



# THEORIZING TRANSITIONAL JUSTICE

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## ABSTRACT

*Transitional justice has been defined as a process of addressing gross human rights violations and encouraging democratic transitions. It embraces the mechanisms of prosecutions, truth-telling, reparations, institutional reforms, vetting and memorialization. The evolution of the concept has widened with democratic transitions and the developing theoretical contributions. The main objective of this study is to evaluate the theoretical discussion made on the concept of transitional justice. The relevant data has been gathered through journal articles, books, reports and other academic publications. The analysis has been done under content analysis, and it is a qualitative data analysis. The results and findings of the study depict that transformation justice theory aims at legal, psychological, socio-economic and political justice to foster the mechanisms of transitional justice. The social learning theory directly deals with repairing former relationships and socioeconomic concerns, avoiding unequal treatment. The justice continuum theory of transitional justice interacts with justice and reparations in building a combined process of reparation justice, restorative justice, civic justice and socio-economic justice.*

**KEYWORDS:** *Transitional Justice, theories, reparations, justice*

## 1. INTRODUCTION

The term transitional justice gained momentum as an umbrella term with the association of different theoretical approaches in post-conflict societies. Transitional justice is a heterogeneous concept in which applying the common forms of theoretical approaches is irrelevant. As a new field of study, it is oriented in more practical perspectives. In recent years many critical studies were initiated to understand the role of transitional justice mechanisms at the international level and changes with the localities of operation. The theories of transitional justice can be mainly discussed under transformative justice theory, social learning theory of transitional justice and the justice Continuum theory of reparations for Transitional Justice.

## 2. LITERATURE REVIEW

The term "Transitional Justice" has been defined and discussed in the field of international relations to reconstruct the post-war scenarios of the world. After the end of the Cold War, transitional justice gained momentum as an essential framework for conflict-ridden areas of the world. The concept of transitional justice has attached many valuable definitions from its antiquity. The United Nations defines the concept of transitional justice as "The whole range of systems and actions connected with a society's attempts to come to terms with an account of large-scale past violations, and to assure accountability, serve justice and accomplish reconciliation". A narrow down definition has been put forward by Teitel (2003), "Transitional justice is a notion of justice blended with stages of political transformation distinguished by significant feedbacks to confront the wrongdoings of authoritarian predecessor governments." Transitional justice is performed in the circumstances of a process of transformation from violence or mass violation of human rights to numerous nonviolent and democratic nations; from the aspect of a civil society reaching from mass destruction, justice may have endeavored as

retribution for crimes, but also as a mode of getting into positions with the history and establishing a different expectation (Lambourne, 2009).

The development of the notion of transitional justice can be explained in three stages of its history. Transitional justice begins back in Athens 411 and 403 BC and presents particular discussion through the French reconstructions of 1814 and 1815. In 412-11 and then in 403 B.C. Athenians experienced two short oligarchic events, and Athenians took punishment measures against the oligarchs and compensation to their victims (Elster, 2003). Most scholars argue that transitional justice came into existence with the results of the 2nd World War. The first generation of transitional justice is reflected in the post-World War II model of justice. The Nuremberg trial was the first birth moment of transitional justice, which took the perpetrators of genocide, war crimes and human rights violations to international law's surface. With the horrendous crimes committed by Hitler's totalitarian regime, the United States, Great Britain, France and the Soviet Union wanted more than just the negotiation of a ceasefire and a peace agreement (Bothmann, 2015). When the military and authoritarian regimes emerged in Latin America and Greece in the 1970s, a more significant debate on transforming these kinds of regimes into democratic structures was initiated. The post-war transitional period was attracted towards retributive justice, in which the critical concern was punishing the perpetrators, eliminating the occurrence of future crimes and publicly confessing or begging for forgiveness. The post-Cold War period was a global political transition, with the breakdown of the Soviet Union, the bipolar system, and the establishment of new democracies worldwide. Most of the new democracies that emerged after following military coups and questions were raised regarding the methods of prosecuting perpetrators and finding ways to heal the victims. Moreover, the term transitional justice or



