of transitional justice are more aware than ever before that there cannot be a one-size-fits-all approach to transitional justice".[104] One essential aspect of reconciliation is ultimately that of reparations. Reconciliation as restorative justice intends to not just punish crimes but help the victims move forward by compensating them and facilitating their healing. This aspect has largely been a failure and is part of the reason why reconciliation is feared to be a disguise for doing as little as possible. Reparations should involve symbolic actions as well as rehabilitation for victims which may come in the form of free healthcare, facilitated employment and mental healthcare too. Alex Boraine recognises of the TRC "our poor approach to reparation has... been criticised, and I would agree".[105] Although the TRC recommended reparations (it was not within its powers to *grant* them), this aspect was hardly acknowledged by the South African government. The issue is wider than states, however, and appears to include the international setting as well. Priscilla Hayner claims "there has been a weakening of the willingness of international institutions to push national authorities to implement truth commission recommendations".[106] Finally, as Terreblanche argues, structural inequality must be addressed in a transitional society through some of the ways also discussed by McEvoy, so that legalism does not "foreclose questions from other complementary disciplines and perspectives which transitional lawyers should be both *asking* and *asked*".[107]

## 5. CONCLUSION

The question of reconciliation is one that parallels the wider debates in transitional justice. Through Ruti Teitel's genealogy, one can make the case that this issue arose from debates around the judicial responses which were taken during the wave of democratisation in the 1980s and after. She identifies this period as the second phase of transitional justice, which, she argues, is characterised by pragmatism in law and by a move away from retributive notions of justice. The answer is not a straightforward one as it depends on one's understanding of justice, reconciliation and impunity. I argue that if one favours a restorative notion of justice, coupled with an understanding of impunity as a total lack of accountability, and sees reconciliation as a transformative process which pervades society in more areas than just judicial responses, then reconciliation can be much more meaningful than its origin in the Latin American experience. I take Kieran McEvoy's argument and agree with him in the call for a thicker understanding of transitional justice, because it will allow for the wider structures which allowed these regimes to hold power be appropriately addressed, and only then will reconciliation be a positive transformation as opposed to just uncovering the truth.

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[78] Terreblanche, 267

[79] Asmal, 15

[80] Ibid.

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[81] Hayner, 35

[82] Terreblanche, 267

[83] Gibson, 215

[84] Ibid.

[85] Boraine, 76

[86] McEvoy, 414

[87] Ibid., 415

[88] Ibid., 417

[89] Ibid., 418

[90] Ibid., 421

[91] Ibid., 422

[92] Orentlicher, 17

[93] McEvoy, 425

[94] Ibid., 428

[95] Ibid., 432

[96] Ibid., 439

[97] See Paul Farmer, "An Anthropology of Structural Violence," *Current Anthropology* 45, no. 3 (2004): 305-325

[98] Dwyer, 97

[99] Prager, 213

[100] Van Zyl, 47

[101] Ibid., 43

[102] Ibid., 44

[103] Orentlicher, 21

[104] Ibid., 18

[105] Boraine, 73

[106] Hayner, 193

[107] McEvoy, 417

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