transitional justice became an official concept with in-depth valued definitions due to various actors' involvement in handling the peace agreements of prosecuting human rights violators. After the 1990s, the concept of transitional justice underwent more significant expansion due to non-judicial concepts, neo-traditional and domestic approaches. The South African Truth and Reconciliation Commission's primary outcomes further motivated the multi-faceted nature of transitional justice. The South African Truth and Reconciliation Commission's mechanisms led to the vast literature on reconciliation and concepts like apology and forgiveness. The experiences of the South African Truth and Reconciliation Commission and the international tribunals for Rwanda and Yugoslavia further enhanced the developments of transitional Justice. With the expansions of the concept, transitional justice embraced restorative justice instead of retributive justice. Restorative justice is a victim-centered concept which consists of reparations, truth-telling and apologies. The process of transitional justice can be implemented at various levels: international level, national level, and local level. The purpose of implementing transitional justice will decide the implementation level with other possible requirements. The mechanisms of transitional justice are deeply related to retributive justice and restorative justice. It mainly consists of prosecutions, truth-telling procedures, reparations or compensations and institutional reforms.

### 3. METHODOLOGY

The study is entirely based on secondary data and qualitative data analysis. The relevant data has been gathered from journal articles, books, reports and other academic publications. The collected data has been analyzed through content analysis to address the research objectives of the study.

### 4. DISCUSSION AND ANALYSIS

#### 4.1. Transformative Justice Theory

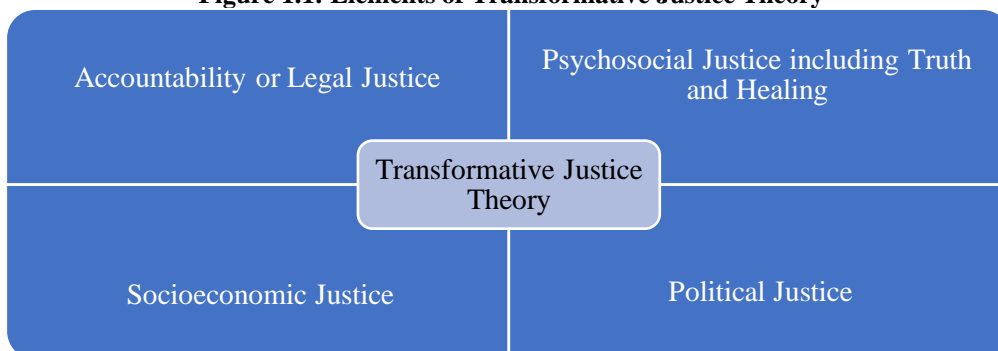
The enrichment of transitional justice into the peacebuilding process of post-conflict societies is holistic due to its close relationship with the reconciliation and peacebuilding mechanisms. Therefore, theorizing transitional justice usually falls into the model of justice-based reconciliation and peacebuilding frameworks. The retributive justice model inspired by the liberal tradition and prosecution may lead through ad hoc international criminal tribunals, hybrid courts, international courts, and ICC. Contrary to the prospects of

retributive justice, restorative justice is aimed at using truth and reconciliation commissions to rebuild relations within a society that suffered drastically due to violence. Nowadays, the international community has realized that the incorporation of retributive and restorative justice components can be regarded as the best clarification for transitional societies. It is a combination of approaches of retributive and restorative justice. However, this mutual framework is also inadequate in the so-called world to address transitional justice standards and methods driven by external interventions. The difference between retributive justice in the Western formal legal system and restorative justice in indigenous informal justice mechanisms is oversimplified and serves to mask rather than illuminate the multiple, complex human needs, expectations and experiences about justice and reconciliation. However, restorative and retributive justice acts respectively in frameworks like “Gacaca” community justice in Rwanda. It is more relevant to incorporate locally applicable mechanisms with restorative and retributive justice.

Moreover, it is crucial to clarify the relationship between transitional justice and peacebuilding. Peacebuilding contains a broad spectrum of political, economic, humanitarian, and human rights spheres and intends to ensure short-term and long-term goals. These objectives include democracy, development, governance, security, political spheres, the rule of law and justice. Justice, as a component of peacebuilding, has more transitional means to support sustainability in post-war societies. Sustainable peace requires the need to preserve negative peace into positive peace. It explains how transforming physical violence into social engagement implies the combination of legal, political, economic and social necessities. Considering these psychosocial preferences, Wendy Lambourne has put forward a theory of transformative justice.

This model was accompanied by the mass atrocities in Cambodia, Rwanda, East Timor, and Sierra Leone. Wendy Lambourne has reviewed the steps taken by the government of the states mentioned above and how the international community address those issues. Based on the conducted case studies of those countries, Wendy Lambourne has proposed a model for transformative justice, which consists of four major elements.

**Figure 1.1: Elements of Transformative Justice Theory**



Source: Created by Author, 2023



The model identified accountability and legal justice as the main elements of transitional justice within the framework. The majority of the victims of those countries preferred accountability and punishments for the perpetrators and have criticized the dissatisfaction of limited retributive justice in their countries' reconciliation process. Therefore, Wendy Lambourne suggested that retributive and restorative justice should be components of accountability and legal justice. Moreover, the study model indicated that only the prosecutions could not rebuild post-conflict societies. It expects the settlement of societal divisions that badly strengthen the mass atrocities of many states. Psychosocial justice, including the truth and healing, which is the second principal component of the model, contributes to victims' betterment in dealing with their sufferings. Wendy Lambourne pointed out that the word "truth" is misleading in a transitional justice context, including victims and perpetrators. Victims who contributed to this paradigm wanted to know the truth rather than have justice because they believed truth is a part of justice. Truth-telling of victims consisted of knowledge and some sense of acknowledgement of people's sufferings. In this process, NGOs' involvement significantly improved the participation of victims to reveal the truth in a greater capacity. Most TRC programs of the states contributed to peacebuilding, and they were more concerned with the immediate needs of socio-economic and political justice as a way of promoting peacebuilding. It reveals that accountability, legal justice and psychosocial justice are not sufficient to strengthen transformative justice. However, the model proposed by Wendy Lambourne emphasized the importance of victims, survivors and perpetrators acknowledging as part of the fundamental aspect of transitional justice. The truth-telling of perpetrators convinces what they have done and what kind of suffering the victims have gone through. The details of that truth-telling are more important for the justice and reconciliation process of the country.

The concept of socio-economic justice is associated with financing and other tangible elements like compensation, restitution, and reparation. It aims at reviewing the occurred violence and reducing the future reoccurrence of such crimes and violence. According to the proposed transformative justice theory model, victims tend to focus on historical reparations rather than future socio-economic justice as a conflict preventive measure. Moreover, the government's inability to secure the basic needs appropriate for peace and reconciliation. The 4<sup>th</sup> component of the model explains how political justice uplifts the concept of transitional justice. Likewise, with the socio-economic justice majority of the victims of Wendy's study criticized the government's inability to provide for their basic needs. Lack of commitment to good governance, lack of democratization and lack of political justice are the main factors that undermine the peacebuilding process. Political justice should be more complicated in handling institutional reforms. Institutional reforms are essential for the better improvement of transitional justice under the platform of political justice. Political justice requires political identity, cultural justice and institutional reforms. Moreover, the executive, legislative and judiciary should be more accountable to support the political

justice of a state. Eliminating corruption and fair representation is more applicable to political justice to foster the transformative justice theory.

#### 4.2. Social Learning Theory of Transitional Justice

Nevin T. Aiken put forward the social learning theory of transitional justice to examine the importance of serving social learning as a mediating feature between transitional justice and reconciliation in divided societies. He claimed that this initiative is not an effort to interpret that transitional justice mechanisms do not just foster reconciliation in divided societies. This theory explains how social learning creates necessary conditions for reconciliation and sustainable peace. The first element of social learning theory, 'instrumental learning,' refers to building relationships between divided groups of societies. There should be positive intergroup communications and transformative dialogues to maintain the quality of the interactions to foster instrumental learning. Upholding positive intergroup contact leads to improved relations among groups and reduces the occurrence of misperceptions. To achieve that end, the intergroup contacts should be in a non-adversary manner, through an extended period within a collaborative framework to reconstruct the group divides. Most of the scholars indicated that the inherent benefits of developing friendships and indirect contacts across groups might have ripple consequences that can spread throughout a group. Positive contact has the opportunity to establish intergroup relations and avoid prejudice, misperceptions and other rigid perceptions. It can be considered as the first step to initiate mutual trust between the victims and enemies after the conflict.

Apart from instrumental learning, the concept of justice is considered one of the most controversial requirements in both conflict transformation and transitional justice in divided societies. Justice is incredibly connected with sustainable peace in transformative communities, and reconciliation among former enemies may classify positive and negative peace through justice. Furthermore, the most controversial issue regarding the forgive-and-forget criteria is whether the victims are willing to forgive those who committed severe grievances for their lives. Injustices prevailing from the root causes can damage future generations, and it may continue to grow hatred tendencies with the apparent mistrust between the parties. Most academic scholars tend to believe that partial justice mechanisms should be implemented to foster reconciliation programmes in ridden areas. They have introduced several socio-emotional learning to advance the reconciliation process. The most special procedure acknowledges the injustices done to victims and makes the perpetrators accountable for their crimes. This initiative serves justice as a bridge to compromise the issues between the future and the past. Secondly, the indication of the use of violence and other coercive methods is not a productive long-term solution to prevent the occurrence of conflicts.

Nevertheless, the promotion of justice in divided societies can foster the process of truth recovery, which is an essential part of achieving sustainable peace and reconciliation. Adam and

Moodley (2005) illustrate that uncovering a factual record of the past can bring about more peaceful relations and suggest that truth recovery is a required element of the broader transitional justice process and reconciliation. Truth recovery plays a vital role in reconciliation as it narrows down the permissible lies and approaches to overcome future conflicts and antagonisms. Most scholars who put greater importance on reconciliation pay little attention to the positive impact of truth recovery in conflict transformation. Collective memories are usually maintained by groups throughout the conflict and transformed into future generations, forming antagonistic group behaviour through cultural and political channels. Besides, biased beliefs can prevent intergroup reconciliation and limit the social learning required to develop new understandings. Truth recovery processes can provide the space for the dissemination of new information needed by former enemies to transcend existing antagonisms and their own preoccupations with victimization and begin a process of redefinition of the identity of a negotiated settlement. Therefore, truth recovery is considered as an integral component of the reconciliation process of a post-conflict society. Transitional justice institutions are essential in this stage to specify the legitimacy of the truth recovery. Most truth commissions' procedures are solely employed to discover, clarify and compose the post-violence with the involvement of all parties involved in the past violence. Involving all the parties responsible for post atrocities may build reliable truth, recovering in a legitimate nature.

However, social learning requires the implementation of reconciliation, which cannot be overcome with transformation in social interactions, truth recovery and instrumental learning. Apart from the primary factors supporting the reconciliation, unequal distribution and inequality appear as a dominant phenomenon that should be upgraded to foster long-lasting reconciliation. Unequal distributions in economic wealth, social status, material infrastructure and basic human needs are influential when the other required elements are achieved. It implies that fair distribution within the post-conflict societies is more significant in shaping the reconciliation-based transformation. Johan Galtung argued that fostering reconciliation and a sense of lasting sustainable peace among the former enemies in divided societies may require not only the end of physical violence but the creation of a more positive peace addressing the more profound structural violence underlying such conflicts. The presence of social inequalities also affects the perceptual and ideological changes expected in transformative societies. Moreover, it may spread biased views and myths quickly. The main organ in achieving

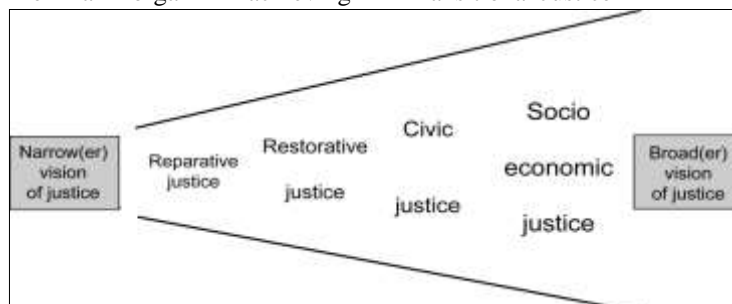
instrumental learning is better communication and contacts. To achieve this end, there should be no material inequalities. When people interact in a highly unequal stand, they will further categorize themselves with social disparities. It may badly influence the communication channels as well as the contact building within the post-conflict societies. Therefore, conflict transformation to advance social learning in divided societies requires ameliorating the structural systems of dominance, dependence, and inequality that produce antagonistic intergroup identifications. The structural contribution to inequality should be coupled with transitional justice mechanisms or transitional justice interventions, and much consideration should be given to material inequality. There are two specific mechanisms to incorporate transitional justice interventions within a post-conflict society to proceed with the distribution procedures to eliminate disparities. The first mechanism is reparations, which formalize the distribution of material elements to those who experienced severe socio-economic and political effects during the conflict. The second mechanism is to initiate the distributive mechanisms as a part of the transitional justice institutions.

However, the social learning theory of transitional justice offers a new understanding of utilizing transitional justice mechanisms to foster reconciliation and legitimacy in transitional justice. It introduces a new avenue for assessing transitional justice through instrumental, socio-emotional and distributive forms of social learning. Socio-learning theory facilitates the most wanted requirement of the society of post-conflict backgrounds and maintains the long process to achieve sustainable peace. It offers a new theoretical framework to perform best practices of transitional justice. This theory mainly focuses on truth and justice, which are the most potent reconciliation and transitional justice factors. It concludes with creating equitable partnerships and rebuilding the platforms to transform the divided societies.

### 4.3. "Justice Continuum theory" of reparations for Transitional Justice

The founder of the justice continuum theory, Lisa. J. Laplante focused on the interaction between justice and reparations. The theory of justice continuum is based on the broader nature of reparations under four theories of justice: reparation justice, restorative justice, civic justice and socio-economic justice. These main theories incorporate a narrow vision of justice and a broader vision of justice.

Figure 1.2: "Justice Continuum theory" of reparations for Transitional Justice



Source: (Laplante, 2014)



The concept of reparation is closely linked with economic compensation. According to the teachings of Aristotle, the person who caused harm by violence should pay reparations for the relevant victims who underwent severe damage and the consequences of the damage. Reparations can be illustrated as determining the magnitude of the correction imposed on the particular offence and the amount of compensation to be paid. In the present correction, justice is practised through civil remedies and tort law. International human rights tribunals are focusing on individual cases in which the compensations are applicable or not. There are a variety of methods for restoring the victims to their statuses, such as rehabilitation, satisfaction, compensation, restitution and other kinds of guarantees of non-repetition. Reparation justice usually interacts with the domestic counterparts to measure the damage and the harm caused by victims. Nevertheless, the most common and traditional judicial strategies may not provide effective remedies to crop up with the harm victims and reparation building. Traditional domestic reparation procedures, most of the time, set a unified package for all victims rather than examining them individually. Basically, reparations are defined as a way of treating the victims with financial compensation to overcome the bitter experiences of crime and harm. Therefore, the reparations mechanisms have been criticized for lack of investigation, lack of trustworthiness and limited mandate towards violations of rights.

Just like reparation justice, restorative justice theory also focuses on repairing the harm and facilitates the shortcomings of reparative justice. It provides new ways of achieving the expected outcome by monitoring the damage and rebuilding it from a broader perspective. Restorative justice describes a process whereby all the parties with a stake in a particular offence come together to deal with the outcome of the offence and its implications for the future. Some scholars define restorative justice as the precise opposite of retributive justice, which allows punishments for offenders and makes them equal to victims' pain. Even though restorative justice historically focused on interpersonal suffering and harm, restorative justice further emphasized its framework on mass violence and mass suffering of a large group of people after the new transformation. Traditional theories of restorative justice prefer state-sponsored initiatives to protect the people from external threats. Despite the historical evolutions, restorative justice usually contributes to promoting transitional justice and questions the beneficiary on what and how the harm should be repaired and restored. This process restores the wounds and self-respect of safety and empowerment. Allowing the victims to participate in the reparation process may make them confident enough to redefine their status in society, and it will transform the wrong in the right direction. Restorative justice always focuses on eliminating the shortcomings of the reparation process. It helps to respect the dignity of the beneficiaries and avoid unfair treatment to repair the non-material harms associated with human rights violations. In some instances, the restorative justice mechanisms motivate the victims to define the parameters of reparations, which have the possibility to lead to micro-reconciliation frameworks. The positive methods of involving victims in the restorative justice

process clearly address the most sensitive issues, such as repairing victims' social status and restoring dignity.

The 3rd justice mechanism of the “Justice Continuum theory” of reparations for Transitional Justice, “Civic Justice”, refers to the relationship between the government and the governed. Civic justice is connected with the central democratic values, and every citizen is allowed to participate in the public realm. It encompasses democratic politics in which decisions and policies are justified in the process of discussion among free and equal citizens and their representatives. It motivates the government of the state to make the victims and survivors engaged in the reparation process as stakeholder partners. While initiating this process, the government may face problematic frontiers due to the victim’s perception that they are not treated equally. Their status is less than human due to the severe human rights violations they faced during the war-torn periods. Therefore, governments should take appropriate measures to ensure the status of the victims and repair their perceptual thinking. The macro-level reconciliation seeks to address these issues and strengthen the relationship between the government and the governed. Moreover, civic justice clarifies that violent conflicts may occur when the government fails to manage the marginalization of underrepresented constituencies. Civic justice promotes the democracy-building of transitional justice to overcome these grievances. On the other hand, civic justice can be utilized as an alternative to avoid conflicts before their emergence and build up discussions and non-violent discourse to encourage the people to come together and discuss the most controversial facts. This process can lead to a large-scale societal transformation and institutional transformation.

Reparations are essential in the sense of building the principle of the rule of law to reinforce a right-based counter-culture to hold the government accountable for human rights violations as an official policy. On the other hand, it motivates the government to respect and protect fundamental rights. In this way, civic justice may encompass modified retributive justice theory in the civic penalties serve to deter future transgression. This continuum theory facilitates the social, political and judicial reform process, which leads to social reconstruction. Governments use reparations as a method of transferring the previous societal system of the country to get adjustable for a more human rights-oriented one. However, culture plays a dominant role in transforming societal structures. This vision of transitional justice procedures was implemented in Peru and demanded reparations that stand for social and political facts to achieve macro-reconciliation. The Peruvian mechanism is solely related to the factors of civic justice. The interaction between transitional justice and development put forward the concept of socio-economic justice. It implies the causes of conflict, which leads to severe human rights violations. These causes of conflicts mean social and economic inequalities, leading to malpractices of human rights and other crimes. Lambourne (2009), argues that socio-economic justice can combine financial and material compensation while providing reparation for past violations and distributive justice in future attempts.



## 5. CONCLUSION

The theoretical and conceptual analysis of transitional justice and reconciliation represents significant contributions interacting with a wide variety of concepts. The theories of transitional justice gained significance as a new field associated with international relations. The transformative justice theory of transitional justice was proposed in reference to the atrocities committed in Cambodia, Rwanda, East Timor and Sierra Leone and the measures that were taken against such atrocities. Transformative justice theory mainly aims at legal justice, psychological justice, socio-economic justice and political justice. The combination of these various types of justice can forge a strong prosecution procedure, psychological healing for victims and relevant reparation and institutional reforms. The social learning theory of transitional justice revives the importance of social learning and serves as a mediatory fact between transitional justice and reconciliation. The social learning theory is coupled with instrumental learning, socio-economic learning and distributive learning. It directly deals with repairing former relationships and socio-economic issues and minimizing inequalities. The justice continuum theory of transitional justice emphasizes the interaction between justice

and reparations. It includes reparation justice, restorative justice, civic justice and socio-economic justice.

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